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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions
Roger Couch, Circuit Court Judge

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SC Court of Appeals

Case Nos. 2014-GS-46-3857
2014-GS-46-3858

State of South Carolina .....Respondent,

versus

Orlando Martinez Coleman .....Appellant.

INITIAL BRIEF OF APPELLANT

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II. Whether the trial court abused its discretion in qualifying Ms. Laurie Caldwell as an expert in delayed disclosure when the vast amount of her knowledge, experience, training, and skill was in the field of forensic interviewing and her testimony was sufficiently reliable under Rule 702, SCRE, when the expert testimony before the jury improperly bolstered and vouched for the minor child's credibility in violation of Rule 608, SCRE, and when the minimal probative value of the expert testimony was substantially outweighed by its prejudicial effect.

STATEMENT OF THE CASE

On December 11, 2014, Appellant Orlando Martinez Coleman was indicted by the York County Grand Jury for two counts of criminal sexual conduct with a minor, first degree, having occurred between August 24, 2010 and June 15, 2012. See Indictments, December 11, 2014. The case was set for trial and a jury was selected on January 12, 2015, and a pre-trial Jackson v. Denno hearing held on January 13, 201.5, but was subsequently continued prior to the presentation of opening statements due to an illness of the public defender and was rescheduled in February of 2015, and was continued for weather-related court closures. Tr. 32, l. 23 – 33, l. 7. On February 26, 2015, the two indictments were amended with the only change made as to the timeline of the alleged incidents: May 13, 2011 through June 15, 2012. See Amended Indictments, February 26, 2015.

Trial commenced in the Court of General Sessions of York County before the Honorable Roger Couch and jury on March 16 and continued through March18, 2015. Tr. p. 1. The State of South Carolina was represented by assistant solicitors Sharon O'Hayon and Erin Joyner. Tr. p. 1. Mr. Coleman was represented by assistant public defenders Ashley Anderson and Melissa Inzerillo. Tr. p. 1. At the conclusion of the trial, Mr. Coleman was found guilty on both indictments. Tr. p. 371. Judge Couch sentenced Mr. Coleman to twenty-five (25) years for each guilty verdict to run concurrently with credit for the five hundred twenty-seven (527) already served, ordered electronic monitoring, and ordered sex offender registry. Tr. pp. 379-80.

This appeal follows.

STATEMENT OF FACTS

Appellant, Orlando Martinez Coleman, and his mother resided at the Pace's River Apartments in York County, South Carolina, from approximately May 13, 2011, through November of 2011. Tr. p. 33, ll. 22 – 24. Sometime during the month of November, 2011, Mr. Coleman and his mother moved away from Pace's River Apartments. Tr. pp. 33, l. 21 – 34, l. 3. On or about June of 2013, Mr. Coleman graduated from high school and subsequently completed the Youth Challenge put on by the South Carolina National Guard in hopes of transferring into the military. Tr. p. 375, ll. 15 – 20.

During the summer of 2013, the minor child reported inappropriate sexual touching done by Mr. Coleman and a criminal investigation began. Tr. p. 30, ll. 16 – 23. The minor child attended a forensic interview with Safe Passage, a child advocacy center located in Rock Hill, South Carolina, on or about September 24, 2013. Tr. p. 209, ll. 9 – 24. An officer made initial contact with Mr. Coleman on September 25, 2013, and interviewed him with regard to the allegations made by the minor child. Tr. p. 211, ll. 3 – 17. Thereafter, the officer sought a warrant for Mr. Coleman's arrest and executed the warrant on October 8, 2013. Tr. pp. 212, l. 24 – 213, l. 5. Mr. Coleman remained in custody while awaiting and through trial, then was transferred to the Lee Correctional Institution upon sentencing by Judge Couch. Tr. pp. 379 – 80.

During presentation of its motions in limine, the defense made a timely motion to quash the second indictment, Case No. 2014-GS-46-3858, on the grounds that this indictment which covered the second alleged offense "fail[ed] to provide sufficient notice to adequately and effectively defend against the allegations" therein. Tr. p. 13, ll. 18 – 23. Defense counsel argued that the timeline alleged upon both incidents changed drastically

from the arrest warrant and incident report, through discovery and subsequent interviews with the minor child, and upon both presentation of indictments true billed by the grand jury, such that Mr. Coleman was not provided sufficient notice and information to form a proper defense as to the second incident. Tr. pp. 13 – 15. After hearing arguments from both parties and considering the case of State v. Baker, Judge Couch denied the defense's motion to quash but not before amending the indictments to indicate that one was assigned to the "staircase" incident and the second to the "tennis court" incident. Tr. pp. 37 – 39.

Also during motions in limine, defense counsel moved to restrict any witness from offering testimony that would bolster or vouch for the credibility of the minor child. Tr. p. 24, ll. 1 – 6. Upon the state's proffer of expert testimony, the defense objected under Rule 702, 608, and 403, SCRE. Tr. pp. 132 – 33. After hearing the parties' examination of the proffered witness and legal arguments, Judge Couch agreed to qualify Ms. Laurie Caldwell as an expert in delayed disclosure, but limited the scope of her testimony to two specific facts: "that late reporting does occur in a large number of majority of the cases and that children do have difficulty relating time and dates during interviews." Tr. pp. 176 – 77. During Ms. Caldwell's direct examination, the State elicited testimony that went beyond the limited scope allowed by the judge and defense counsel made timely objections to her testimony, which were both sustained but not before the jury heard the expert's testimony. Tr. pp. 254 – 57.

ARGUMENT

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "We are bound by the trial court's factual findings unless they are clearly erroneous." Id. at 6, 545 S.E.2d at 829.

I. The trial court erred when it denied the Defendant's motion to quash the second indictment despite clear evidence that the indictment was unconstitutionally overbroad and did not include any temporal limitation within the asserted timeline of the alleged offenses, which prejudiced Mr. Coleman by denying him sufficient notice of the charged offenses and time to effectively prepare a defense.

Federal and South Carolina constitutional principles firmly establish than an individual accused of a criminal act has the right to know the charges they must defend against and that the accused must have sufficient notice of those charges in order to prepare a defense. U.S. Const. amend XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law..."); S.C. Const. art. I, § 11 ("[n]o person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed...."). South Carolina further institutes this federal constitutional principle in requiring that "no person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury...." S.C. Code Ann. § 17-19–10 (2015). An indictment is an essential instrument in providing notice of the alleged offense to an accused, thus an indictment must comport with federal and statutory provisions protecting an accused right to receive notice of the charges faced. State v. Baker, 411 S.C. 583, 588, 769 S.E.2d 860, 863 (2015).

In State v. Gentry, the South Carolina Supreme Court established that upon being notified of the nature and scope of the charges against them, an accused may then

challenge the "propriety of the accusation" by challenging the sufficiency of the indictment or the "truth of the accusation" through a judgment of his peers. State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 499–500 (2005). If a sufficiency challenge against an indictment is raised in a timely manner, the trial court must give due consideration to the defendant's claim and analyze the sufficiency of the indictment to determine whether the charge was stated with sufficient certainty and particularity to enable the defendant to know what he is called upon to answer and whether he may plead an acquittal. Baker, 411 S.C. at 589, 769 S.E.2d at 863 (referencing the standards as set forth in State v. Gentry). Should a timely challenge to the propriety of the accusation be made, a trial court shall view the facts and circumstances as they existed pre-trial with a practical eye to determine whether an accused was taken by surprise such that he was unable to present an appropriate defense. See State v. Tumbleston, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct. App. 2007) ("In determining whether an indictment meets the sufficiency standard, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances."); see also State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991) ("one is to look at the 'surrounding circumstances' that existed pre-trial, in order to determine whether a given defendant has been 'prejudiced,' i.e., taken by surprise and hence unable to combat the charges against him."). Accordingly, the sufficiency of an indictment is examined objectively on a case-by-case basis, from the viewpoint of a reasonable person, and not from the subjective viewpoint of a particular defendant. Tumbleston, 376 S.C. at 97, 654 S.E.2d at 853 (citing State v. Means, 367 S.C. at 383, 626 S.E.2d at 353-54), see also Wade at 306 S.C. at 83, 409 S.E.2d at 782 (denying defendant's request to abandon the case-by-case approach and instead adopt a

per se rule that a two-year timeframe in an indictment is unconstitutionally overbroad) (citing State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981)).

In the present case, Mr. Coleman's defense counsel made a pre-trial motion prior to the jury being sworn to quash the second of the two indictments[1] Mr. Coleman faced, arguing that the indictment and information contained therein regarding the alleged second incident failed to provide sufficient notice of the allegations to Mr. Coleman such that he was deprived of the opportunity to adequately and effectively assert a defense. Tr. p. 13, ll. 18 – 23. Specifically, defense counsel cited to the vacillating and shifting timeline that morphed from one to two indictments, which under *Baker* and its progeny, unfairly prejudiced Mr. Coleman's ability to identify the timeframe in question and prepare a proper defense. Tr. p. 13, ll. 23 – 16, ll. 18. The trial court ultimately denied the defense's motion to quash as a matter of law, but not before amending both indictments to add the phrases "staircase" and "tennis court" to help the jury distinguish each indictment from the other and to identify the specific instance being tried under each indictment. Tr. pp. 25 – 39. Mr. Coleman was found guilty of the charge alleged in each indictment. Tr. p. 371.

A. The indictments did not provide sufficient notice of the offenses Mr. Coleman faced as they only included the elements of the offense charged and an overbroad timeline without any specificity as to when the alleged acts occurred, which denied Mr. Coleman adequate notice and opportunity to prepare a complete defense.

[1] At the start of trial on March 16, 2015, the Defendant faced two separate indictments, Case Numbers 2014-GS-46-3857 and 2014-GS-46-3858. The language on the face of both indictments were identical, both alleging Criminal Sexual Conduct with a Minor, First Degree having occurred between May13, 2011, through June 15, 2012. Defense counsel's pretrial motion requested the trial court quash the second indictment, Case Number 2014-GS-46-3858, which covered the incident to have occurred second in time.

An indictment cannot simply state the elements of the crime charged – it must state with "sufficient certainty and particularity" the offense with which an accused is charged such that the accused may "know what he is called upon to answer and whether he may plead an acquittal." Baker, 411 S.C. at 590, 769 S.E.2d at 864. Indictments that state a timeline within which certain criminal acts allegedly occurred without any temporal limitation identified within it are unconstitutionally overbroad and do not afford an accused proper notice of the offense they must defend against. Id. at 590, 592, 769 S.E.2d at 864, 865. The concept of proper notice is intertwined with that of preparation, in that "the notice function of an indictment necessarily includes an assessment of whether an accused has the opportunity to prepare a defense." Id. at 590, 769 S.E.2d at 864 n.4.

Proper notice provides an accused the opportunity to research, prepare, and present a defense and, more specifically, provide opportunity for an accused to present a complete defense such as an alibi. Baker 411 S.C. at 591, 769 S.E.2d 864-65. In Baker, the defendant was originally presented with indictments that alleged criminal offenses occurred during the summers of 2002, 2003, and 2004, which the defendant had approximately one year to prepare to defend. Id. at 590, 769 S.E.2d at 864. Two weeks prior to trial, the indictments were amended to include a timeframe extending over a six-year period (1998 – 2004) with a lack of any temporal limitation specific to each allegation therein. Id. The Supreme Court found that this significantly expanded timeframe presented two weeks prior to trial prejudiced Baker by preventing him from effectively defending himself and establishing his whereabouts during the timeframe

presented in the indictments.[2] Id. at 591, 769 S.E.2d at 864. Although Baker did not submit an alibi defense, the Supreme Court believed it impossible for Baker to produce such evidence to establish such a complete defense due to the expansive timeframe and lack of specificity within that timeframe.[3] Id., 769 S.E. 2d at 865. Thus, this defect in the indictments in that they were unconstitutionally overbroad and lacked any temporal limitation or specificity therein, prejudiced Baker and the trial court's decision to deny the defense's motion to quash and Baker's subsequent convictions were reversed. Id. at 592, 769 S.E. 2d at 865.

Prior to the Baker decision, our courts have held that where the language of the crime charged within an indictment is "substantially in the language of the common law or of the statute" of the offense such that the "nature of the offense charged may be easily understood" that an indictment would pass legal muster as a sufficient notice document. Baker, 411 S.C. at 593, 769 S.E.2d at 865-66, (Toal, C.J., dissenting) (citing S.C. Code Ann. Section 17-19-20 (2003) and State v. Tumbleston, 376 S.C. at 98, 654 S.E.2d at 853). Prior decisions regarding sufficiency challenges also considered whether time was a material element of the offense and chose not to create a rule establishing that a lengthy time period alleged in an indictment was per se overbroad. Tumbleston, 376 S.C. at 98-99, 654 S.E.2d at 853-54; Wade, 306 S.C. at 85, 409 S.E.2d at 783. The dissent in Baker

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[2] The Supreme Court also noted that the defense had difficulty obtaining Baker's employment records for a portion of the timeframe covered by the indictments, which added to his inability to establish his whereabouts during that time. Baker, 411 S.C. at 591, 769 S.E.2d at 864.

[3] The Supreme Court noted that the only complete defense to the charges Baker faced would be an alibi, noting that with such a defense an accused "attempts to prove that he was at a place so distant that his participation in the crime was impossible" and that such a defense must produce evidence to cover the entire time the accused's presence was required to commit the offence. Baker, 411 S.C. at 591, 769 S.E.2d at 864-65 (citing State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980)).

cited to the previous decisions in Gentry, Tumbleston, and Wade to support their argument that the very language contained within the indictment, which closely resembled the statutory language of the offense charged, gave sufficient notice to the defendant such that the court knew what judgment to pronounce, the defendant knew what he was called to answer, and that the defendant knew the elements of the offense with which he was charged. Baker, 411 S.C. at 596, 769 S.E.2d at 867 (Toal, C.J., dissenting). Despite the dissent's concern that the majority conflated the concepts of notice and preparation in its opinion, the majority specifically held that merely stating the elements of the offense charge was not sufficient notice to an accused; there must be some temporal limitation provided within the indictment to provide certainty and particularity to the accused to provide proper notice and opportunity for preparation of a defense. Id. at 592, 769 S.E.2d 865, see also dissent at 595/867. Thus, Baker removed any requirement that time be an element of an offense when considering sufficiency and specificity within a stated timeline in an indictment and that an accused is prejudiced where a complete defense (alibi) would be otherwise available but for a lack of specificity within an overly broad timeline. Id.

The shifting and expansive timeline as it existed pre-trial in Mr. Coleman's case falls squarely within the concerns of Baker in that Mr. Coleman was denied proper notice and the opportunity to prepare a complete defense due to the defects within his indictments. The timeframe provided by and through the state from Mr. Coleman's arrest in October of 2013 through the morning of trial in March of 2015 fluctuated as follows: a single incident allegedly occurred on September 1, 2011;[4] a single incident allegedly

[4] See Tr. p. 29, l. 22; see also Incident Report and Arrest Warrant.

occurred during the summer of 2011;[5] two incidents allegedly occurred between August of 2010 – June of 2012;[6] two incidents allegedly occurred between May 2011 – June 2012;[7] and one "staircase" incident allegedly occurred first in time and second "tennis court" incident allegedly occurred second in time via trial court amendment made pre-trial on March 16, 2015.[8] For the fourteen-month period between Mr. Coleman's date of arrest in October of 2013, through the first indictments being true billed on December 11, 2014, Mr. Coleman prepared his defense based upon an incident allegedly occurring on September 1, 2011, or possibly the more generalized "summer" of 2011, then shifted that timeframe slightly to a period of May through November of 2011, encompassing the duration of Mr. Coleman's residency at the Pace's River Apartments. Tr. pp. 14, ll. 5-7, 12-18; 28, ll. 4-6; 33, ll. 22-24. It was not until the presentation of the indictments true billed on December 11, 2014, one month prior to the original trial date, that the timeframe significantly broadened to include a timeframe of August 24, 2010 – June 15, 2012. Tr. p. 36, ll. 24 – 25; see also Indictments true billed December 11, 2014. After the January 2015 trial was continued,[9] the indictments were amended and true billed on February 26, 2015, with a May 13, 2011, through June 15, 2012 timeframe. See Indictments true billed February 26, 2015. Trial was then held beginning March 16, 2015. Tr. p. 1. Thus, Mr. Coleman faced a drastically expanded period of time within which he

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[5] See Tr. p. 29, l. 22; see also Incident Report commentary.
[6] See Indictments (2) true billed December 11, 2014, approximately one month prior to the start of trial.
[7] See Indictments (2) true billed on February 26, 2015, two weeks prior to the start of trial.
[8] See Trial Court's amendment to indictments. Tr. pp. 38, ll.18 – 39, ll. 14.
[9] A continuance of January 2015 trial was granted due to illness of the public defender then postponed again in February due to weather-related court closures. Tr. pp. 32, l. 23 – 33, l. 7.

was to prepare his defense with insufficient notice to do so prior to trial, placing this matter squarely within the concerns addressed and ruled upon in Baker.

The drastic change in timeline asserted in the indictments Mr. Coleman faced in addition to the lack of sufficient notice and information to support any specificity within that timeframe effectively prevented Mr. Coleman from investigating, researching, or preparing a proper defense. Throughout the fourteen-month period Mr. Coleman prepared his defense, he did so with the understanding that the alleged incidents occurred sometime between May 13, 2011, and November of 2011, while he and his mother resided at the same apartment complex as the minor child. Tr. pp. 28, ll. 4-6; 33, ll. 22-24. During that investigation period, the information provided through discovery, assertions made by the state in its communications with defense counsel,[10] and statements made by the minor child during forensic interviews[11] and law enforcement, all indicated that both alleged incidents occurred at some point during 2011, and most likely between May through November of that year. Tr. pp. 29, l. 19 – 34, l. 3. The information that continued to trickle in and the affirmative statements given by the state's attorney effectively established these 2011 guideposts for defense counsel for the entirety of their investigation. Tr. pp. 31, l. 7 – 32, l. 20; 36, ll. 5 – 16. It was not until February of 2015 when the state notified defense counsel that it had changed its theory as to the timeline in

[10] Defense counsel noted that in September of 2014, almost one year after Mr. Coleman's arrest, the state did disclose the minor child informed the state that the second incident may have occurred sometime between January to June of 2012, but the state later informed defense counsel in January of 2015 that upon looking further into the minor child's statements, it believed the minor child was actually relating the incidents to extraneous events all occurring in 2011. Tr. pp. 31, l. 7 – 32, l.6.

[11] To include a copy of the forensic interview taken on September 24, 2013, indicating two different incidents but with no distinction or reference as to time in any manner. Tr. p. 30, ll. 16 – 23.

this matter and intended to proceed at trial with the theory that one incident occurred in 2011 and the second in 2012.[12] Tr. p. 33, ll. 6 – 20. Thus, the state's belated presentation of its theory that the second incident occurred sometime in 2012 provided to Mr. Coleman a mere two weeks prior to trial, severely undercut Mr. Coleman's ability to fully investigate, research, and prepare an effective defense for that indictment.

Upon its evaluation and ruling in light of the defense's motion to quash the second indictment, the trial court failed to give due consideration to and application of the principles established in Baker, that *but for* the lack of temporal limitation specified within the timeline on the indictments, and belated notice given to Mr. Coleman two weeks prior to trial, Mr. Coleman would have been able to investigate, research, and prepare a complete defense (alibi). In attempting to comply with the Baker decision, the trial court examined the indictments under the Gentry standard, using a practical eye looking at the circumstances as they existed pre-trial to determine whether the indictments were sufficient to give notice to the court as to what judgment to pronounce, notice to the defendant to know what he was called upon to answer, and whether it apprised the defendant of the elements of the offense charged. Tr. 26. However, instead of correctly applying the Baker principles and concerns noted by the majority, the trial court noted the concerns of the dissent in Baker and imposed its own sufficiency standard finding the indictments were sufficient, reasoning that the state in Mr. Coleman's case had made a "good faith effort to narrow the timeframe" given the nature of the particular investigation. Tr. p. 38, l. 6 – 7, 13 – 15. The trial court then mentioned the necessity for

[12] Although these communications between the state and defense are not part of the indictment or produced to the court and incorporated into the trial record, the state informed the court that this rendition of the circumstances as stated by the defense was "pretty much exactly as defense has stated." Tr. p. 35, l. 20 – 21.

it to determine whether Mr. Coleman suffered any prejudice based upon the nature of the indictments, but failed to enumerate any internal evaluation as to that matter, and instead repeated his belief that the state put forth a good faith effort to narrow the scope of the allegations and denied the defense's motion. Tr. p. 38, l. 8 – 18. The Baker court did not consider nor hinge its ruling on any "good faith effort" analysis, thus this proffered reasoning to support the trial court's denial of the defense's motion was not supported in law. Furthermore, the trial court made no indication of any weighing as to the prejudice Mr. Coleman suffered due to his lack of notice to prepare a defense as to the second indictment; thus it is unclear as to whether the trial court weighed anything in the balance other than the state's good faith effort to attempt to narrow a timeline. As the trial court failed to comply with the principles established in Baker, its decision to deny the defense's motion to quash the second indictment should be reversed.

The language of the indictments themselves also did not provide any specificity as to when the alleged acts were to have occurred to provide Mr. Coleman specific notice of the charges he was to defend against. The trial court, when reviewing the indictments as they existed pre-trial in light of the Baker decision, noted that both indictments read exactly the same and did not include any language to differentiate which specific event or allegations were being made within each individual indictment.[13] Tr. p. 25, l. 24 – 26, l. 3. The trial court noted that it was "concerned with the fact that the two indictments, while the attorneys may be aware of what they refer to, basically are the same indictment" and that it found the indictments to be "confusing as they [then] exist[ed]."

[13] Both indictments closely resembled the statutory language of S.C. Code Ann. Section 16-3-655 and did not differentiate as to what specific incident was being alleged within the general May 2011 through June 15, 2012 timeframe. Tr. pp. 25, l. 24 – 26, l.3.

Tr. p. 38, ll. 6, 18 – 20. To combat these concerns, arguably to *give proper notice and clarity* to the jury as to the charges Mr. Coleman faced and from which, they as the trier of fact, were to determine Mr. Coleman's guilt or innocence, the court amended the indictments to identify the first indictment as referring to the "staircase" incident and the second as the "tennis court" incident with the "staircase" incident occurring first and the "tennis court" incident occurring second. Tr. pp. 38, l.20 – 39, l. 14. Although the trial court went on to reason that this slight amendment to the indictments did not change the elements of the offense and was done in an effort to clarify the separate charges for the jury, these amendments by the court drastically changed the characterization of the offenses, with nothing being done to clarify or narrow the expansive timeline, within mere minutes of the jury being sworn and the matter proceeding to trial. Tr. p. 39, ll. 10 – 14. This clarification to the jury effectively pinpointed a specific location, without any clarification as to the timeline of the alleged incidents within a severely truncated timeframe for the defendant to research and prepare a complete defense afforded under Baker.

The indictments as they stood at and during Mr. Coleman's trial were insufficient to give proper notice under a Baker analysis and should have been quashed prior to trial. The shifting timeline effectively restricted the defense's investigation of the matter strictly to a 2011 timeframe for nearly fourteen months, then greatly expanded the timeframe one month prior to trial, and finally morphed into its final form within weeks prior to the March 2015 trial. This vacillating timeline and lack of specificity within that altered timeframe so close in time to trial effectively prevented Mr. Coleman from any real chance to investigate, research, and prepare a proper defense to the charges he faced.

Furthermore, the very language of the indictments in all forms did not offer any distinction between the incidents or allegations to which they referred such that the trial court had to alter the indictments the morning of trial. Therefore, as the trial court failed to correctly apply the standard established in Baker and incorrectly found the state's indictment sufficient given the circumstances as they exited pre-trial, this court should reverse the trial court's decision to deny the defense's motion to quash the second indictment and reverse Mr. Coleman's conviction as to that indictment.

B. The defects within the indictments, which effectively denied Mr. Coleman adequate information and notice to prepare a defense, and the trial court's misplaced protection of the difficulty it would impose upon the prosecution to require more temporal limitations within its asserted timeline unfairly prejudiced Mr. Coleman and placed him in a position in which he was inadequately prepared to combat the charges against him.

Constitutional and statutory provisions should not give way to an inability of the prosecution to adequately give notice, and specificity within that notice, to an accused in child sexual abuse cases. Baker, 411 S.C. at 592, 769 S.E.2d at 865. Where difficulties such as a child's inability to specify a date or give consistent statements after initiation of a criminal action appear to impair the state's ability to provide a set timeframe with specificity within that timeframe, those impediments cannot be used as an excuse to allow an insufficient indictment to stand against an accused. Id. Regardless of this concern for the difficulty of the state to narrow a timeline in an indictment presented in cases before it,[14] the Supreme Court in Baker specifically noted that in cases where an

[14] But see Tumbleston, 376 S.C. at 102, 654 S.E.2d at 855 ("The stealth and repetitive nature of the alleged conduct compels identification of the broader time period. The victim is a young child, whom one cannot reasonably expect to recall the exact dates of the sexual abuse."); Wade, 306 S.C. at 84, 409 S.E.2d at 783 (finding that based upon the testimony of the eight-year-old victim, the indictment was "narrowed as much as possible under the circumstances.").

indictment is unconstitutionally overbroad due to a lack of specificity within the timeframe alleged, the indictment will not pass legal muster. Id. In Baker, the majority was well aware of the concerns cited by the dissent regarding the "difficulty the prosecution faces in identifying exact dates in child sexual abuse cases," yet firmly established that "the class of criminal case should not translate into an exception that operates to circumvent constitutional and statutory principles." Baker, 411 S.C. at 592, 769 S.E.2d at 865; but see Baker at 596, 867 dissent (stating that this ruling would hinder the State's ability to prosecute these kinds of cases and essentially created a requirement not otherwise supported by Gentry and its progeny). Notwithstanding these concerns potentially posed to the prosecution in attempting to exact dates from a minor child, the Baker decision made clear that the focus of the analysis in a challenge to the sufficiency of an indictment should be upon the sufficiency of notice and opportunity to prepare an effective defense presented to an accused. Id. at 591-92, 769 S.E.2d at 865. Where an indictment is unconstitutionally overbroad and does not provide temporal limitations within the asserted timeline, an accused is prejudiced and such defects in an indictment render it insufficient. Id.

Through the shifting timeline asserted by the state throughout its investigation of Mr. Coleman's case, the morphing of one charge and incident to two, and the lack of notice that the second incident occurred within the January to June 2012 timeframe until mere weeks before trial, the defense was essentially handicapped in its ability to prepare a proper defense and, more specifically, denied Mr. Coleman the opportunity to research, prepare, and present an alibi defense for the second indicted incident. Upon being notified by the state that it believed the second incident occurred sometime in 2012 and

that was the theory the state intended to proceed with at trial, the defense was thrown into a different position than it had been in the preceding approximately fifteen months since Mr. Coleman's arrest. Tr. pp. 33, l. 7 – 34, l. 3. This 2012 timeframe pinpointed a period of time Mr. Coleman and his mother no longer resided at the same apartment complex as the minor child and presented a liturgy of factors that, with proper notice and research, could have presented an alibi for Mr. Coleman. Tr. p. 34, ll. 3 – 15. In addition to no longer living at the same apartment complex as the minor child in 2012, Mr. Coleman did not have a driver's license to transport himself back to the scene of the alleged second incident, was currently attending high school during the Spring 2012 semester several miles from the minor child's apartment complex, and Mr. Coleman's mother worked and thus had periods of time where she would have been unable to transport Mr. Coleman. Tr. p. 34, ll. 3 – 15.

Each of these factors presented in argument by defense counsel indicated several scenarios that, upon proper notice and the chance to research, may have allowed the defense to determine whether Mr. Coleman was at or near the property where the second incident was alleged to have occurred. Tr. p. 34, ll. 13 – 15. It was this drastic change in the timeframe in which the second incident allegedly took place within a few weeks prior to trial after the defense had investigated and prepared under auspice from the state that both incidents occurred in 2011, that formed the basis of the defense's motion to quash and evidences the prejudice Mr. Coleman suffered at the hand of the state's lack of specificity within their indictments. Tr. p. 34, ll. 15 – 19. Without being afforded the proper notice required under Baker where an expansive timeline, lack of specificity within that timeline, and lack of notice to the accused, Mr. Coleman was effectively

prevented from having an opportunity to prepare a proper defense or alibi and was unduly prejudiced.

Therefore, the trial court failed to properly apply the Baker principles and recognize that the indictments did not provide sufficient notice to Mr. Coleman of the charges he was to defend against, specifically with regard to the lack of specificity within the alleged timeframe. Furthermore, this insufficiency unduly and unfairly prejudiced Mr. Coleman from any ability to prepare a complete defense to his charges. Due to these failures and resulting prejudice, the trial court's denial of the defenses motion to quash the second indictment should be reversed.

II. The trial court abused its discretion when it qualified Laurie Caldwell as an expert witness in delayed disclosure because she did not have the requisite qualifications to testify to that field of study, the expert qualification was merely a venire used by the state to allow a trained forensic interviewer to testify as an expert and bolster the credibility of the minor child's testimony, and such qualification and allowance of expert testimony unfairly prejudiced Mr. Coleman's case.

It is well within the discretion of the trial court whether to qualify an individual as an expert and its decision to so qualify as well as to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions. State v. Douglas, 369 S.C. 424, 429–30, 632 S.E.2d 845, 848 (2006). Notwithstanding this preserved degree of deference to the trial court, labeling an individual an expert before a jury is a task to be "jealousy guarded by the court and never loosely bandied about." State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013). Beyond qualifying an individual as an expert, the trial court also has an affirmative

gatekeeping duty with regard to all expert testimony subject matter, including non-scientific and experienced-based testimony. State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

In the present case, the state made a proffer of evidence to tender Ms. Laurie Caldwell as an expert in delayed disclosure. Tr. pp. 132 – 178. The defense objected to Ms. Caldwell's qualifications under Rule 702, SCRE, that, if qualified, her testimony would amount to improper bolstering and vouching for the credibility of the minor child's testimony under Rule 608, SCRE, and finally that the probative value of the expert testimony, if any, would be substantially outweighed by unfair prejudice under Rule 403, SCRE. Tr. pp. 132, l. 23 – 133, l.2. After both parties were allowed to examine Ms. Caldwell's qualifications and testimony before the trial court, and upon entertaining extensive legal arguments from both parties, the trial court reluctantly agreed[15] to qualify Ms. Laurie Caldwell an expert in "delayed disclosure" but limited her range of testimony to specific topics within the field of delayed disclosure. Tr. pp. 176, l. 12 – 177, l. 8. Despite the trial court's clear limitation for Ms. Caldwell's expert testimony, the state elicited testimony from Ms. Caldwell in the presence of the jury that not only violated the trial court's ruling, but drew heavily upon her extensive experience, training and skill in the field of forensic interviews while under the label of being an "expert" witness, causing substantial prejudice to Mr. Coleman. Tr. pp. 248 – 260.

[15] The trial court noted its belief that qualifying Ms. Caldwell as an expert at all was a "dangerous way to go" but that the state wanted an expert. Tr. pp. 174, l. 20 – 175, l. 3.

A. The trial court's abused its discretion when it qualified Caldwell as an expert in delayed disclosure because the subject matter was not of such specialized or technical knowledge such that expert testimony was necessary, Caldwell did not have the requisite level of experience, knowledge, or skill to testify as an expert with regard to delayed disclosure, and the substance of Caldwell's testimony did not show sufficient indicia of reliability based upon Caldwell's training, knowledge, and experience.

Where "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. Expert testimony is permitted where the subject matter before the trier of fact is beyond the realm of ordinary lay knowledge and, once qualified as an expert, the witness is permitted to testify regarding information not within their own personal knowledge and may use information made available to them to present their expert opinion. Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010) (comparing to the testimony of a lay witness who may only testify to matters within their own personal knowledge that does not require any special knowledge, skill, experience, or training). Prior to admitting any expert testimony, a court must also determine that the subject matter is beyond the ordinary knowledge of the jury, that the expert has acquired the requisite knowledge and skill to be qualified as an expert in the particular subject matter, and that the substance of the expert's testimony is reliable. State v. Brown, 411 S.C. 332, 340, 768 S.E.2d 246, 250 (Ct. App. 2015) (citing Watson, 389 S.C. at 446, 699 S.E.2d at 175).

Once the subject matter is deemed to be beyond the ordinary knowledge of the jury, a trial court must evaluate whether the proffered expert, although not necessarily a specialist in the particular branch of the field, maintains the requisite knowledge and skill

to qualify as an expert in the particular subject matter. Watson, 389 S.C. at 446, 699 S.E.2d at 175. While our courts have held that "[t]he general characteristics of child sex abuse victims are, therefore, more appropriate for an expert qualified in the field to explain to the jury," particularly when the victim is a child, the individual providing such testimony to the trier of fact must also be *qualified in the field* or subject matter being provided. Brown, 411 S.C. at 342, 768 S.E.2d at 251 n.1 (noting that the appellant had not challenged the qualifications of the witness as an expert in delayed disclosure thus this second prong of the Watson test was not addressed, but upholding the testimony of one expert as relevant and necessary because the juror's qualifications indicated they had little to no knowledge of sexual abuse and that the appellant had extensively cross-examined the various victims specifically regarding delayed disclosure.); see also State v. White, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004). Where an expert's testimony involves a non-scientific subject matter, the trial court must make a threshold determination to assess the qualifications of the individual as well as the reliability of the subject matter, which are both analyzed under the analytical framework established in State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009); see also State v. Chavis, 412 S.C. 101, 106-07, 771 S.E.2d 336, 338-39 (2015). However, where an individual merely testifies as to their personal observations and experiences, it may be considered unnecessary for that individual to be qualified as an expert. See State v. Douglas, 380 S.C. 499, 502-03, 671 S.E.2d 606, 608 (2009) (finding that it was unnecessary for the trial court to qualify an individual as an expert in the field of forensic interviewing as the witness merely testified to her personal observations, experiences, and interview with the minor child).

Once an individual is qualified as an expert in a particular subject matter, the trial court must then make a threshold determination as to the reliability of the expert's testimony under Rule 702, SCRE. State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009) (specifying that "the familiar tenant of evidence law that a continuing challenge to evidence goes to weight, not admissibility has never been intended to supplant the gatekeeping role of the trial court") (internal citations omitted). It is crucial that the substance of an expert's testimony be reliable due to the weight a jury tends to give the testimony of an expert by the very nature of their expert designation. See State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (analyzing the reliability of expert testimony and noting that the bolstering present in their case "especially when made by a witness imbued with imprimatur of an expert witness, improperly invades the province of the jury."). "Evidence of 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." State v. Chavis, 412 S.C. 101, 108, 771 S.E.2d 336, 339 (2015) (finding that although the expert was sufficiently trained in the RATAC protocol and used that during her interviews, no other evidence was presented to support that the expert's conclusions or impressions were accurate, peer reviewed, or had any identification of her error rate, thus determining the reliability requirement of Rule 702, SCRE was not met). Thus, any expert testimony that does not show the requisite indicia of reliability should not be admitted.

Although behavioral evidence may be admissible and an appropriate subject matter for expert testimony under Brown, such expert testimony must also be relevant, beyond the ordinary knowledge of the jury, and so specialized in nature that *expert*

testimony is necessary. In the present case, the state did not make a sufficient offer of proof that the sworn jury had any particular need for expert testimony in the field of delayed disclosure,[16] nor any showing that information drawn from any witness or the defense during cross examination regarding the minor child's delayed disclosure of the incidents such that expert testimony on delayed disclosure was necessary under Rule 702, SCRE. Tr. pp. 132 – 178. Thus the subject matter of delayed disclosure, particularly in the manner the state intended to present expert testimony to clarify for the trier of fact, did not qualify under Rule 702, SCRE and should not have passed the first threshold under Watson.

Even if expert testimony to explain delayed disclosure had been necessary for the trier of fact to understand the evidence before it, Ms. Caldwell failed to prove sufficiently *qualified* by her knowledge, skill, experience, training, or education under Rule 702, SCRE to testify as an expert in the designated field of delayed disclosure. During the state's initial examination during the proffer for Ms. Caldwell, it drew on her vast educational and training background in child sexual and physical abuse investigations, with extensive training in the field of forensic interviewing including her years of experience teaching "all over South Carolina in the field of child forensic interviewing," as well as in North Carolina, Virginia, Nevada, and Florida. Tr. pp. 133, l. 21 – 137, l. 19. Although Ms. Caldwell disclosed she had previously been qualified as an expert in the field of delayed disclosure, defense counsel quickly had her admit that "a large majority" of her experience was predominately in forensic interviewing, that she had not received

[16] The state did argue that it felt "the jury may feel like this is not common, may not know how common delayed disclosure actually is" but made no proffer specific to this sworn jury that it would, in fact, assist them in *understanding* what delayed disclosure was as a subject matter. Tr. pp. 164, l. 19 – 165, l. 1.

any specialized degree or subspecialty within her training in the area of delayed disclosure, and that she had not done any research nor had any hypothesis tested in the field of delayed disclosure, and instead relied on the research of others for her basis of knowledge about the study of delayed disclosure. Tr. pp. 138, ll. 7 – 17, 140, ll. 4 – 7, 141, ll. 6 – 8, 146, ll. 20 – 24. If anything, Ms. Caldwell revealed her exposure to and knowledge of the subject of delayed disclosure was enveloped within her training and materials read for her role as a forensic interviewer, but could not provide any connection between her extensive knowledge and training as a forensic interviewer and that of any similar level of skill, knowledge, or training specific to delayed disclosure. Tr. p. 142, ll. 1 – 23, pp. 143, l. 23 – 144, l. 24.

As similarly established in Douglas, it was unnecessary for Ms. Caldwell to be qualified as an expert not only because she lacked the requisite knowledge, skill, education, and training to be so qualified, but Ms. Caldwell merely testified to her *personal observations and experiences* that children gave delayed reports of abuse in the course of her employment as a forensic interviewer. Tr. p. 147, ll. 9 – 14. The expert testimony proffered by Ms. Caldwell revealed that she could only testify to articles she had read and her personal observations of delayed disclosure as it presented during her forensic interviews, but there were no other indicators of the reliability of her expert testimony sufficient to meet the White threshold of reliability.[17] Tr. p. 150, ll. 8 – 20.

[17] The trial court noted its concerted effort to lead the state away from requesting Ms. Caldwell be qualified as an expert: "I was trying to lead the state into just saying we won't even offer her as an expert, we'll just offer her as somebody that can testify from her experience as to what she's found in her interviews. They didn't bite on the bait, so I can't go there. They want her to be an expert." Tr. p. 174, ll. 20 – 25. The trial court went further to state its belief that the state's request was "probably a dangerous way to go, but that's okay." Tr. p. 175, ll. 2 – 3.

Like the expert in Chavis, Ms. Caldwell may have been extensively trained in the field of forensic interviews and the RATAC protocol, which may have included elements of exposure to the field of delayed disclosure, but no other evidence was presented to show that any of Ms. Caldwell's conclusions for either delayed disclosure or as a forensic interviewer were supported or accurate, peer reviewed, or that she had any way to determine her error rate. Tr. pp. 139, l. 4 – 141, l. 9, 146, ll. 20 – 24. Although the trial court ultimately qualified Ms. Caldwell as an expert in delayed disclosure, it specifically limited her testimony to two specific facts that fell well within the range of her personal experience and observation.[18] Tr. p. 177, ll. 3 – 8.

Therefore, the subject matter of delayed disclosure was not one that required expert testimony to assist the trier of fact, Ms. Caldwell was not qualified to testify as an expert in the field of delayed disclosure, and Ms. Caldwell's proffered expert testimony did not meet the threshold of reliability under White and is progeny. As such, the trial court abused its discretion when it qualified Ms. Caldwell as an expert in delayed disclosure and allowed her to testify before the jury.

B. The trial court further abused its discretion when it qualified Caldwell as an expert in delayed disclosure because it effectively allowed the state to admit expert testimony in the field of forensic interviewing, allowing the expert to bolster the credibility of the minor child's testimony and statements by vouching for a class of victims the minor child fell within, in violation of the holding in Kromah and Rule 608, SCRE.

The Supreme Court made clear in Kromah that qualifying an individual as an expert in forensic interviewing is unnecessary and improper because although the nature

[18] Ms. Caldwell's testimony was limited to: one, that "late reporting does occur in a large number of majority of the cases" and two, "that children do have difficulty relating time and dates during interviews." Tr. p. 177, ll. 3 – 6.

of the work of a forensic interviewer may be useful for law enforcement investigations, it is not appropriate for a courtroom nor as a subject matter that would fall within the scope of Rule 702, SCRE. Kromah, 401 S.C. at 357, 737 S.E.2d at 499 nn.4-5 (2013) (reiterating the holding in State v. Douglas, wherein it was found to be unnecessary for a qualification of expertise in forensic interviewing given the lack of specialized knowledge required for such a qualification and going on to establish that the court could not envision any future instance in which such a qualification would ever be necessary). The very nature of the work of a forensic interviewer is to determine the veracity of claims made by potential victims, acting essentially as a "human truth-detector," which errs dangerously close to invading the province of the jury in vouching or bolstering the credibility of a victim's statements and allegations. Id.; see also State v. Portillo, 408 S.C. at 71, 757 S.E.2d at 724 (Ct. App. 2014) (stating "[i]t is undeniable that the primary purpose for calling a forensic interviewer as a witness is to lend credibility to the victim's allegations."). The non-scientific method of interviewing used by forensic interviewers, known as the RATAC[19] method, assists the interviewer in determining the truth of the subject's statements and although this method may be useful in the initial law enforcement investigative process, it is not appropriate for presentation in the courtroom where such methods may "run afoul of evidentiary rules and a defendant's constitutional rights." Id. With this level of likelihood that a forensic interviewer, if qualified as an expert, would tow the line of improper bolstering and vouching merely by testifying as to the nature and quality of their work and experiences therein, coupled with the incredible

[19] RATAC: Rapport, Anatomy, Touch, Abuse Scenario, and Closure – a method used nationwide in forensic interviews of children when physical and/or sexual abuse is alleged. Kromah, 410 S.C. at 357, 737 S.E.2d at 499 (citing State v. Douglas, 380 S.C. 499, 500, 671 S.E.2d 606, 607 (2009)).

weight that a jury naturally gives to an expert by virtue of their expert designation, the likelihood of prejudice to an accused when these two elements coexist before a jury is high.

Although an expert may testify to facts not within their personal knowledge and render an opinion based upon information provided to them, they may not render an opinion or testify as to the reliability or credibility of a child victim in a sexual abuse matter. See Kromah, 401 S.C. at 358-59, 737 S.E.2d at 500; see also State v. Portillo, 408 S.C. 66, 71, 757 S.E.2d721, 724 (Ct. App. 2014). Courts have held that where experts, particularly those qualified in the field of forensic interviewing, have indicated that they believed the victims' allegations of abuse, such testimony is impermissible and improperly bolsters the child victim's testimony. See Kromah, 401 S.C. at 356 and 358, 737 S.E.2d at 498-99 (2013) (finding an expert stating a "compelling finding" of physical abuse was problematic)[20] (citations omitted); see also State v. McKerley, 396 S.C. at 465, 725 S.E.2d at 142 (noting the comments on the veracity of a victim's statements regarding their alleged sexual assault amounted to impermissible bolstering). When the comments or opinions given by expert witnesses rise to the level of bolstering, it has been found that the expert witness testimony admitted at trial was improper. See State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011); State v. Dawkins, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989); State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d

[20] The Supreme Court in Kromah established guidelines to instruct a forensic interviewer regarding what testimony should avoid during trial: informing the jury that the child was instructed to be truthful, rendering a direct opinion affirming the child's veracity or tendency to tell the truth, any statement even indirect that vouches for a child's credibility, any statement indicating that the forensic interviewer believes the child's allegations, or any opinion indicating the child's behavior was further evidence of the child's veracity. State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013).

306, 309-10 (Ct. App. 2000). Even where an expert's testimony does not directly conflict with the guidelines established in Kromah, if there is no other way to interpret the testimony other than that it amounts to vouching for the credibility of the victim's statements or behavior, the expert's testimony amounts to improper bolstering. See State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding error where there was "no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful") see also Jennings, 394 S.C. at 483, 716 S.E.2d at 96 (Kittredge, J., concurring) (referring to the forensic interviewer's statement in the reports as "patently inadmissible evidence").

It is patently clear that the vast majority of Ms. Caldwell's experience, knowledge, training, and skill were grounded in the field of forensic interviewing of children who have reported sexual or physical abuse. Tr. pp. 132 – 178. Ms. Caldwell had traveled across the United States to train others in the field of child forensic interviewing, had received extensive training in the subject herself, had twenty-eight (28) years of experience in child sexual and physical abuse investigations, conducted over two thousand (2,000) forensic interviews, and was trained in the RATAC method. Tr. pp. 133, l. 21 – 136, l. 25, 138, ll. 7 – 17, 140, ll. 22 – 24, 141, ll. 23 – 24, 145, ll. 22 – 24. The state themselves even mistakenly referred to Ms. Caldwell as "the forensic interviewer" when attempting to exhibit her qualifications in the field of delayed disclosure. Tr. p. 145, ll. 7 – 11. When Ms. Caldwell was called to testify before the jury, she testified to her extensive knowledge, experience, and training in forensic interviewing, while only briefly mentioning that she had previously been qualified as an expert in delayed disclosure at the point she was qualified as an expert in delayed

disclosure. Tr. pp. 249, l. 11 – 252, l. 25. Although Ms. Caldwell was named an expert in "delayed disclosure," the substance of her testimony providing the foundation of her expertise heard by the jury was that of a forensic interviewer.

During her testimony, Ms. Caldwell briefly testified to the definition of delayed disclosure before her testimony drew an objection from the defense that her testimony went beyond the limited scope set by the trial court. Tr. pp. 254, l. 1 – 257, l.23. The trial court sustained the objection, but not before the jury heard Ms. Caldwell testify that "[i]t is more common for a six-year-old, and all other ages of children, to delay in reporting their sexual abuse." Tr. p. 255, ll. 4 – 5. This testimony went beyond the permitted generalized scope of delayed reporting within Ms. Caldwell's experience and offered an expert opinion regarding a specific fact in the present case: that six year olds commonly issue delayed reports. Tr. p. 255, ll. 1 – 24. This validation that delayed reporting is common in six-year-old children made by Ms. Caldwell who was designated an expert before the jury, vouched for the credibility of the testimony and statements of the minor child who was herself six years old when the alleged incidents occurred. The trial court did find that the state improperly asked Ms. Caldwell about a specific age "that just happens to be the age of the complaining party or the victim in this case" which fell outside his ruling regarding the limited scope of Ms. Caldwell's testimony. Tr. p. 256, ll. 5 – 20. Furthermore, immediately after this improper testimony was presented to the jury and the defense's objection sustained, the state elicited additional testimony about Ms. Caldwell's extensive experience as a forensic interviewer, had her define what a forensic interview was, describe the purpose of forensic interviews, and identify the typical age

range of children she had interviewed during her forensic interviews. Tr. p. 258, ll. 6 – 24.

The substance of Ms. Caldwell's testimony with regard to forensic interviews and the depth of her knowledge, experience, training, and skill as a forensic interviewer makes clear that the state used the expert designation of "delayed disclosure" as a venire to disguise their expert forensic interviewer. As our Supreme Court in Kromah has unequivocally held that no expert designation for forensic interviewers is necessary due to the nature of the work of a forensic interviewer or proper due to the weight a jury tends to give to expert witnesses, the state's request and the trial court's decision to qualify Ms. Caldwell as an expert was improper under Rules 608 and 702, SCRE, and should be reversed.

C. The highly prejudicial nature of Caldwell's testimony evidencing her vast experience as a forensic interviewer, her label as an "expert" regardless of the designated subject matter of expertise, and the ability of the jury to link her statements with those made by the minor child which amounted to improper bolstering substantially outweighs the dearth of probative value provided by Caldwell's testimony.

Evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. Our courts have made clear that "expert testimony and behavioral evidence are admissible 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); see also State v. Weaverling, 337 S.C. 460, 474-75, 523 S.E.2d 787, 794 (Ct. App. 1999) (confirming this principle as stated in Schumpert and going on to explain that the probative value of such relevant testimony so greatly assists the trier of fact in explaining typical patterns of adolescent victims of sexual assault and in understanding their behavior and often strange demeanor that a trier of fact might

otherwise lack insight and knowledge to understand that any prejudicial effect is outweighed). Furthermore, there must be a "reasonable probability the jury's verdict was influenced by the challenged evidence" to show prejudice in evidence admitted by a court. Brown, 411 S.C. at 339, 768 S.E.2d at 249 (referencing Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

There is a danger of unfair prejudice when an expert is qualified in any subject matter because it is an inescapable that a jury is more likely to give more weight to an expert's testimony by virtue of their expert designation alone. Kromah, 401 S.C. at 357, 737 S.E.2d at 499 (noting that although no more weight should be given to an expert than any other witness, it is clear jurors have a tendency to attach more significance to the testimony of experts, thus the discretion of a trial court in labeling such an expert should be jealously guarded) (citations omitted). The weight of this unfair prejudice naturally attached to expert testimony is enhanced when such qualification of an expert is unnecessary, especially when that designation is in the field of forensic interviewing. See Kromah, 401 S.C. at 357, 737 S.E.2d at 499 n.5 (stating "we could envision no circumstance where their [forensic interviewer's] qualification as an expert at trial would be appropriate" as, by the very nature of the work of a forensic interviewer they seek to determine the veracity of the victim's allegations and statements).

In light of Kromah's unequivocal determination that there is likely never a circumstance in which an expert qualification for forensic interviewers would be necessary and the problematic nature of their work in light of improper bolstering concerns, it would be nearly impossible to find a scenario in which the prejudicial effect of the admission of such an expert qualification or testimony from and expert would not

vastly outweigh its probative value, if any. Although Ms. Caldwell was not designated an expert in the field of forensic interviewing, her liturgy of experience presented before the jury all pointed to her experience and expertise as a forensic interviewer. Tr. pp. 249 – 259. Any attempt the state made to qualify Ms. Caldwell in any other field was an ineffective attempt to qualify their expert as an expert with her forensic interviewing qualifications, made in an attempt to circumvent the unequivocal directive in Kromah prohibiting such an expert designation. Furthermore, the entirety of Caldwell's testimony was her informing the jury of her credentials and experience as a forensic interviewer with minimal testimony regarding delayed disclosure, rendering any probative value of her testimony substantially outweighed by its prejudicial effect under Rule 403, SCRE.

Therefore, the trial court abused its discretion when it qualified Ms. Caldwell as an expert in delayed disclosure and allowed her to testify before the jury. Her testimony improperly bolstered and vouched for the credibility of the child's testimony and statements as it confirmed tendencies of delayed reporting specifically in a class of children the same age of the minor child in this case. This testimony correlating the child's age with the credibility of the behavioral traits she exhibited, in addition to the continued objectionable testimony that went beyond the scope the trial court explicitly set for this expert testimony during the proffer of evidence. As her testimony provided extensive information regarding her knowledge, skill, training, and experience as a forensic interviewer, an remote probative value of Ms. Caldwell's testimony was substantially outweighed by the prejudicial effect to Mr. Coleman. Thus, this court should find the trial court abused its discretion and reverse Mr. Coleman's convictions.

CONCLUSION

By reason of the foregoing arguments, Mr. Coleman's convictions should be reversed, and this case remanded to the York County Court of General Sessions for a new trial.

Respectfully submitted,

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This 11th day of March, 2016.