STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY

Court of General Sessions
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2015-002530

THE STATE,

Respondent,

v.

PRESTON MOZEAK,

Appellant.

FINAL BRIEF OF RESPONDENT

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III.

The trial court properly found Victim competent to testify, both at the pretrial competency hearing and following Appellant's objection to her competency during cross-examination, because she met the competency requirements of Rule 601, SCRE.

STATEMENT OF THE CASE

A Marion County Grand Jury indicted Appellant for first-degree criminal sexual conduct (CSC) with a minor and third-degree CSC with a minor. (R. 223-224) On November 18–19, 2015, Appellant proceeded to a trial before the Honorable William H. Seals, Jr., and a jury. Thurmond Brooker, Esquire, represented Appellant, and Assistant Solicitors David Richardson and John Holt represented the State. The jury found Appellant guilty, and Judge Seals sentenced him to twenty-five years' imprisonment for the first-degree CSC charge and fifteen years' imprisonment for the third-degree CSC charge, to be served concurrently. (R. 216, 221).

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Victim was a seven-year-old child living in Marion, South Carolina, between August and November of 2014. (R. 48, lines 15–16). During the time in question, Victim lived with her mother (Mother), father, and five-year-old brother (Brother). (R. 48, lines 17–25). Victim's grandmother and grandfather (Appellant) lived in their own home, which was also located in Marion. (R. 49, lines 11–19). Victim and Brother would take the bus after school to Appellant's house and would stay there until their parents picked them up at approximately 6:00 in the evening. (R. 52, lines 4–17). While Victim and Brother stayed with their grandparents, Appellant would take them to places such as the park or stores like Wal-Mart and Food Lion. (R. 52, lines 20–24).

During these trips to the park and stores, Victim would ride in the front seat of the car next to Appellant while Brother sat in the backseat. (R. 53, line 16–R. 54, line 5). Appellant would instruct Victim to unzip her pants, recline the seat, and hold onto the car door handle while he would insert his pointer finger into her "pee hole." (R. 55, lines 3–12; R. 55, lines 17–19; R. 56, line 2–R. 57, line 13). On some of these car rides, Appellant would unzip his pants and instruct Victim to lean over and touch his penis. (R. 59, lines 17–R. 60, line 16). This behavior continued at Appellant's home. (R. 61, lines 7–15). At the home, Victim would sit beside Appellant or in his lap. (R. 62, line 9). Appellant would then instruct Victim to unzip her pants, and Appellant would digitally penetrate her "pee hole" while sitting in his chair in the living room. (R. 62, lines 9–19).

On November 21, 2014, Victim disclosed to Mother what Appellant was doing. (R. 94, lines 5–17). Victim's mother immediately took her to her pediatrician for an evaluation. (R. 97,

lines 18–24). Next, Mother went to the police department to file a police report. (R. 98, lines 19–21).

After reporting the abuse to the police, Mother took Victim to Care House in Florence, South Carolina. (R. 99, lines 2–6). Care House is a children's advocacy center that conducts forensic interviews of children in cases of suspected child abuse. (R. 122, lines 19–22). Sally Williamson, a forensic interviewer and therapist, conducted a video-recorded interview with Victim on November 25, 2014. (R. 123, lines 4–11). Appellant was arrested on November 26, 2014. (R. 141, lines 9–10).

A pretrial hearing was conducted on the admissibility of the recording of the forensic interview of Victim at Care House pursuant to S.C. Code Ann § 17-23-175. (R. 12, line 10). In addition to hearing testimony from Williamson, the trial court reviewed the recording of the interview itself. (R. 9–28). Williamson testified that she utilized the Child First South Carolina method in her interview with Victim. (R. 16, lines 13-14). She explained that this method allowed more flexibility than the previous interview method:

> [D]epending on the child, their developmental functioning, their cognitive abilities, we may not go specifically through the same exact steps, but basically we're still building rapport with the child, explaining the rules of the room and the purpose of the interview, helping them to feel comfortable. We may go into anatomy identification or we may ask the child, an older child for example, may be able to respond to why are you here. And they may know why they are there and be able to explain where as a younger child we may take a different approach and go straight into anatomy identification and asking about private parts.

(R. 17, lines 9–20). At the end of the hearing, the trial judge ruled the recording of the interview was admissible due to the fact that it met all the requirements of S.C. Code Ann. § 17-23-175, particularly finding the interviewer's questions were not leading and the statement was detailed and coherent. (R. 28, lines 11–23). The trial judge explained:

> It's my opinion that the questions were not leading. They were open-ended questions. As far as Ms. Williamson goes, she is very qualified, trained, has a ton of experience. I think [she] has a requisite training to conduct this interview. As far as being detailed, I think the statement is detailed enough. It may not be perfect, but I don't know of any testimony or deposition that is actually perfect in 110 percent detailed and I think it's detailed enough. And it's coherent and it kind of flows and makes sense when you take into account that it's a seven-year-old child. It's an interview of a seven-year-old child, that's pursuant to 17-23-175. I find that it['s] trustworthy enough to come in at trial.

(R. 28, lines 11–23).

Immediately following the admissibility hearing, the trial court held an *in camera* competency hearing to allow the State to qualify Victim to testify. (R. 29, lines 2–23). The solicitor examined Victim, asking her about what happens to people at school who disobey, to which she answered that they get sent to the office. (R. 30, lines 2–25). The solicitor further probed into the difference between telling the truth and lying and asked what happened to people who tell lies, to which Victim replied, "They get in trouble." (R. 31, lines 3–13). Defense counsel then asked Victim the difference between right and wrong and asked her to define "truth" and "lie." (R. 32, lines 2–21). The trial judge found her competent to testify, and Appellant did not object to this finding. (R. 32, lines 22–25).

The jury returned to the courtroom and the State called Victim to the stand. She testified that Appellant would drive her and Brother to the park frequently. (R. 52, line 20–R. 53, line 24). She testified that on these trips in the car, Appellant would tell her to unzip her pants. (R. 55, lines 3–19). He would then instruct her to grab the door handle of the car and lean her seat back. (R. 57, lines 9–10). Appellant would then digitally penetrate her "pee hole" with his pointer finger. (R. 56, lines 5–16). Additionally, Victim testified that Appellant would make her touch his penis, stating:

> I thought he was going to be doing the same way that he did to me, but it was going to be different because he zipped his pants—he unzipped his pants and he told me to lean on to him and do the same thing he did to me.

(R. 60, lines 10–13). She went on to describe this encounter in greater detail, stating that "the only thing I needed to touch was the middle part" and that it felt "a little soft and a little squishy." (R. 60, lines 17–19; R. 61, lines 4–6).

On a separate occasion, the sexual abuse occurred inside Appellant's house. (R. 61, lines 7–18). Victim testified regarding an incident in which Appellant inserted his finger into her vagina while sitting in his living room. (R. 61, line 7–R. 62, line 6). Victim explained: "I usually sit beside him. I sit in his lap. And then when I'm on off his lap, he tells me—I unzip my pants and he done the same thing that he does in the car." (R. 62, lines 9–11). Additionally, Victim testified that Appellant told her not to tell anyone about this behavior or he would go to jail, and she did not want that to happen. (R. 63, lines 2–7).

During Victim's testimony, she stated that she had practiced what she was going to say every night with her mother in preparation for trial. (R. 65, lines 10–22). She explained that they practiced her testimony in regard to "when someone was going to ask me about what happened, where it was, and how did it happen and something like that." (R. 66, lines 23–25; R. 67, lines 1–2). After this statement, Appellant's counsel moved to disqualify Victim, arguing she was not competent to testify. (R. 67, lines 16–25). Additionally, he argued she had a lack of personal knowledge because, due to practicing her testimony with her mother, she was no longer testifying based on her own perceptions. (R. 68, line 9–R. 70, line 12). The trial judge ultimately overruled Appellant's motion, finding that the fact that Victim practiced her testimony with her mother did not disqualify her:

> I think considering her age, the sensitive [nature] of the testimony that she has to give in court, the seriousness of court, the importance of court. The fact that it involves a family member. The idea that a parent will practice a little bit with their child is appropriate, most lawyers practice with their witnesses anyway. I'm going to overrule it.

(R. 70, lines 24–R. 71, line 7).

Mother testified that on one occasion she arrived at Appellant's house to find Victim sitting on Appellant's lap. She stated that she considered it inappropriate for her young child to be sitting on Appellant's lap and she scolded her. (R. 96, lines 5–25). She explained:

> He's a man. You're a little girl. You don't sit in any man's lap. I mean, I don't care if it is your grandfather, you know. And so I had been seeing that she's been kind of sitting under him, you know, really next to him, that's what I had noticed.

(R. 96, lines 21–25). Mother testified that immediately after Victim disclosed the sexual abuse to her, she took Victim to the doctor's office and then went to the police station to file a report. (R. 97, lines 22–24, R. 98, lines 20–21). Mother testified that she later took Victim to Care House where the forensic interview was conducted. (R. 99, lines 5–6). Mother additionally testified that she observed noticeable differences in Victim's behavior after the sexual abuse, including one particular incident in which she witnessed seven-year-old Victim attempting to masturbate:

> After the Care House, yes, yes, whereas [Victim] is very talkative. I mean, she is more reserved. There was even a time when, you know, bedtime, okay. So I always go say and [sic] good night, you know, I love you and everything like that. This particular time I went in the room and she was playing with herself. She had her finger down there and I said, [Victim], what are you doing.

(R. 99, lines 10–18). Mother testified that prior to these allegations she had never observed any behavior like this. (R. 100, lines 4–7).

After the State rested, defense counsel moved for a directed verdict, and the trial court denied the motion. (R. 126, line 7–R. 129, line 22). The defense then called Appellant to the stand. (R. 133, lines 1–14). Appellant testified that he was responsible for watching Victim and Brother every afternoon after school until their parents picked them up at 6:00. (R. 140, lines 1–9). Appellant testified that they would do multiple activities in an effort to keeps the kids "out [of] the streets." (R. 140, line 18). He testified that they would take trips to the park, often driving. (R. 140, lines 22–23). Appellant denied ever asking Victim to recline her seat or unbuckle her pants. (R. 143, lines 11–13; R. 144, line 24–R. 145, line 3). He denied ever touching Victim sexually or ever having Victim "massage or handle [his] penis." (R. 145, lines 4–R. 146, line 5).

The jury ultimately found Appellant guilty of both charges. (R. 215, line 25–R. 216, line 10). The trial court sentenced Appellant to twenty-five years' imprisonment for the first-degree CSC charge and fifteen years' imprisonment for the third-degree CSC charge, to be served concurrently. (R. 221, lines 7-12).

ARGUMENT

I.

Appellant's argument regarding the trial court's use of the word "truth" during the jury charges is not preserved. Even if preserved, the trial court properly charged the jury and made clear the jury's duty was to determine, based on the evidence presented, whether the State had proven Appellant's guilt beyond a reasonable doubt. Any conceivable prejudice created by the trial court's reference to arriving at a verdict that speaks the truth was cured by the trial court's extensive instructions that the State bore the burden of proving Appellant guilty beyond a reasonable doubt.

Appellant argues the trial court erred in charging the jury that it was their "duty . . . to determine the truth in this case" and "arrive at a verdict which speaks the truth," and that "the word verdict, which has a Latin derivative, means a true saying" where such instructions improperly detracted from the State's burden to prove the elements of the charged offenses beyond a reasonable doubt. On the contrary, none of the charge that involved the word "truth" in any way detracted from the emphasis the trial judge placed on the State's burden to prove the elements of the crimes beyond a reasonable doubt. Thus, no prejudice existed. The jury charge was proper, and this Court should affirm.

Initially, the State submits this particular issue is not preserved for appellate review. While Appellant did have a discussion with the trial judge following the jury charges, he did not specifically object to the charges. When asked if there were any objections (after having no objections whatsoever when he read the jury instructions before the judge charged the jury), defense counsel simply stated,

> I don't think, Your Honor, is - - the only concern that I have with it is the part that says basically is the jury is to seek a verdict that seeks the truth. And if I'm not and like I said, I don't have any case law, but from my memory is that I remember probably about [a] year ago reading some law in reference to that in which there

> was a lot of cases in which the superior courts had admonished as to whether or not that sort of language is appropriate specifically is is that when it comes to asking the jury whether or not they're seeking the truth. I think it -- and I think it goes as to whether or not that's somehow shift or change the burden and that they're supposed to be looking for and that is is that whether or not the State has satisfied, you know, the burden of proof beyond a reasonable doubt. So their job is not to seek the proof but determine whether or not that burden has been satisfied. So like I said, I can't quote any law. It struck my mind when that part was read and **so I'll leave it to Your Honor's discretion with respect to what he has.**

(R. 212, line 19–R. 213, line 13) (emphasis added). Significantly, defense counsel never used the word "objection" in his comments to the trial judge. Indeed, he ended what he had to say by telling the trial judge he was leaving it to his discretion. He did not ask for the judge to recharge the jury with a curative instruction or for any other remedy. Even the judge's response seems to indicate he did not regard defense counsel's statements as an objection that needed to be ruled upon. The trial judge merely stated that he was "going to leave it like it is," rather than ruling "overruled" or "denied." Thus, it is questionable whether a valid objection on the part of defense counsel was made.

If this Court finds this was a valid objection, Appellant's argument still fails on the merits. The appropriate test for reviewing a jury charge involves determining whether there is a reasonable likelihood the jury applied the charge in a way that violated the Constitution. *Estelle v. McGuire*, 502 U.S. 62, 71 (1991). Ultimately, "[a] trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied." *State v. Rye*, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007); *see State v. Ezell*, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal.").

The irony of Appellant's argument is that the central function of the trial process in both criminal and civil cases is to discover the truth. *See Portuondo v. Agard*, 529 U.S. 61, 73 (2000) (stating "the central function of [a] trial . . . is to discover the truth"); *see also State v. Wren*, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App. 1996) ("A trial is a search for the truth[.]"); *see, e.g., Carella v. California*, 491 U.S. 263, 265 (1989) (explaining that burden-relieving jury instructions "subvert the presumption of innocence accorded to accused persons and also **invade the truth-finding task assigned solely to juries** in criminal cases" (emphasis added)). Rather than detracting from the State's burden as Appellant claims, the State's burden to prove a criminal defendant's guilt for every element of a criminal offense beyond a reasonable doubt is part of the truth-seeking process. *In re Winship*, 397 U.S. 358, 364 (1970); *see also Burr v. Florida*, 474 U.S. 879, 880 (1985) ("[T]he **beacon of the truth-seeking process** in criminal cases is not absolute certainty, but the 'reasonable doubt' standard[.]" (emphasis added)).

Our Supreme Court has cautioned trial judges to avoid using language that instructs the jury to "seek the truth" due to the **risk** that such language could **potentially** shift the burden of proof to the defendant in an unconstitutional manner. *State v. Aleksey*, 343 S.C. 20, 27–28, 538 S.E.2d 248, 251 (2000). Additionally, the Supreme Court has advised trial judges not to instruct jurors that their verdicts "would represent truth and justice for the parties" due to the risk that such language could distract the jury from its core functions. *State v. Daniels*, 401 S.C. 251, 258, 737 S.E.2d 473, 477 (2012) (Toal, C.J., concurring for the majority). However, our Supreme Court specifically declined to hold that **any** mention of "the truth" in jury charges is unconstitutional. *See Aleksey*, 343 S.C. at 28, n. 2, 538 S.E.2d at 252 ("Although settled law disfavors instructing jurors to seek the truth in some contexts because it might be misleading as to the burden of proof, we decline to hold any mention of 'the truth' in jury charges is

unconstitutional."); *see also State v. Hoffman,* 312 S.C. 386, 395, 440 S.E.2d 869, 874 (1994) (holding a reasonable doubt jury charge that included "in seeking the truth" language constituted a correct definition of reasonable doubt when read as a whole and did not shift the burden of proof to the defendant). In *State v. Beaty*, decided after this trial, our Supreme Court again addressed "searching for the truth" language. *State v. Beaty*, Op. No. 27693 (S.C. Sup. Ct. filed Dec, 29, 2016) (reh'g granted March 24, 2017). The Court was able to distinguish *Beaty* from *Aleksey* because the comments were made right after the jury was sworn, not as part of the jury charges. The Court did point out that trial courts should "refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict" because of the fear of burden shifting. It then determined that even though the trial court erred, prejudice was not shown that would warrant reversal.

In the instant case, the "seeking the truth" comment came at the end of the jury charges, not during a discussion of the State's obligation to prove Appellant's guilt beyond a reasonable doubt and not right after the jury was sworn. The comments were made during an effort by the trial court to impart to jurors the gravity of their responsibility. The comment in this context was not improper.

This situation is very similar to the one in *Aleksey*. There, the Court looked at when the "truth" language was given to the jury and determined that because it was not given in either the reasonable doubt or circumstantial evidence charges, there was no error. The Court found "the reasonable doubt and circumstantial evidence charges were complete and proper." *Aleksey*, 343 S.C. at 27, 538 S.E.2d at 252. In *Aleksey*, the "truth" language was given as part of the instruction on witness credibility. Here, the language was given at the end of the jury charges

after all of the substantive instructions had been given, including the charges on reasonable doubt and circumstantial evidence. Thus, the reasonable doubt standard of proof was not diluted by the "truth" language.

Indeed, as shown below, the trial court did an exemplary job of communicating the State's burden of proving the charges beyond a reasonable doubt, so the isolated comment at the end of the substantive jury charges was not prejudicial to Appellant. *See State v. Raffaldt*, 318 S.C. 110, 115–16, 456 S.E.2d 390, 393 (1995) (finding a jury charge instructing the jury to "seek some reasonable explanation other than the guilt of the accused" was erroneously burden-shifting but determining any error with that instruction was harmless because the charge as a whole properly explained the State had the burden of establishing Raffaldt's guilt beyond a reasonable doubt); *see also State v. Needs*, 333 S.C. 134, 154, 508 S.E.2d 857, 867 (1998) ("In *Manning,* the Court pointed to the 'in search of the truth' language contained in the reasonable doubt charge as contributing to its defective nature. However, appellate courts since have seemed to allow the use of the phrase – at least when it is not combined with other offending terms outlined in *Manning*." (citations omitted)).

The trial court instructed Appellant's jury as follows on the State's burden:

> In this case, the State of South Carolina charges the defendant with the offenses known as criminal sexual conduct with a minor first degree and criminal sexual conduct with a minor third degree. To these charges, the defendant has entered a plea of not guilty. These pleas of not guilty places [sic] **the burden of proof on the State to prove the guilt of the defendant to you beyond a reasonable doubt on each charge**. It is vital to understand that the defendant is presumed under the law to be innocent of the charges. It is a fundamental rule of our law that a defendant regardless of the seriousness of the charges against him is always presumed innocent of the crimes for which he is charged, **unless and until his guilt has been proved by evidence that satisfies you beyond a reasonable doubt**. The presumption of innocence is not a mere legal theory or legal phrase. The presumption of innocence is very important. And you need to understand that this presumption accompanies the defendant from the time of his arrest and

appearance in this court and continues with the defendant even after you retire to the jury room to deliberate.

In other words, the defendant receives the benefit of the presumption of innocence until the very end of this trial. **When you, the jury, would deliberate upon the evidence and decide whether the State has proved his guilt on each and every charge beyond a reasonable doubt.**

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are few things in this world that we know with absolute certainty, so even in criminal cases the law does not require proof that overcomes every possible doubt. However, if based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crimes charged, you must find him guilty. If on the other hand you think there's a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty. Please understand that reasonable doubt may arise from evidence which has been presented in the case or from the lack of evidence in the case. **It is your responsibility to determine whether or not reasonable doubt exist[s] as to the guilt of this defendant on each and every charge**. I charge you that the defendant is entitled to every reasonable doubt arising in the whole case. If upon any issues of fact essential to conviction in a verdict of guilty, you have a reasonable doubt as to how that issue should be resolved. It would be your duty to resolve that reasonable doubt in favor of the defendant. Thus, in summary it is important to understand that a defendant is not required prove his innocence. Instead, **the State is required by law to prove every essential element of the charges against the defendant by evidence which satisfies you of his guilt beyond a reasonable doubt** only then can you convict the defendant and find him guilty.

(R. 204, line 17–R. 205, line 18; R. 207, line 10–R. 208, line 12) (emphasis added).

The trial court advised the jury it is the exclusive judge of facts. (R. 206, lines 12–19.) In discussing the specific offenses, the trial court informed the jury the State had to prove beyond a reasonable doubt that the defendant engaged in a sexual battery with Victim. (R. 208, lines 23–25). The trial court further informed the jury that the State had to prove beyond a reasonable doubt that Appellant willfully and lewdly committed or attempted to commit a lewd or lascivious act upon the body of Victim. (R. 209, lines 14–19). In describing the offenses, the trial court made clear that each of the elements of the crimes had to be proved beyond a reasonable doubt. (R. 208, line 25–R. 210, line 3).

Put in context, the trial court's comments merely imparted the gravity of the jurors' responsibility. The comments did not create any real danger that the jurors would not follow the trial court's extensive instructions on the State's burden of proving the charges beyond a reasonable doubt that were mentioned at least eleven times within the jury charge. *See State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994) ("Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error."). Accordingly, the trial court did not err, and Appellant was not prejudiced by any perceived error.

II.

The trial court did not err in admitting the videotaped forensic interview because the 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 S.C. Code section 17-23-175.

Appellant argues the trial court erred in admitting the videotaped forensic interview, claiming it did not possess particularized guarantees of trustworthiness due to the interviewer's use of leading questions, the lack of details regarding the alleged offenses, and the lack of internal coherence. On the contrary, the trial court held an *in camera* hearing (during which both parties were able to question the forensic interviewer), viewed the videotape, and properly found it satisfied the requirements of the statute. This Court should affirm its decision.

The forensic interview video statute at issue 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.
>
> (B) 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 (2014) (emphasis added).

The admission or exclusion of evidence is left to the sound discretion of the trial judge. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. *State v. McLeod*, 362 S.C. 73, 79, 606 S.E.2d 215, 218–19 (Ct. App. 2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

The two questions Appellant complains are leading are as follows:

1) Asking Victim whether she ever called her grandpa "daddy."

2) Asking, "So did it happen when you were six, five, and four, or only when you were seven?" in regard to what age she was when the abuse happened.

Neither question was leading and each was in response to something Victim had just said. When Williamson asked Victim if anyone had touched her private parts, she answered that yes, her grandpa had. She then began describing the incident and said, "Daddy told me to lean back and unzip my pants." After Victim had finished describing the incident, Williamson asked her, "You said Daddy told me?" Victim said, "I mean Grandpa." Williams clarified by asking, "Do you ever call Grandpa 'Daddy'?" Victim nodded in the affirmative. This entire exchange seemed to be Williamson's way of clarifying who Victim was saying touched her. It was not

leading and, furthermore, the recording does not support Appellant's claim that "it was clear the interviewer was dissatisfied with the Minor Child's use of 'grandpa' and 'daddy' and wanted the minor child to pick one." (App.Br.15). This statement by Appellant is at least confusing and borders on misleading. Of course an interviewer would want to clarify which person a victim is talking about in regard to alleged sexual abuse. However, alleging that the interviewer was "dissatisfied" is not an accurate description of a question that actually sought clarity on the identity of the abuser. It is her job to collect information from an alleged victim and one important piece of that information is the identity of the abuser. It was quite reasonable for the interviewer to want to make sure she knew which person Victim was saying touched her in this way. Williamson was thorough in finding out which person Victim was referring to by asking for their first names. Victim referred to Appellant as "Daddy" later in the recording too, and Williamson again asked her to clarify who she was talking about.

As to the second question involving Victim's age at the time of the incidents, Williamson began by asking her if the abuse had ever happened when she was in a different grade other than second. She asked if it happened when Victim was in first grade, and Victim replied that it did not. Williamson then asked, "Were you seven all the times it happened or a different age?" Victim replied, "Different age." In response to Victim's answer, Williamson then asked her what age, and Victim replied, "Okay, six, five, and four." In response to this answer from Victim, Williamson asked, "Did it happen when you were six, five, and four . . . ." at which point Victim shook her head "No." (State's Exhibit #1 DVD of forensic interview at 11:20:18). In response to Victim's negative answer, Williamson then finished her question with ". . . or only when you were seven?" Victim answered, "Seven." Rather than being a leading question, Williamson's question involving the different ages was actually merely a repetition of Victim's

answer. It is clear from the video that Williamson had developed a rapport with Victim and was properly responsive to her answers, both spoken and gestured. Appellant's issue with this question is similar to his above argument that the interviewer was "dissatisfied" with Victim's earlier answer. He argues, "Again, the interviewer's tone implied to the Minor Child which answer was 'correct' in the mind of the interviewer." (App.Br.15). Appellant suggests that both of these questions indicate the interviewer used a particular tone to imply to Victim which answer was correct. The State vehemently disagrees with this mischaracterization of the interview. The State also strongly disagrees with Appellant's statement in his brief that "[w]hen her age and year in school did match, the interviewer prompted her to change her response . . . ." First, to the extent Appellant implies the interviewer was trying to lead Victim into giving a consistent response, this statement makes no sense. Second, nothing in the interviewer's questions suggested "prompting her to change her response." Williamson merely repeated back what Victim herself said, which is very likely an interview technique she has been trained in. A thorough review of the videotaped interview shows no evidence of Williamson ever prompting Victim to change her responses to any of the questions or using a particular tone to imply which answer might be "correct." Indeed, the State takes offense at these unfounded allegations against a seasoned, experienced interviewer who, as can clearly be seen in the video, made every effort to remain neutral and professional during her interview with Victim.

Appellant also argues some of Victim's statements did not make sense: falling asleep during the abuse; her grandmother telling her to stay away from Appellant; hearing her grandmother talk about Appellant going to jail; saying, "Well, I—it did happen to me, but I keep on forgetting these kind of times because—because every time when I blink, um, it—it takes pictures, um, where I was, I think." (State's Exhibit #1 DVD of forensic interview at 11:15:04).

Additionally, Appellant argues Victim was unable to relay the sequence of incidents or how long each lasted. Yet none of these statements or alleged deficiencies indicate a lack of details or coherence. Instead, Victim was able to give specific details about the incidents from where they were driving at the time to how she would recline her seat at Appellant's request, to what Appellant said, to which hand he used. Furthermore, her descriptions of the incidents were coherent. Even the parts about falling asleep and the fact that Victim reported she knew the abuse happened to her but kept forgetting the incidents and where they occurred do NOT indicate lack of coherence. Rather, this is classic dissociation and makes perfect sense as a response to the abuse she suffered at the hands of Appellant.

> To cope with the horror of their experiences, many child sexual abuse victims develop dissociative defense mechanisms similar to those observed in combat veterans and victims of other atrocities. Dissociation can take a number of forms, including traumatic amnesia-more commonly known as repressed memory. Childhood sexual abuse is extremely traumatic for the child victim and is therefore especially conducive to the repression of memory. . . . The premise of repressed memory is that an event occurs which is so traumatic that, in a desperate effort to cope, one's mind dissociates itself and shuts the memory out.

Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 156–57, 511 S.E.2d 699, 702–03 (Ct. App. 1999), *aff'd*, 341 S.C. 320, 534 S.E.2d 672 (2000) (internal citations omitted).

Finally, it is entirely within the trial judge's discretion to find, based on the totality of the circumstances surrounding the making of the statement, that a statement possesses particularized guarantees of trustworthiness under the statute. In determining such, the statute provides that the judge "may consider" whether the statement has internal coherence. The trial judge watched the video and determined the questions were not leading and that the statement was detailed and coherent. Appellant argues: "The trial court excused the lack of coherence in the statement by citing the Minor Child's age." However, the trial judge did not find a lack of coherence; rather,

according to the record, he found "it's coherent and it kind of flows and makes sense when you take into account that it's a seven-year-old child." Appellant also complains the trial judge erred in finding the statement was "detailed enough" and "trustworthy enough," arguing the State's burden was much higher and that the trial court diluted the standard. According to the statute, the trial court may consider whether the statement represents a detailed account of the alleged offense and whether the statement has internal coherence. The trial judge here considered these two factors and determined it was "trustworthy enough to come in at trial." This is all that is required by the statute. The trial judge's decision will not be reversed absence an abuse of discretion. *Gaster*, 349 S.C. at 557, 564 S.E.2d at 93. No abuse of discretion occurred here because there was evidence in the record to support that finding and it was not based on an error of law. The trial court properly admitted the video of the interview and this Court should affirm its decision.

III.

The trial court properly found Victim competent to testify, both at the pretrial competency hearing and following Appellant's objection to her competency during cross-examination, because she met the competency requirements of Rule 601, SCRE.

Appellant argues the trial court erred in finding Victim competent to testify, claiming she received blatant coaching from her mother that made her incapable of understanding her duty to tell the truth and testify based on personal knowledge. On the contrary, the trial judge properly held a competency hearing pretrial and ruled that Victim was competent to testify, to which Appellant did not object. Then, when Appellant did object during his cross-examination of Victim based on her testimony that she had practiced her testimony with her mother, the trial judge properly overruled his objection. This Court should affirm.

Rule 601, SCRE, provides:

> **(a) General Rule.** Every person is competent to be a witness except as otherwise provided by statute or these rules.
> **(b) Disqualification of a Witness.** A person is disqualified to be a witness if the court determines that (1) the proposed witness is incapable of expressing himself concerning the matter as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth.

Every person in South Carolina is presumed competent to be a witness except as otherwise provided by statute or rule. Rule 601(a), SCRE; *Sellers v. State*, 362 S.C. 182, 607 S.E.2d 82 (2005); *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998). "A witness must have personal knowledge of the matter and must swear or affirm to tell the truth." *Needs*, 333 S.C. at 142, 508 S.E.2d at 861. A person will be disqualified as a witness if the court determines that (1) the proposed witness is incapable of expressing himself to the judge or jury concerning the

matter or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth. Rule 601(b), SCRE; *see S.C. Dep't of Soc. Servs. v. Doe*, 292 S.C. 211, 219, 355 S.E.2d 543, 547 (Ct. App. 1987) (noting that in making a determination respecting competency of a witness, the trial judge must rely on personal observation of the child's demeanor and responses to questions posed).

In *Needs*, this Court determined that a "proposed witness understands the duty to tell the truth when he states that he knows that it is right to tell the truth and wrong to lie, that he will tell the truth if permitted to testify, and that he fears punishment if he does lie, even if that fear is motivated solely by the perjury statute." *Needs*, 333 S.C. at 143, 508 S.E.2d at 861. To be competent to testify, "a witness must have the ability (1) to perceive the event with a substantial degree of accuracy, (2) remember it, (3) communicate about it intelligibly, and (4) be mindful of the duty to tell the truth under oath." *Id.* at 143, 508 S.E.2d at 861 (citing *Commonwealth v. Goldblum*, 447 A.2d 234 (Pa. 1982)). The party opposing a witness bears the burden of proving the witness is incompetent. *Id.* The determination of a witness's competency to testify is a question for the trial court, and the trial court's decision will not be overturned absent an abuse of discretion. *Id.*; *see also TNS Mills, Inc. v. S.C. Dep't of Rev.*, 331 S.C. 611, 503 S.E.2d 471 (1998); *State v. Green*, 267 S.C. 599, 230 S.E2d 618 (1976). After the trial court properly determines if a witness is competent, the resolution of the credibility of the witness is within the province of the jury. *Id.* at 144, 508 S.E.2d at 862. "Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a trial judge experiences 'a feel of the case' which oftentimes may not be detected from a cold printed record." *State v. Perry*, 278 S.C. 490, 494, 299 S.E.2d 324, 326 (1983). "The test to determine a minor's competence to testify is whether the child is aware of right and wrong and

understands the probability of punishment for lying." *State v. Hudnall*, 293 S.C. 97, 99, 359 S.E.2d 59, 61 (1987).[1]

Child witnesses are required to carry out incredible acts of courage by being called to the stand to testify about the abuse they suffered at the hands of the abuser who is sitting in the courtroom. Their dilemma is described as follows in a recent legal journal:

> Children of all ages are approaching the bench, being sworn in by a judicial officer, and are asked to sit in a room full of adults to discuss potentially traumatizing and embarrassing events of their victimization. The average adult is intimidated by the criminal justice system and is generally not knowledgeable about court proceedings. The system is even more perplexing for children, especially when asked questions far above their developmental level.

Fanscher, Ashley and del Carmen, Rolando V., *"The Child As Witness": Evaluating State Statutes on the Court's Most Vulnerable Population,* 36 Child. Legal Rts. J. 1 (Spring, 2016).

"A child's competency to testify depends on showing to the satisfaction of the trial judge that the child is substantially rational and responsive to the questions asked and is sufficiently aware of the moral duty to tell the truth and the probability of punishment if [s]he lies." *S.C. Dep't of Soc. Servs. v. Doe*, 292 S.C. 211, 219, 355 S.E.2d 543, 547 (Ct. App. 1987). "If the child is mature enough (1) to understand questions and narrate answers, (2) to perceive facts accurately through the medium of the senses, (3) to recall them correctly, (4) to relate a true version of the facts perceived, (5) to know the difference between right and wrong, good and bad, (6) to understand it is right or good to tell the truth and wrong or bad to lie, (7) to be willing to tell the truth, and (8) to fear punishment if [s]he lies, then [s]he is competent to testify." *Id.* The question of the competency of a child witness is to be determined by the trial judge, whose

[1] *Overruled on other grounds by State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993).

duty is to make an independent judicial determination of competency by relying on his personal observation of the child's demeanor and responses to inquiry on voir dire examination. *Id.*

Here, the trial judge did just that. He held a pretrial hearing whereby both parties were able to examine Victim. The State asked her about the truth and lies and what happens to people who lie, and defense counsel asked her about the difference between right and wrong. Not only was the trial judge satisfied with her answers, but defense counsel did not object when the judge found her competent. (R. 30–32). However, later in the trial defense counsel asked Victim about practicing her testimony with her mother. He then objected to her being "drilled" and "coached" by her mother, claiming she was not competent because she was not testifying based on her own perceptions, knowledge, and memory. (R. 69, lines 7–13).

Appellant advocates that South Carolina should follow other states that have found "any indication of coaching or instruction as to answers to be given" is a significant factor in determining competency. *State v. Said*, 644 N.E.2d 337, 340 (Ohio 1994). The New Jersey case cited by Appellant discusses the holding of a "taint hearing" if "some evidence" is raised that the statements were the product of suggestion or coercion. *State v. Michaels*, 642 A.2d 1372, 1383–84 (N.J. 1994). No evidence of that was raised here. Rather, Appellant speculates that Victim's testimony was a product of suggestion. Appellant cites a five-part test that both Washington[2] and Wyoming[3] use to determine the competency of child witnesses and emphasized the third factor, "a memory sufficient to retain an independent recollection of the occurrence," presumably to argue Victim did not have that here. (App.Br.19). However, as his own question on cross-examination illustrated, Victim said she "practice[d] hard to try to remember everything[.]" (R. 66, line 25–R. 67, line 8). This certainly indicates an independent recollection. Appellant cites

[2] *Matter of Dependency of A.E.P.*, 956 P.2d 297, 304 (Wash. 1998).
[3] *English v. State*, 982 P.2d 139, 146 (Wyo. 1999).

language from the Washington case that says, "If a defendant can establish a child's memory of events has been corrupted by improper interviews, it is possible the third *Allen* factor, 'a memory sufficient to retain an independent recollection of the occurrence' may not be satisfied." *Matter of Dependency of A.E.P.*, 956 P.2d at 307 (quoting *State v. Allen*, 424 P.2d 1021, 1022 (Wash. 1967)). Yet, as noted above, Appellant did not establish Victim's memory had been corrupted by improper interviews. Indeed, he never even asked her or her mother whether she was told what to say.

Appellant cites *Commonwealth v. Delbridge*, 855 A.2d 27, 35 (Pa. 2003), for its definition of taint. "Taint is the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering that child incompetent to testify." Again, no evidence of anything "unduly suggestive and coercive" was presented here. The test Appellant cites from Pennsylvania requires: "(1) the capacity to communicate, including an ability to understand questions and to frame and express intelligent answers, (2) the mental capacity to observe the occurrence itself and the capacity to remember what it is that she is called to testify about, and (3) a consciousness of the duty to speak the truth." *Delbridge*, 855 A.2d at 48. Victim met all of these requirements here. Additionally, Appellant cites this quotation from the *Delbridge* case: "Where it can be demonstrated that a witness's memory has been affected so that [her] recall of events may not be dependable, Pennsylvania law charges the trial court with the responsibility to investigate the legitimacy of such an allegation." Again, this was NOT demonstrated by Appellant here. Finally, it is interesting that Appellant cites the portion of *Delbridge* that states, "[A] competency hearing is the appropriate venue to explore allegations of taint" when here defense counsel did

not investigate any alleged taint until after the competency hearing was over, the trial judge had found Victim competent to testify, and he had not objected to that finding. If Appellant suspected any possibility of taint, he should have explored it when given the chance at the competency hearing.

Even if South Carolina followed these other states' rules, here there was absolutely no indication that Victim was coached with "answers to be given" or that her memory had been "infected." Victim described the practicing she did with her mother as follows:

> Victim: Like if someone [sic] going to ask me about what happened, where was it, how did it happen and something like that.
>
> Defense counsel: Okay. So you all practice [so] you know what you would say?
>
> Victim: (Nod head).
>
> Defense counsel: Okay. Did you practice hard to try to remember everything?
>
> Victim: Yes, sir.
>
> . . .
>
> Victim: We talked about what I was going to say like what we thought they was [sic] going to say.
>
> Defense counsel: Okay. You okay?
>
> Victim: Yes, sir.
>
> Defense counsel: Did you testify about what you were going to say?
>
> Victim: Yes, sir, my mom she was the one acting like who was going to ask me the questions and I was the one was going to answer them.

(R. 66, line 25–R. 67, line 8; R. 71, line 25–R. 72, line 7). It is interesting to note that even when defense counsel questioned Victim on cross-examination regarding the alleged coaching, he asked, "Did you practice hard to try to remember everything?" to which she replied, "Yes, sir." He seemed to accept this answer and did not delve any further, stopping at that point to move to disqualify her. However, he never uncovered any evidence that she was told what to say. Even after the motion was denied, he asked her more questions regarding the practicing she did with her mother, but he never actually asked whether her mother had told her what to say.

Furthermore, Victim's mother testified that she asked her daughter questions like "any person would ask" to prepare her for the upcoming court appearance, something she had no experience with. She did not tell her what to say, plant anything in her head, or tell her how she should react. (R. 103, lines 4–19). Defense counsel did not ask her about the practicing on cross-examination. Thus, the testimony from both Victim and Mother simply show that Victim practiced testifying what she was going to say, based on what she remembered, while her mother asked her questions she thought the child might be asked. This is vastly different from "coaching as to answers to be given" or "unduly suggestive and coercive as to infect the memory of the child."

Thus, Victim did not exhibit the requirements of Rule 601for disqualification because she was capable of expressing herself and capable of understanding the duty to tell the truth. Moreover, she clearly demonstrated she understood questions and could narrate answers, perceived facts accurately through her senses and recalled them correctly, related a true version of the facts perceived, knew the difference between right and wrong and good and bad and why it is right to tell the truth and wrong to lie, was willing to tell the truth, and understood people were punished if they lied. *Doe*, 292 S.C. at 219, 355 S.E.2d at 547. Because no evidence

indicated she was coached by her mother, Victim's testimony was based on her own personal knowledge and she was competent to testify.

Appellant's claim that the trial judge failed to meaningfully consider how the practiced rehearsal of Victim's testimony affected her competency is without merit. Following Appellant's objection and argument by the State, the trial judge did consider how practicing her testimony affected Victim's competency and found:

> I think considering her age, the sensitive [nature] of the testimony that she has to give in court, the seriousness of court, the importance of court. The fact that it involves a family member. The idea that a parent will practice a little bit with their child is appropriate, most lawyers practice with their witnesses anyway. I'm going to overrule it.

(R. 70, lines 24–R. 71, line 7). The trial judge properly found Victim was competent to testify, and this Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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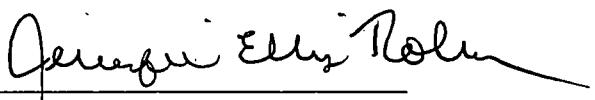
BY: 
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ATTORNEYS FOR RESPONDENT

June 6, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2015-002530

THE STATE,

Respondent,

v.

PRESTON MOZEAK,

Appellant.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Laura R. Baer, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served. This 6th day of June, 2017.

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June 6, 2017

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RE: State v. Preston Mozeak
Appellate Case No. 2015-002530

Dear Ms. Baer,

I am enclosing two (2) copies of the Final Brief of Respondent in the above-referenced case.

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
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JER/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original & 9 copies enclosed)
Victim Services