

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Greenville County  
Honorable James R. Barber, III, Circuit Court Judge

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THE STATE,

Respondent,

vs.

GERALD DEWAYNE POWELL,

Appellant.

Appellate Case No. 2016-01574

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**INITIAL BRIEF OF RESPONDENT**

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## **STATEMENT OF ISSUE ON APPEAL**

The subject matter of the expert testimony on delayed disclosure and the behaviors of sexually abused children met the reliability requirement of Rule 702, SCRE, so the trial court did not abuse its discretion in allowing the expert testimony, and appellant was not prejudiced by Galloway-Williams' testimony on the behaviors of sexually abused children.

## **STATEMENT OF THE CASE**

Appellant Powell was convicted by a jury of criminal sexual conduct on a minor in the first degree (CSC) and lewd act on a child following trial on July 18-19, 2016 before the Honorable James R. Barber, III. Judge Barber sentenced Powell to concurrent sentences of twenty-five years imprisonment for CSC and fifteen years imprisonment for lewd act.

## STATEMENT OF FACTS

Victim testified Appellant Powell touched her below the waist repeatedly over an extensive time frame. The first time happened at the family's house on Lakeland Drive when she was on Powell and her mother's bed. Powell and Victim were watching television. Powell was between Victim and Mother, with his back facing Mother. Mother was looking at the computer screen. Powell put his hands inside her pants, but there was no penetration. Tr. pp. 121-22.

The second occurrence happened when Powell came into Victim and her sister's room at night. He lay on her bed and made a motion for her to touch him. However, Victim pulled back her hand and did not touch Powell. Tr. p. 124. Powell did this several more times at Lakeland Drive. Victim testified he would put his hands in her pants and fondle, but never penetrate, her vagina. She testified this started when she was seven years old. Tr. pp. 122-23.

Powell committed further sexual assaults at this residence. He would come into the bedroom while Victim was watching television and put his hand down her pants. Tr. p. 126. Victim testified that at the time she did not know if this was good or bad, and she did not know what to do. Tr. p. 123.

One time, Powell pulled down her pants and asked her if he could kiss "it," meaning her vagina. He did not wait for an answer and "kissed" her vagina. She explained it was "[l]ike a French kiss to a person on the mouth, just on [her] vagina." Tr. p. 127, lines 20-22.

Powell told Victim to not tell her mother because it would hurt her, and alternatively, Powell would tell Victim he would hurt her mother if she told. Tr. p. 128. After the family moved to West Chase Apartments, Powell would put his hand in Victim's pants three or four times a week. Tr. p.

129. Victim was eight or nine years old at the time. Tr. pp. 128-29. Victim explained that it happened so much and she did not know what to do or what to feel. She explained, “But I didn’t think it was wrong but I didn’t think it was right.” Tr. p. 130, lines 1-3. Victim and her family moved from the apartments to Taylors in Fourth grade, and during that time, Powell did not touch her. Tr. p. 131. At that time, she would come home from school with her friend Tammy, and Tammy would stay there until Tammy’s mother picked her up around 5:30 or 6:00 p.m., about the same time Victim’s mother came home. Tr. pp. 131-32. From there, they moved to an Econo Lodge for a short time and then to Hunting Downs. Powell started touching her again at Hunting Downs. This happened two or three times a week on the couch or in the bedroom. Tr. pp. 133-35.

Victim acknowledged she did not disclose the abuse at the time. She explained, “it came up in my head but I would just like push it off because I didn’t think anybody would do anything. I didn’t think – by then I didn’t think it was like a horrible act and nothing would have happened even if I did tell.” Tr. p. 134, lines 19-24.

Victim explained she loved her sister, Jess, and she was home when Jess died. She explained she was young and did not fully realize what was going on. When Powell was acquitted of charges stemming from Jess’s death, and Victim found out Powell was no longer in jail, it scared her. Nonetheless, at that time it never crossed her mind to disclose the abuse. Tr. pp. 135-39.

Instead, the disclosure, three years after her sister died and Powell moved out, came when she was speaking with her step-brother, Cory. She explained the disclosure as follows:

I was riding home with my step-brother, Cory. And over that past week me and my mom, we – it wasn’t really fighting, it was more like disagreements. And I so called moved out and moved into my dad’s house for a week. It wasn’t a big deal. And I [rode] home with Cory

that night. And we were sitting in the driveway. And I don't even remember what brought it up, I just started crying. And then I finally said, what if I told you my step-dad touched me inappropriately.

Tr. p. 140, lines 12-20. After disclosing to Cory, Cory told his mother (Victim's stepmother) and this led to disclosures to Victim's stepmother, her biological father, and Mother. Tr. pp. 141-43.

Victim testified she was mad at Powell over her sister's death. However, she testified that she did not make up allegations to get back at him. Victim explained, "No. If I wanted to get back at him I would have taken a whole 'nother direction. I wouldn't want to be here." Tr. p. 144, lines 19-22. She verified she did not like being at the trial, she did not like talking about what happened about her, but felt "it need[ed] to be done." Tr. pp. 144-46 (direct quote, p. 146, lines 14-16).

Father testified that Victim changed around 2007. Prior to then she was more carefree, but became more reserved and introverted at that point. Tr. p. 167-68. Father testified how Victim disclosed the abuse to her stepmother, and her stepmother told him. Tr. p. 170. Father testified that after she disclosed, their relationship improved, "[a]nd she wanted to do some of the things we had done before. So, she wanted to be close to me again, she wanted to hold my hand again." Tr. p. 173, lines 2-7.

Stepmother testified that after she disclosed abuse to Cory, Victim was upset, crying, and shaking. Tr. p. 177. Stepmother testified she did not know Powell and never knew Jessica. Tr. p. 176.

Mother testified she married Powell in 2008. She gave some further background. Jessica, Victim's step-sister, was born in 1987 during Mother's first marriage. A disease in the first year of her life rendered Jessica wheel-chair bound and severely disabled the rest of her life. She was non-

verbal. Victim was born in 2000. Mother's third husband (Father) was the father. They separated in 2005 and later divorced. Tr. pp. 91-92. Mother met Powell while she waited tables, her second job. At the time Powell was employed. They married in 2008. Powell's job ended and he was unemployed. Meanwhile, Jessica's daycare program ended when she turned twenty-one, so Powell started taking care of Jessica and Victim while Mother worked. Tr. pp. 93-100.

Jessica passed away in January 2012, from a lethal dose of methadone. Mother did not have a prescription for methadone. Powell, however, did. Tr. p. 105. Mother noted Jessica was unable to feed herself or even lift her arms to put a pill in her mouth. The only way to give Jessica medicine was to crush it (she took Baclofen and Valium) and dissolve it in water, then use the medication in a gravity feeding, such as by syringe. Mother testified that is the only way methadone could have ended up in Jessica's system as well. Tr. p. 105.

The morning Mother found Jessica dead, she woke up early, at 4:30 a.m. Powell slept on the couch that night and woke up when Mother went to the kitchen for coffee. He asked her to check on Jessica because he gave her medication the night before. Mother checked on Jessica and found she was not breathing, so she called EMS, but Jessica was already dead when EMS responded. Tr. pp. 106-07. Mother testified that while she was on the phone giving the 911 operator directions, she heard Powell say, "I think I gave her too much, I think I gave her too much." Tr. p. 108, lines 16-18. At the time, she thought Powell meant valium. Tr. pp. 107-08. Six weeks later, following a toxicology report, law enforcement arrested Powell. Mother wanted an immediate divorce, but upon her attorney's advice, waited until Powell went to jail. Tr. p. 108.

When asked if she was mad at Powell, Mother replied, "Well yeah, he killed my daughter.

Yes, I'm very angry at him." Tr. p. 109, lines 1-3. The trial, in which Powell was acquitted, was in March 2013. Mother testified she found out about Victim's allegations against Powell on January 27, 2015. Tr. p. 109. She explained her disagreement with Victim was over the friends she was hanging around, which led to Victim wanting to live with her father. Mother clarified on redirect examination that Victim was not lying, but her friends were, and this led to the dispute. She learned about the abuse after Victim disclosed to Cory and Victim's stepmother. Then, the stepmother and Victim disclosed the abuse to her. Tr. pp. 110-12, p. 116.

When asked if she and Victim concocted a plan to set up Powell with these allegations to make Powell go to court, Mother explained,

Absolutely not. I mean, no offense, Your Honor, but the judicial system had totally let me down to start with. There was no way in the world I wanted to come back here. I mean, you know, I'm not threatening him but my first thought was [to] buy a shotgun. We'll just take care of it. Because I totally felt – there was so much evidence showing that he had done that, that there's no way I would have wanted to come back here and leave it up in the air again.

Tr. p. 112, lines 13-21. When asked by defense counsel if she still believed Powell killed Jessica, Mother replied that she knows he did. Tr. p. 116.

The defense strategy at trial was that the allegations were fabricated by Victim and/or her mother to get back at Powell because they blamed her for Victim's sister's death. During opening argument, defense counsel exclaimed, "Ladies and gentlemen, this is a case about revenge. Plain and simple." Tr. p. 74, lines 5-6. Defense counsel reiterated, "And ladies and gentlemen, this is about revenge. This is about a second shot at him." Tr. p. 74, lines 15-16. Powell testified at trial that he believed Mother was behind the allegations because she was mad about the not-guilty verdict in the

prior case. Tr. p. 233. However, during closing argument, perhaps realizing Victim's credibility and the strength of the State's case meant the revenge defense would not work, defense counsel punted and went with a nonsensical she-said-it-and-now-cannot-take-it-back defense. Even the cold record shows Victim would rather be anywhere than in court telling strangers the uncomfortable details of her sexual abuse.

Powell's opening claim that the State's case was "feeble" is as wrong as it is desperate. Of course, the nature of the crime ensured no forensic evidence would be left behind, and in keeping with the methods these crimes are committed, the sexual abuse occurred in secret starting when the victim was too young to even understand the crime committed against her. But she was brave and credible, presenting anything but a feeble case, as this Court will see from reading the testimony in total. The jury clearly rejected the revenge defense and the cannot-take-it-back defense and believed Victim as demonstrated by the verdict.

## ARGUMENT

**The subject matter of the expert testimony on delayed disclosure and the behaviors of sexually abused children met the reliability requirement of Rule 702, SCRE, so the trial court did not abuse its discretion in allowing the expert testimony, and appellant was not prejudiced by Galloway-Williams' testimony on the behaviors of sexually abused children.**

Powell claims, in his statement of the issue, the trial court erred in finding Galloway Williams' expert testimony on delayed reporting and the behaviors of sexually abused children was reliable. Powell makes this argument in the face of considerable authority finding such testimony admissible and fails to offer authority capable of lifting his case out of the well-worn tracks of the case law establishing the reliability and admissibility of such testimony. Further, Powell's statement of the issue is artifice to cloak an unpreserved bolstering claim that differs little from the arguments already rejected in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) and State v. Jones, 417 S.C. 319, 790 S.E.2d 17 (Ct. App. 2016), in which those appellants attempted to argue broad, unreasonable interpretations of State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) to apply to expert witnesses who provided general background information on the behaviors of sexually abused children.

Galloway-Williams first testified in an in camera hearing. She is the same expert witness whose testimony was at issue in Brown and Jones. She testified she is the executive director of the Julie Valentine Center. The Julie Valentine Center provides services in Greenville and Pickens County related to child abuse and sexual assault including education, intervention, and prevention. Tr. p. 183. Galloway-Williams earned a bachelor's degree in psychology from Winthrop University and a master's degree in counseling from Clemson University. She is a licensed professional

counselor in South Carolina since 2004. She has twenty years of experience in the mental health field, fifteen years specifically working with children and families. Tr. p. 184.

Galloway-Williams is a member of the board for the South Carolina Coalition Against Domestic Violence and Sexual Assault. She also served for six years on the board for the South Carolina Network of Children's Advocacy Center and served a term on the board for the South Carolina Professional Society of Abuse of Children. Tr. p. 184. Galloway-Williams devotes most of her continuing education hours to the area of child abuse and/or sexual assault. Tr. p. 185.

Galloway-Williams explained she was familiar, and required to be familiar, with current research related to child abuse and child sexual abuse. This research she relies on is peer reviewed. She reads journals and studies to keep updated on current topics. She also participates in peer reviews of articles submitted for publication in these journals. Tr. p. 185, lines 11-25.

Galloway-Williams is an instructor in the Child Advocacy Studies Program at USC Upstate. She participated in a program recently training a school district in mandated reporting and responding to child maltreatment in an educational setting. Tr. p. 186. She has been qualified in the area of child abuse dynamics over thirty times. Tr. p. 186.

In South Carolina, "[t]he admission or exclusion of expert testimony is a matter within the sound discretion of the trial court." Burroughs v. Worsham, 352 S.C. 382, 390, 574 S.E.2d 215, 219 (Ct. App. 2002). "A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629

S.E.2d 363, 365 (2006).

The subject matter of Galloway-Williams' testimony was admissible pursuant to Rule 702, SCRE. The South Carolina Supreme Court has found that the admissibility of scientific evidence is dependent on whether the expert relied on scientifically and professionally established techniques. State v. Jones, 273 S.C. 723, 730-31, 259 S.E.2d 120, 124 (1979). The South Carolina Supreme Court has set out four factors a trial court must consider when deciding whether to allow expert testimony for scientific evidence: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality of control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." State v. Council, 335 S.C. 1, 19, 515, S.E.2d 508, 517 (1999).

However, the Supreme Court has found these factors serve no purpose when it comes to non-scientific evidence such as the expert testimony provided in this case and therefore only requires the trial court to exercise its gatekeeper role to determine whether the evidence is reliable. White, 382 S.C. at 274, 676 S.E.2d at 688. In order for a witness to be qualified as an expert, the trial court must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011).

Of course, expert testimony on common behavior by victims of sexual abuse is allowed in South Carolina and most other jurisdictions. State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999). "Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault." Id. at 475, 523 S.E.2d at 794; see

also People v. Carroll, 740 N.E.2d 1084, 1090 (N.Y. 2000) (“We have long held that expert testimony regarding rape trauma syndrome, abused child syndrome or similar conditions may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand[.]”).

The Alabama Criminal Court of Appeals found that an expert’s testimony on delayed disclosure based on her specialized knowledge was admissible and “clearly assisted the jury to understand the evidence presented” regarding the victim’s ten year delay in disclosing abuse. W.R.C. v. State, 69 So.3d 933, 939 (Ala. Crim. App. 2010) (noting “other jurisdictions have held similar testimony to be admissible in child-sexual-abuse cases”).

A law review article highlights the soundness of the expert testimony on delayed disclosure, explaining:

Psychological research demonstrates that delayed reporting is common among sexually abused children. Frequently when children finally disclose, they give slightly different versions of the abuse to different interviewers. Finally, although there is debate about how many sexually abused children recant, it is undisputed that some children recant and some recant their recantation. Thus, from a psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such testimony is not worrisome.

John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol’y, 45-46 (2010) (footnotes omitted).

Generally, “[e]xpert testimony that abused children often delay reporting the abuse . . . informs the jury that the victim’s failure to disclose in a timely fashion does not necessarily exonerate the defendant without suggesting that the particular child witness in the case was or was

not abused.” Commonwealth v. Bougas, 795 N.E.2d 1230, 1236 (Mass. App. Ct. 2003). Further, “disclosure in child abuse cases is generally delayed because of coercion, guilt, or some other reason, [and thus] there will be no physical evidence to corroborate the victim’s allegations. Therefore . . . expert testimony will . . . assist the jury in understanding the evidence.” People v. Beckley, 456 N.W.2d 391, 402 (Mich. 1990); see State v. Carpenter, 556 S.E.2d 316, 321 (N.C. Ct. App. 2001) (finding expert testimony on delayed disclosure is “clearly instructive and helpful to the jury in understanding the evidence since the nature of the sexual abuse of children places lay jurors at a disadvantage”). “Indeed, the majority of states permit expert testimony to explain delayed reporting, recantation, and inconsistency . . . .” People v. Spicola, 947 N.E.2d 620, 635 (N.Y. 2011).

Likewise, expert testimony concerning trauma resulting from sexual abuse is admissible. “[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect.” State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993). “Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior.” State v. White, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004) (finding testimony is admissible in prosecutions where the victim of sexual abuse is an adult).

Powell argues that the subject matter of the expert testimony was not reliable because of the manner of selecting subjects used in various case studies relied upon by Galloway-Williams. Galloway-Williams explained “many of the participants [in studies] have been identified as those who have been abused.” Tr. p. 187, lines 19-21. The subjects may be people in indicated cases with

the Department of Social Services, or have gone through the legal process. Tr. p. 187, lines 19-25. Sometimes the subjects relied upon self-reported. Tr. p. 188, lines 1-3. In terms of control groups that might be used in scientific experiments, Galloway-Williams explained it was not feasible to subject adults or children to competing control groups, (i.e. abusing children for one control group and not abusing them for another). Tr. p. 188.

She explained the peer process for defense counsel: “So, before an article can be published in one of those journals it would have to be reviewed by a committee **or other professionals and experts in the field** before that could be approved to be in that particular journal.” Tr. p. 189, lines 12-15. Galloway-Williams explained she was not relying on anyone study, but a number of articles. She explained there is a lot of information available. Her testimony is also based on her experience and her formal and continuing legal education. Tr. p. 190, lines 3-7.

Following this testimony, Powell conceded Galloway-Williams’ training and experience as to the matter she was testifying about met the first two elements of Rule 702, SCRE, but argued the reliability prong of Rule 702 was not met, claiming there was no quality control measure despite Galloway-Williams’ testimony about peer review by professionals in the field, and her testimony on the selection of subjects in various studies. Tr. pp. 190-91. The objection was overruled, and Galloway-Williams testified in camera about delayed disclosure, how non-offending caretakers may effect disclosure, and trauma that may result from sexual abuse. Tr. pp. 191-99. At the conclusion of her in camera testimony, Powell’s counsel conceded, “I have no motion based on the testimony that she’s given.” Tr. p. 198, lines 23-24. Note Powell’s counsel did not complain the testimony was bolstering.

The requirement of showing reliability only relates to the area of expertise, and not the reliability of an expert witness' testimony. State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012) ("To be clear, the reliability of a witness's testimony is not a prerequisite to determining whether or not the witness is an expert."). Further, the trial court must take care in its undertaking of the gatekeeper function without infringing on the jury's duty as a fact finder, the gatekeeper role merely requires the trial court "decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010).

The admission of expert testimony is within the sound discretion of the trial court. State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). The need for this standard is astutely explained by the United States Supreme Court as follows:

[The abuse of discretion] standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid **unnecessary** "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.

Kumho Tire Company v. Carmichael, 526 U.S. 137, 152 (1999) (emphasis added). Given the plethora of case law supporting admission of this evidence, the instant case presents an ordinary case "where the reliability of an expert's methods is properly taken for granted." Kumho, *supra*.

However, the trial court did not merely take the area of expertise for granted – the State provided sufficient foundation establishing reliability. Galloway-Williams' testimony supports admission of the evidence. She explained she relied on her own experience and studies and journals

that were peer reviewed. She explained that the peer review process involved review by professionals in the field. See State v. Jones, 273 S.C. 723, 732, 259 S.E.2d 120, 125 (1979) (finding the trial judge properly exercised his discretion in admitting expert testimony on “bite-mark” evidence where “[t]here was no showing that the techniques and theories employed were other than accepted by the photographic and dental communities”).

Powell relies heavily on State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015). In Chavis, the trial court qualified two witnesses (Elliott and Griggs) as experts in child abuse assessment. Elliott, who had significant training and experience with the RATAC protocol for forensic interviews, conducted a forensic interview of the victim, but also testified it was her expert opinion the victim’s disclosures noted in a report issued by another forensic interviewer, who was unavailable to testify at trial, constituted disclosures of sexual abuse. 771 S.E.2d at 338-339.

The Supreme Court affirmed, with two justices finding Elliott was sufficiently trained in RATAC protocol, which she used during her forensic interviews, but there was no evidence her conclusions or impressions from the other interview she reviewed, but did not conduct, were accurate, and therefore, the trial court erred in qualifying her as an expert. As to Griggs, who also conducted a forensic interview of the victim, the two justices assumed there was sufficient evidence of reliability as to her expert qualification, but held her testimony about recommending the victim not be around the defendant for any reason improperly bolstered the victim’s credibility. Id. at 339-340. Ultimately, however, the two justices concluded both errors were harmless beyond a reasonable doubt while two other justices concurred in result because they disagreed any error occurred. Id. at 340-341.

Unlike the expert testimony at issue in Chavis, Galloway-Williams never interviewed Victim, her family, or law enforcement, and did not render any opinions or recommendations that could be regarded as specific to the allegations against Powell in this case. In fact, she never expressed any conclusions specific to the case. Therefore, the discussion of individual reliability referenced in Chavis is inapplicable to this case. Instead, Galloway-Williams simply provided background information on the behaviors of sexually abused children without making any findings. She explained to defense counsel during the in camera hearing, “I’m here to provide information about the dynamics of child sexual abuse, not to provide an opinion specifically about this case.” Tr. p. 197, lines 8-10.

This Court distinguished Chavis in State v. Jones, 417 S.C. 319, 790 S.E.2d 17 (Ct. App. 2016) when Jones argued Galloway-Williams’ testimony was not reliable. This Court distinguished that case from Chavis, observing that Chavis involved a person qualified as a forensic interviewer who testified to conclusions reached after victims were interviewed using the RATAC method. This Court observed, “In contrast, Galloway-Williams testified in general terms as to child sex abuse dynamics, focusing on delayed disclosures and the responses of nonoffending caregivers.” Id. at 332, 790 S.E.2d at 24. This Court ultimately concluded that the trial court did not abuse its discretion in finding the subject matter of the testimony reliable. Id.

While ostensibly Powell’s issue on appeal is the reliability element of Rule 702, the reality is Powell is rehashing the arguments in Jones, State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), and State v. Barrett, 416 S.C. 124, 129, 785 S.E.2d 387, 389 (Ct. App. 2016) where appellants attempt to argue reliance on State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) and

other bolstering cases. In Jones, this Court observed, “In Brown, however, this court **clearly** ‘distinguished improper bolstering in cases involving experts who themselves conducted the forensic interview from cases involving independent mental health experts who addressed general behavioral characteristics.’” Jones, at 335, 790 S.E.2d at 25 (quoting Barrett, 416 S.C. at 129, 785 S.E.2d at 389; citing Brown, 411 S.C. at 343-45, 768 S.E.2d at 252-53).

Indeed, the prosecution utilized the procedure advocated by our Supreme Court in utilizing an expert who had not conducted a forensic interview to provide the expert testimony on behaviors of abused children. State v. Anderson, 413 S.C. 212, 218-19, 76 S.E.2d 76, 79 (2015). In Anderson, this Court reaffirmed its holding from State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) and cited State v. Weaverling, 337 S.C. 460, 473, 523 S.E.2d 787, 794 (Ct. App. 1999) favorably to explain expert witnesses, like Galloway-Williams, are allowed to testify to behavioral characteristics of sex abuse victims.

Further, this Court should refrain from considering any complaints about bolstering. First, Powell failed to state this issue in his statement of issues. State v. Moses, 390 S.C. 502, 524, 702 S.E.2d 395, 407 n.8 (Ct. App. 2010) (noting appellant’s argument regarding the introduction of bad character evidence should not be reviewed because “[w]hile this argument appears in Moses’ brief, we note it is not mentioned in the issues on appeal.”). The only argument Powell raised in the statement of issues was the reliability of the expert testimony, so that is the only issue this Court should review.

Additionally, Powell’s counsel did not object to Galloway-Williams’ testimony and did not raise a bolstering argument when challenging the admission of the expert testimony as a whole. An

issue is not preserved for review unless a contemporaneous objection is made to and ruled upon by the trial court. State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). An issue conceded in trial court is not preserved for review. State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000). “[A] party cannot argue one theory at trial and a different theory on appeal.” State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003). Powell never objected to any specific testimony Galloway-Williams provided and never made even a generalized argument that the testimony was bolstering. Further, Powell indicated he had no objections to the testimony at the conclusion of Galloway-Williams’ in camera testimony. So the furtive bolstering claims in Powell’s brief should not be reviewed.

Additionally, Powell fails to show prejudice from the alleged error in admitting the expert testimony. Powell’s arguments confuse the requirement of unfair prejudice with the probative value of the expert testimony in this case. The improper admission of evidence is reversible error only when the admission causes prejudice. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). “Unfair prejudice means an undue tendency to suggest a decision on an improper basis.” State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). “Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (internal quotation marks omitted). “All evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (internal quotation marks omitted). In the instant case,

testimony about delayed disclosure, the chief subject of the expert testimony, was not offered to show that abuse occurred, but merely to show that the delay in disclosure did not mean the allegations were fabricated. Galloway-Williams confirmed defense counsel's assertion to this effect, explaining, "The timing of their disclosure would not determine whether or not they had actually been abused, correct." Tr. p. 211, line 24 – p. 212, line 1. She explained she knew nothing of the case and her testimony was "purely to provide an education on child abuse dynamics." T. p. 212, lines 8-9. Because the reliability of the subject matter was established in this case, and seemingly countless times in case law from this jurisdiction and others jurisdictions, and because no prejudice ensued from any conceivable error, this Court should affirm the conviction and senentence.

**CONCLUSION**

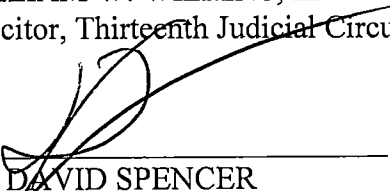
For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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DAVID SPENCER  
Senior Assistant Attorney General

WILLIAM W. WILKINS, III  
Solicitor, Thirteenth Judicial Circuit

BY:   
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ATTORNEYS FOR RESPONDENT

August 4, 2017

**RECEIVED**

AUG 04 2017

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal from Greenville County  
Honorable James R. Barber, III, Circuit Court Judge

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Appellate Case No. 2016-001574

THE STATE., .....Respondent,

v.

GERALD DEWAYNE POWELL, .....Appellant.

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**PROOF OF SERVICE**

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I, Angela Bennett, certify that I have served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Laura R. Baer, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211

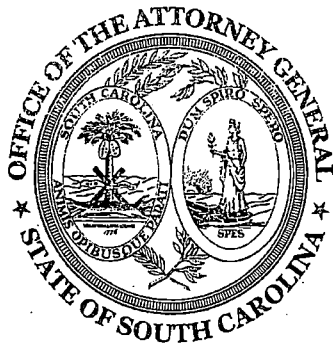
I further certify that all parties required by Rule to be served have been served.

This 4<sup>th</sup> day of August, 2017.

  
ANGELA BENNETT  
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**RECEIVED**  
AUG 04 2017  
SC Court of Appeals



ALAN WILSON  
ATTORNEY GENERAL

August 4, 2017

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SC Court of Appeals

The Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, South Carolina 29211

Re: The State v. Gerald Dewayne Powell  
Appellate Case No: 2016-001574

Dear Ms. Kitchings:

Enclosed please find the Initial Brief of Respondent and Designation of Matter along with proof of service in the above-referenced case.

Sincerely,

David Spencer  
Senior Assistant Attorney General  
S.C. Bar No: 68571

DS/ab  
Enclosures

cc: Laura R. Baer, Esquire  
Victim Advocacy Division