STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE, RESPONDENT,

V.

WAYLAND PURNELL, APPELLANT

APPELLATE CASE NO 2014-001501

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

A Richland County Grand Jury indicted Appellant at the October 11, 2012 term of General Sessions for two counts of first degree criminal sexual conduct with a minor (CSCM), and at the February 20, 2014 term for lewd act upon a child. R. 345 His case was called to trial on July 7, 2014 before the Honorable Clifton Newman, and a jury. R. 1. Assistant Solicitors Margaret Bodman and John Steadman represented the state, and J. Taylor Bell and Jessamine Grice represented Appellant. R. 1.

On July 10, 2014, the jury acquitted Appellant of one count of first degree CSCM, but found him guilty of the other count as well as lewd act upon a child. R. 329, l. 21 – R. 330, l. 18. Judge Newman sentenced him to twenty-five years imprisonment for first degree CSCM and fifteen years concurrent for lewd act. R. 331, ll. 4-17.

This appeal follows.

STATEMENT OF FACTS

Relevant Facts

Appellant and Kia Muse began dating sometime during the year 2010. Their relationship consisted mostly of talking on Facebook and exchanging text messages. They also spent a few weekends together in Atlantic City. At some point during January 2011, Appellant came to live with Muse and her four children, B.M., Minor 1, Minor 2, and B.S, in New Jersey. He left to visit his family for several weeks shortly after he moved in with Muse, but returned to live with the family permanently after the couple married on March 18, 2011. R. 60, l. 24 – 61, l. 23.

The family eventually moved to Columbia, South Carolina on September 2, 2011. R. 63, l. 17-19. They moved into a four bedroom home. B.M., who was the oldest child, and B.S., the youngest child and only boy, both had their own bedrooms and Minor 1 and Minor 2 shared a bedroom. R. 65, l. 16 – 66, l. 7. Shortly after they moved, Appellant became employed as a barber and worked long hours seven days a week. R. 67, ll. 9-23. Muse also worked, but only part-time. The children were all enrolled in school and engaged in after school activities such as Girl Scouts and Boy Scouts. Minor 1 also attended a community reading literacy program three days a week after school because she was "having problems with reading." R. 67, l. 24 – 68, l. 11.

On April 30, 2012, Minor 1 attended the reading literacy program with her friend, D.H. R. 40, ll. 3-24. D.H.'s mother drove the children to and from the program that evening. Sometime after the program ended, Minor 1 allegedly told D.H. that she "knew what a male's private was." D.H. asked Minor 1 how she knew about a "male's private" and Minor 1 allegedly "told [D.H.] what happened." R. 40, l. 21 – 42, l. 20. D.H. shared

this information with her mother, Danielle Jackson, when they arrived home, and Jackson immediately called Muse and relayed the allegations to her. R. 43, ll. 8-15; R. 47, l. 4 – 49, l. 3. Later that evening, after Muse picked Minor 1 up from Jackson's home, she questioned B.M., Minor 1, and Minor 2 about alleged sexual abuse by Appellant. Minor 1 and Minor 2 both claimed Appellant had improperly touched them and Muse immediately reported the allegations to law enforcement. R. 69, l. 11-21.

Appellant was interviewed that evening by an investigator and was given permission to travel to Delaware to care for his father who had been diagnosed with stage four cancer. R. 162, l. 2 – 164, l. 14. He was instructed to stay in touch with the investigator and did so regularly. R. 173, ll. 4-24. On June 21, 2012, Appellant was asked to return to South Carolina to further discuss the case with law enforcement. When he arrived in Columbia, an investigator picked him up, interviewed him, and eventually served him with arrest warrants. R. 164, l. 15 – 165, l. 9.

On May 22, 2012, Minor 1 and Minor 2 went to the Assessment Resource Center (ARC) for a forensic interview. R. 179, l. 23 – 180, l. 5; R. 230, ll. 12-18. Videotaped recordings of their forensic interviews were played for the jury over Appellant's objection. See R. 186, ll. 3-30 and R. 231, ll. 4-15. The girls were also physically examined by a licensed pediatrician for signs of sexual abuse on that same day. Dr. Susan Luberoff testified that neither child had any signs of trauma, injury, or scarring in their vaginal or anal region. R. 142, l. 13 – 143, l. 8; R. 145, l. 4 – 146, l. 13.

Minor 1, who was eleven years old at the time of trial, testified that when she was between eight and nine years old Appellant had anal sex with her once at their home in New Jersey and multiple times at their house in South Carolina. R. 106, l. 13 – 109, l. 20. Minor

2, who was ten years old at the time of trial, likewise testified that when she was between seven and eight years old Appellant had anal sex with her once at their home in New Jersey and multiple times at their house in South Carolina. R. 126, l. 25 – 127, l. 25. Surprisingly, both Minor 1 and Minor 2 indicated that it did not hurt. R. 108, ll. 7-8; R. 119, l. 23 – 120, l. 3; R. 51, l. 25 – 130, l. 1.

Kia Muse admitted during her testimony that she discovered Appellant was having an affair with a woman in Chicago over the Internet and telephone. However, she claimed she did not find out about this affair until the day of Appellant's arrest on June 21, 2012 while she was looking through Appellant's cell phone. R. 73, l. 15 – 74, l. 24. Defense counsel suggested through his questioning that Muse discovered the affair before Appellant's arrest after Appellant sought to send Girl Scout cookies to an address in Chicago earlier in the year. However, Muse denied this. Muse also denied searching through Appellant's cell phone and discovering the affair before the allegations surfaced despite having access to his passcode. R. 86, l. 13 – 89, l. 6. Appellant's defense was that Muse knew about the affair and sought revenge by fabricating the allegations against Appellant. R. 311, l. 4 – 312, l. 10. Muse did admit to calling the woman in Chicago the day after Appellant was arrested and informing her of the allegations. R. 87, l. 19 – 88, l. 13.

As stated above, there was absolutely no physical evidence of sexual abuse. The jury ultimately acquitted Appellant of the first degree CSCM charge related to Minor 2, but found him guilty of the first degree CSCM charge related to Minor 1 and the lewd act charge related to Minor 2. R. 329, l. 21 – 330, l. 18.

In Camera Testimony of Allison Foster

Appellant sought pretrial to exclude the qualification of Allison Foster as an expert in child sexual abuse assessment or the dynamics of child sexual abuse. R. 332. The nature of Appellant's specific objections is discussed *infra*. However, Appellant's main objections were that (1) Foster's testimony would not assist the trier of fact as required by Rule 702, SCRE; (2) her testimony would improperly bolster the complainants' testimony which is prohibited by State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2009); and (3) the subject matter of her testimony is unreliable. Judge Newman qualified Foster as an expert in "the dynamics of child sexual abuse" over defense counsel's objection and found her testimony admissible. R. 260, ll. 5-15.

Foster testified in camera before the court made its ruling. Appellant also proffered the testimony of Julie Buck to counter Foster's testimony and discuss the unreliability of the subject matter.

Foster testified in camera that she is the "chief psychologist" at the Assessment Resource Center (ARC) in Columbia, South Carolina and also has her own private practice. R. 193, ll. 3-7. She discussed her educational background, which included an undergraduate degree from Emory University and a Ph.D. in Clinical Psychology from the University of South Carolina. R. 195, ll. 1-7. She testified that the vast majority of her practice and experience has been working with children who are the alleged victims of physical or sexual abuse. R. 195, ll. 12-18. Foster was also the director of the ARC for seventeen years and was responsible for conducting forensic interviews and providing therapy and counseling for physically and sexually abused children. R. 193, ll. 8-11; R. 194, ll. 9-25.

When prompted by the solicitor, Foster gave a generalized opinion that it is important to understand the dynamics of child sexual abuse and that such testimony would assist the trier of fact. She maintained that it was "a specialized area of knowledge and not something that a typical person understands." R. 196, l. 5 – 197, l. 15.

Foster testified about the "process of disclosure," including delayed disclosure and "piecemeal disclosure." She maintained that "this phenomenon is robustly identified in our field." R. 197, l. 16 – 198, l. 9. However, she did admit that the "process of disclosure" is a "very active area of research" and that it is not "settled science." R. 199, ll. 6-15. She also discussed how chronic abuse can affect a child's memory. Specifically she explained that chronic abuse may cause a child to only remember certain incidents, but not others. Foster likewise maintained, without citing any specifics, that her testimony on memory is supported by research that is peer reviewed. R. 196, l. 18 – 197, l. 8; R. 198, l. 10 – 199, l. 5.

Additionally, Foster testified about "child sexual abuse accommodation syndrome." The "phenomenon" has five components: secrecy, helplessness, "entrapment in accommodation," "delayed tentative unconvincing disclosure," and recantation. She maintained that these five characteristics are not seen in every child of chronic sexual abuse, but they are characteristics that are commonly seen in "different combinations." R. 201, l. 22 – 202, l. 2. Foster explained that this was a "descriptive" syndrome as opposed to a "diagnostic" syndrome and that the "phenomenon" is currently taught in "forensic interview academies" as "part of what investigative teams ought to understand about the dynamics of child sexual abuse." R. 200, ll. 9-25; R. 201, ll. 5-9.

On cross-examination, Foster admitted that child abuse assessment is a hard topic to research because the population studied consists only of individuals who have previously made an allegation or disclosed sexual abuse and cannot account for individuals who have been abused but never disclosed. R. 204, l. 19 – 205, l. 5.

When questioned further about "child sexual abuse accommodation syndrome," Foster testified that not all children go through all five stages outlined in the syndrome. For example, she maintained that not all children go through a stage of recantation, but almost all go through a stage of secrecy and delay in disclosing alleged abuse. R. 207, ll. 8-17. Foster admitted that there was no way to provide a percentage of the number of individuals or children who delay in disclosing alleged abuse because it is impossible to know the number of individuals who never disclose at all. R. 207, l. 18 – 208, l. 15. She conceded it "is an imperfect analysis." R. 209, ll. 9-20.

Foster also described some of the five stages further. "Secrecy" is essentially delayed disclosure. "Helplessness" is when the child feels unable to change or stop the abuse. "Entrapment and accommodation" is "the state that the child finds him or herself in when they feel helpless to change the bargain. The child molestation has begun, it is ongoing and essentially the child still had to get along with the business of life . . . [I]t's accepting and living with something you cannot change." R. 212, ll. 8-24. She explained that some children accommodate by being "on their best behavior" or being very obedient while others act out or show signs of violence. R. 212, l. 25 – 213, l. 11. Other forms of accommodation are behaviors that are "inappropriate for [the child's] age" such as bed wetting or biting. R. 213, ll. 15-21. Foster admitted that it is difficult to know whether a

child's behavior is actually "symptomatic of abuse" since "healthy children who have never experienced any kind of abuse" also exhibit such behaviors. R. 213, l. 22 – 214, l. 22.

Lastly, Foster conceded that the "dynamics of chronic child sexual abuse are complex" and that the field still has "a substantial amount of mystery and error." R. 220, ll. 11-19.

In response to Foster's testimony, defense counsel called Julie Buck to testify in camera. Buck has a Master's Degree in Research Psychology from the University of Tennessee-Chattanooga and a Ph.D. in Psychology from Florida State University. She is currently a full time consultant in the field of eyewitness memory, which is her specialty. Her focus is on research and teaching and thus she has not done any clinical work with children. However, Buck testified that she is familiar with the research on "child sexual abuse accommodation syndrome" and has conducted her own research in the field. R. 225, ll. 2-18.

Buck explained that "child sexual abuse accommodation syndrome" is not supported by research and that "[s]ome researchers have gone so far as to call it junk science." She testified that there are a lot of "limitations" on the studies and research on the subject and that "the research community as a whole is not likely to support it because the research isn't there." R. 234, l. 23 – 235, l. 12.

Foster's Testimony Before the Jury

Foster's testimony before the jury was similar to her testimony in camera, but more detailed. She discussed a child's memory and how it relates to chronic abuse. She explained that "memory is often talked about in terms of three stages." One must code it, meaning "be alert to take it in at some level through your five senses," retain it, and then be

able to retrieve it. She maintained that children who suffer chronic sexual abuse suppress memories of the abuse and have difficulty with retrieving them, especially given their undeveloped brains. She also said that some children will only be able to recall certain instances of abuse, ones that "stick out" for whatever reason, and not recall others. Further, she claimed that it is very difficult for children to remember specific dates and times of the alleged abuse. R. 261, l. 11 – 267, l. 15. Foster also discussed the "child sexual abuse accommodation syndrome" and the five factors discussed during her in camera testimony. She explained delayed disclosures, purposeful and accidental disclosures, accommodation, and helplessness in detail. R. 267, l. 16 – 271, l. 23.

Defense counsel renewed her objection to Foster's qualification as an expert before the jury. R. 260, ll. 5-9.

ARGUMENT

1.

The court abused its discretion by qualifying Allison Foster as an expert in the dynamics of child sexual abuse where there was insufficient evidence of the reliability of the subject matter of her testimony or whether those matters had ever been subjected to peer review.

Relevant Facts

Defense counsel objected to the qualification of Allison Foster as an expert in the field of child sexual abuse dynamics arguing the state failed to provide sufficient evidence of the reliability of the subject matter of her testimony under State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). Counsel argued that the field is based on "junk science" and is not widely recognized. R. 245, l. 16 – 246, l. 1.

Additionally, counsel argued that the studies and research in the field are unreliable because it is impossible to control the population studied due to the nature of the subject. For example, counsel asserted that there was no way to study the subject in a laboratory setting or to compare the differences in a control group versus a study group. Defense counsel also argued that the population studied in the field is always skewed because it consists of individuals who have already disclosed alleged sexual abuse. Moreover, Foster's personal experience is working with individuals or children who are referred to the ARC by law enforcement or the Department of Social Services on suspicion of abuse. Therefore, the group of individuals she deals with on a regular basis is not an accurate representation of the population and leads to unreliable conclusions. R. 246, ll. 2-25.

In her response, the assistant solicitor did not specifically address defense counsel's arguments on the lack of reliability of Foster's testimony. Instead, the state focused on counsel's other objections to the admissibility of her testimony. See R. 250, l. 14 – 252, l. 23.

Judge Newman ultimately held: "Though the whole field of behavioral characteristics of children who may have been sexual assault victims, child sexual abuse victims, it's difficult to place a scientific knowledge test to evaluate the reliability of the testimony based on the fact that it involves a particularized area of expertise. But I believe that from what I've heard I believe the testimony to be offered is sufficiently reliable that it meets the test for the Court in its gatekeeper function." The court went on to recognize that the subject matter of Foster's testimony has been accepted in some states and rejected in others, but refused "to weigh in on" the matter in this case. R. 252, l. 24 – 254, l. 14.

Discussion

"All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009); See Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (holding "the trial court must evaluate the substance of the testimony and determine whether it is reliable."). Rule 702, SCRE, provides:

> If 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.

In White, our Supreme Court held that nonscientific expert testimony, as well as scientific expert testimony, must pass a threshold reliability determination by the trial court prior to its admission into evidence. 382 S.C. at 273, 676 S.E.2d at 688. The Court cleared up any misunderstanding that the reliability determination required by Rule 702 only applied to scientific expert testimony. Id.; See State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012). Moreover, the Court said "the *Council* factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony." Id. at 274, 676 S.E.2d at 688; See State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). However, the Court acknowledged that it did not "know the myriad of Rule 702 qualification and reliability challenges that could arise with respect to nonscientific expert evidence," and thus did not offer a "formulaic approach that will apply in the generality of cases." Id. at 274, 676 S.E.2d at 688-689; See State v. Chavis, 412 S.C. 101, 108, 771 S.E.2d 336, 339 (2015).

Our Supreme Court last addressed an expert in child abuse dynamics in Chavis, 412 S.C. 101, 771 S.E.2d 336, which focused on the reliability element of White, 382 S.C. 265, 676 S.E.2d 684. Appellate counsel in Chavis argued that the "child abuse assessment" label and other similar titles were simply ways of getting around the holdings of State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2009), State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012), and State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011).

The Court in Chavis found that one of the "expert" witnesses should not have been qualified as an expert because there was no evidence that her conclusions or impressions taken from the forensic interviews she conducted were accurate and her only peer review was another interviewer reviewing her work to ensure she was using the RATAC protocol.

412 S.C. at 108, 771 S.E.2d at 339. The Court also found the testimony of the other so called "expert" that the child should not be allowed around Chavis anymore, for any reason, could only be interpreted as the "expert" believing the victim's claim that Chavis sexually abused her. 412 S.C. at 109, 771 S.E.2d at 340.

Like the "expert" in Chavis, there was no evidence that Foster's statements and conclusions were reliable. The subject matter of her testimony is not supported by the research community and has been called "junk science" by some researchers in the field. See R. 235, ll. 4-12. While Foster claimed that her statements and conclusions were supported by research that was peer reviewed, she failed to cite to any specific studies or explain the methods of peer review that were used. She admitted that the "dynamics of chronic child sexual abuse are complex," that some of the conclusions in the field are based on "an imperfect analysis," and that "it's certainly not settled science." See R. 209, ll. 9-20 and R. 220, ll. 11-13.

Because there was no evidence of the reliability of Foster's conclusions and statements, the court failed to properly execute its gatekeeping function by qualifying her as an expert in "the dynamics of child sexual abuse." Respectfully, this Court should find the trial judge abused his discretion, reverse Appellant's convictions and sentence, and remand for a new trial.

2.

The court abused its discretion by qualifying Allison Foster as an expert in the dynamics of child sexual abuse where the subject matter of her testimony would not assist the trier of fact as required by Rule 702, SCRE and improperly bolstered the minor complainants' credibility.

Relevant Facts

Appellant sought pretrial to exclude the qualification of Allison Foster as an expert in child sexual abuse assessment or the dynamics of child sexual abuse. Defense counsel argued that the state's use of such so called "experts" is a "backdoor attempt to go around State v. Kromah."[1] R. 189, ll. 16-20. She said, "[I]t's the State's intention that she [Foster] speak generally about research of what you might typically see in a child's behavior following allegations of abuse. Counsel argued that the only inference the jury could make from Foster's testimony was that she believed the children were telling the truth and that she found their allegations compelling. R. 190, l. 1 – 191, l. 2. She later clarified, "[U]nder Kromah we believe that this testimony about behavior that a child exhibits . . . is improperly being offered to bolster the credibility of the children." R. 240, ll. 15-22.

Defense counsel also argued that Foster should not be qualified as an expert under Rule 702, SCRE, because the subject matter of her testimony would not assist the trier of fact. R. 191, l. 2 – 192, l. 3; R. 240, l. 25 – 241, l. 8.

The assistant solicitor argued in response that under State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) and State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999), expert testimony "regarding behavioral characteristics of sexual assault victims

[1] 401 S.C. 340, 737 S.E.2d 490.

and the range of responses encountered" is admissible. She also argued that such testimony "is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assaults." Moreover, she maintained that such testimony is helpful when the defendant has attacked the credibility of the complainants and claimed Appellant had done so by arguing that the mother had fabricated the allegations. Lastly, the solicitor argued that under Rule 702, Foster was qualified because she has "specialized knowledge" and that the probative value of her testimony outweighs any prejudicial effect. R. 250, l. 15 – 252, l. 23.

The court found Foster was "qualified in the field of evaluating child sexual abuse cases and the behavioral characteristics of abused children." Judge Newman also found the subject matter of Foster's testimony "involved matters that would be helpful to the jury in understanding issues in this case" and would not bolster the complainants' testimony. He specifically ruled that no testimony "would be allowed that would broach upon vouching for a witness." Therefore, the court found the testimony admissible and that the qualification of Foster as an expert in the dynamics of child sexual abuse was proper. R. 252, l. 24 – 254, l. 14.

Discussion

"The label of expert should be jealously guarded by the court and never loosely bandied about." Kromah, 401 S.C. at 357, 737 S.E.2d at 499. As our Supreme Court noted in Kromah, "although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." Id.

As noted above, Rule 702, SCRE provides:

> If 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.

In Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169, our Supreme Court specified the following three-prong test for expert testimony:

> [E]xpert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.

Id. at 446, 699 S.E.2d 169, 175 (internal citations omitted).

Here, Foster should not have been qualified as an expert or been permitted to testify because the subject matter of her testimony would not "assist the trier of fact to understand the evidence" as required by Rule 702. The critical determination in this case was the credibility of Minor 1 and Minor 2. Foster's generalized statements and conclusions on the memory and behavior of child sexual abuse victims could not properly assist the jury in determining whether Minor 1 and Minor 2 were telling the truth and, instead, more likely confused the jury. Moreover, the jury did not need expert knowledge to explain this subject matter as it did not involve scientific, technical, or other specialized knowledge. See Rule 702, SCRE.

The **only** purpose of Foster's "expert" testimony was to improperly bolster Minor 1 and Minor 2's credibility. This Court held in State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012), that it is improper for a witness to bolster the testimony of other witnesses. See Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (finding a "forensic interviewer's . . . opinion testimony improperly bolstered the Victim's credibility").

In McKerley, the trial court allowed a witness to testify as an expert in "forensic interviewing and child abuse assessment." 397 S.C at 463, 725 S.E.2d at 141. The "expert" had interviewed the alleged victim twice and concluded that both interviews were compelling for sexual abuse. She also determined that the victim's statements were consistent with other information she knew about the case. Id. at 466, 725 S.E.2d at 142. This Court determined that there was no other way to interpret the language used in the expert's testimony other than to mean she believed the victim was being truthful. The Court further held, "In light of [the expert's] extensive inadmissible testimony bolstering the credibility of the victim . . . we cannot say the erroneous admission of [the expert's] testimony did not contribute to the jury's decision," therefore finding harmful error. Id. at 467, 725 S.E.2d at 143.

Our Supreme Court has also held that it is improper "for an expert to comment on the veracity of a child's accusations of sexual abuse." Jennings, 394 S.C. 473, 716 S.E.2d 91; see State v. Dawkins, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper); see also State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000) (finding

therapist's testimony children were being truthful in ninety-five percent of instances in which sexual abuse was alleged was improper vouching for child).

In Jennings, the "expert" forensic interviewer interviewed the three alleged victims of sexual abuse and issued a separate report for each child that was admitted into evidence. She concluded in her reports that each child provided a compelling disclosure of abuse by the defendant and that the children provided details that were consistent with the background information received from their mother, the police report, and the other children. 394 S.C. at 476-481, 716 S.E.2d at 92-95. Our Supreme Court held that the conclusions in the reports improperly vouched for the children's veracity and thus the trial court had abused its discretion by admitting the reports into evidence. It further held the error was **not** harmless because there was no physical evidence presented at trial and, therefore, the children's credibility was the sole issue in the case. Id. at 94-95, 716 S.E.2d at 480.

It is clear from the record that the state in this case attempted to circumvent recent case law by presenting an "expert" witness who had **not met** with the complainants, but who was familiar with the case as a result of discussions with the solicitor's office. While Foster did not meet with Minor 1 or Minor 2, the state still used her to **indirectly comment on their credibility** and provide greater weight to their testimony.

Foster's testimony was very likely interpreted by the jury to express that they should believe Minor 1 and Minor 2 because their behavior is typical, expected, and complies with the behavior of the majority of other victims of sexual abuse. Her testimony strongly implied that because the complainants acted in a similar manner as other victims of sexual abuse they must be telling the truth. Her testimony also

improperly made an excuse for Minor 1 and Minor 2's lack of memory regarding specific incidents of the alleged abuse and the lack of detail in their accounts. Therefore, qualifying her as an expert and allowing her to testify was error for "[t]he assessment of witness credibility is within the exclusive province of the jury." McKerley, 397 S.C. at 464, 725 S.E.2d at 141 (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)).

Foster's testimony was also prejudicial to Appellant because there was no physical evidence presented in the case and the sole issue was the credibility of Minor 1 and Minor 2. Because the complainants' credibility was the "most critical determination of this case" and Foster's testimony improperly bolstered their credibility, Appellant was clearly prejudiced and should be granted a new trial. See Jennings, 394 S.C. at 480, 716 S.E.2d at 94-95 ("Because the children's credibility was the most critical determination of this case, we find the admissibility of the [forensic interviewer's] written reports was not harmless.").

Appellant is compelled to point this Court to its recent decision in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015). Appellant acknowledges that this Court in Brown held that testimony like Foster's in this case is admissible. However, a petition for writ of certiorari is currently pending before our Supreme Court in Brown. Respectfully, Appellant urges this Court to reconsider its decision in Brown as it applies to this case. Brown reads Kromah too narrowly. The intent of Kromah and the line of cases that preceded it was to limit "expert" opinions vouching for the credibility of witnesses. The state has simply renamed forensic interviewers as experts in spurious fields like "the

dynamics of child sexual abuse." This testimony does not aid the trier of fact, but instead it invades the province of the jury.

For these reasons, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

3.

The court erred by admitting the videotaped forensic interviews of the minor complainants under S.C. Code Ann. § 17-23-175 since the statute is unconstitutional and violates the Confrontation Clause of the Sixth Amendment under *Crawford v. Washington*, 541 U.S. 36 (2004) and *Maryland v. Craig*, 497 U.S. 836 (1990).

Relevant Facts

Appellant objected pretrial to the admissibility of the audio and video recordings of Minor 1 and Minor 2's forensic interviews pursuant to S.C. Code Ann. § 17-23-175 arguing the statute was unconstitutional under Crawford v. Washington, 541 U.S. 36 (2004) and Maryland v. Craig, 497 U.S. 836 (1990). Defense counsel filed a written motion in addition to making arguments on the record. See R. 335. Counsel maintained that the statements made by Minor 1 and Minor 2 during the forensic interview are hearsay elicited from law enforcement in an interview setting and would not be admissible except for the statute. He argued that in order to be constitutional under Craig, "testimony of the child witness occurring outside the presence of the defendant must be under oath with the opportunity for contemporaneous cross-examination." He further argued in the alternative that if such out of court statements are admissible then under Craig the court should be required to make a finding of necessity before admitting them. Moreover, defense counsel maintained that since the minor witnesses are available to testify in court, admitting their taped forensic interviews violates Crawford. R. 6, l. 22 – 50, l. 19.

The court ultimately ruled that the forensic interviews of Minor 1 and Minor 2 were admissible pursuant to the statute thereby making an implicit finding that the statute was constitutional. Judge Newman said, "I deny the motion in limine to exclude the

videotape[s]. In both instances I find that pursuant to section 17-23-175, that the proper procedure was adhered to in the interviewing process, that the interview was professionally done by a person qualified to do it. That assuming the proper foundation is made through testimony by witnesses leading up to the introduction of the videotape that the videotape is admissible." R. 29, ll. 16-24.

Discussion

A. S.C. Code Ann. § 17-23-175 is unconstitutional because it violates the Confrontation Clause of the Sixth Amendment to the United States Constitution as interpreted by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36 (2004).

The Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "The constitutional right to confront and cross-examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." State v. Hill, 394 S.C. 280, 291, 715 S.E.2d 368, 374 (Ct. App. 2011) (citing State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987)). Cross-examination has been called by the United States Supreme Court the "greatest legal engine ever invented for the discovery of the truth." Kentucky v. Stincer, 482 U.S. 730, 736 (1987) (quoting California v. Green, 399 U.S. 149, 158 (1970)).

"Generally, a prior consistent statement is not admissible unless the witness is charged with fabrication or improper motive or bias." State v. Whitner, 399 S.C. 547, 558, 732 S.E.2d 861, 867 (2012) (citing Rule 801(d)(1)(B), SCRE). However, in 2006 our legislature enacted S.C. Code Ann. § 17-23-175 which makes allowances for such hearsay

statements of children under certain circumstances. Id. The statute permits the admission of out-of-court statements by a child under the age of twelve if the statements were made in response to questioning conducted during an investigative interview of the child and the child testifies at trial and is subject to cross-examination. The statute reads in relevant part:

> (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 . . . ;
>
> (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
>
> (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

S.C. Code Ann. § 17-23-175.

This statute is in direct conflict with the provisions of Crawford v. Washington, 541 U.S. 36 (2004) and therefore violates the Confrontation Clause. In Crawford, the United States Supreme Court discussed the admissibility of out-of-court hearsay statements of a witness and concluded that the right of confrontation is violated by admission of such statements except in very limited circumstances. The limited circumstances for admission of such statements exist only when the witness is **unavailable**, the out-of-court statement is testimonial, and the defendant had a **prior** opportunity to cross-examine the witness. Id. at 68.

In contrast, S.C. Code Ann. § 17-23-175 permits the admission of out-of-court hearsay statements if the statements were made in response to questioning conducted during an investigative interview of the child (making the statements testimonial) and when the child is **available** to testify at trial and subject to cross-examination. S.C. Code Ann. § 17-23-175(A). The requirement that the child be available to testify directly contravenes the Crawford requirement that the witness be unavailable before out-of-court hearsay statements can be admitted.

The United States Supreme Court in Crawford interpreted the Confrontation Clause to be violated when out-of-court testimonial hearsay statements of an **available witness** are admitted. 541 U.S. at 68. If the child is available to testify, Crawford simply does not allow admission of her out-of-court testimonial statements made during the pretrial forensic interview. Because the statute violates Crawford, it is unconstitutional and the forensic interviews of Minor 1 and Minor 2 should have been excluded.

B. The "particularized guarantees of trustworthiness" enumerated in S.C. Code Ann. § 17-23-175(B) are not adequate to protect a defendant's right of confrontation under Crawford.

As noted above, one of the four requirements for the admissibility of out-of-court statements of a child pursuant to S.C. Code Ann. § 17-23-175(A) is that the court finds "that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness." Subsection (B) of the statute states:

> (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.

Prior to Crawford, the United States Supreme Court in Ohio v. Roberts, 448 U.S. 56 (1980), conditioned the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception, or bears "particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66; See Crawford, 541 U.S. at 42. Under the Roberts test, the "particularized guarantees of trustworthiness" enumerated in S.C. Code Ann. § 17-23-175 perhaps could have been found constitutional. However, the United States Supreme Court abrogated Roberts in the Crawford decision, finding that the Roberts test was too broad in that it "applies to the same mode of analysis whether or not the hearsay consists of *ex parte* testimony," yet at the same time too narrow in that it "admits statements that do consist of *ex parte* testimony upon a mere finding of reliability." Crawford, 541 U.S. at 60. The Court stated, "This malleable standard often fails to protect against paradigmatic confrontation violations." Id.

The particularized guarantees of trustworthiness that render firmly rooted hearsay exceptions reliable do not exist with regard to the videotaped forensic interviews in this case. Almost all the firmly rooted hearsay exceptions recognized in our jurisprudence apply to non-testimonial statements, with the exception of certain dying declarations that might be made in a testimonial context. Id. at 56, fn. 6. The Court in Crawford stated the following about the fallacy of using the "reliability" determination when dealing with testimonial statements such as the videotaped interview at issue here:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. **Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.** To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. **It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.** The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Crawford, 541 U.S. at 61 (internal citations omitted) (emphasis added).

Under the reasoning of Crawford, the "particularized guarantees of trustworthiness" factors listed in S.C. Code Ann. § 17-23-175(B) cannot suffice to allow admission of the out-of-court testimonial hearsay statements contained in the videotaped forensic interviews of Minor 1 and Minor 2. Without a prior opportunity for **contemporaneous** cross-examination, admission of the videotaped interviews clearly violated Appellant's right of confrontation.

C. S.C. Code Ann. § 17-23-175 violates Maryland v. Craig, 497 U.S. 836 (1990) because it does not require the child to be under oath or subject to contemporaneous cross-examination.

S.C. Code Ann. § 17-23-175 is also unconstitutional under Maryland v. Craig, 497 U.S. 836 (1990). In Craig, the United States Supreme Court, while indicating that face-to-face confrontation is best, held the testimony of a child witness via closed circuit television did not violate the right of confrontation. The Court stated:

> Maryland's statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial. We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and **must testify under oath**, the defendant retains full opportunity for ***contemporaneous*** **cross-examination**; and the judge, jury,

> and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition.

Id. at 851 (citing Mattox v. United States, 156 U.S. 237, 242 (1895) and California v. Green, 399 U.S. 149, 179 (1970)) (emphasis added).

The Court in Craig noted that the majority of states had approved procedures for child witnesses to testify via closed circuit television or videotaped testimony. The Court concluded, "[T]he Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." Id. at 857. The Court held that **without an oath** and ***contemporaneous* cross-examination**, there cannot be effective confrontation. Id.

The videotaped forensic interviews in this case are not similar to videotaped testimony that occurs outside the presence of the defendant (which was found constitutional in Craig) because during the forensic interview the child is **not under oath** and there is no opportunity for ***contemporaneous* cross-examination**. Because S.C. Code Ann. § 17-23-175 allows for the admission of a child's hearsay statements **without an oath** and **without contemporaneous cross-examination**, it is unconstitutional.

D. Even if constitutional, the application of S.C. Code Ann. § 17-23-175 to admit out-of-court videotaped statements should be limited to situations where the court makes specific findings regarding the necessity of admitting the evidence.

Even if this Court determines that S.C. Code Ann. § 17-23-175 does not violate the Confrontation Clause, it respectfully should require all trial judges to consider the necessity of admitting videotaped forensic interviews in addition to the criteria enumerated in the statute, as is required when a court determines whether to allow testimony of children via closed circuit television. In Craig, the United States Supreme Court held that the Confrontation Clause does not prohibit a child witness from testifying by closed circuit television, but that a case specific finding of necessity for the use of the procedure was required. Id. at 855-856.

If a finding of necessity is required in the circumstances where a child is actually testifying **under oath** during a trial **and** is subject to **contemporaneous cross-examination**, certainly the same finding should be made for the admission of an out-of-court testimonial statement in which the child witness was not subject to contemporaneous cross-examination. As noted in Craig, the denial of a physical, face-to-face confrontation at trial is permitted "only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Id. at 850.

In Craig, the United States Supreme Court held that the public policy of protecting child witnesses from the trauma of giving testimony in child abuse cases could be sufficiently important in some cases to outweigh the defendant's right of confrontation. Id. at 853. However, the Court also held that the importance of protecting child witnesses outweighs the defendant's right of confrontation only "if the State makes an adequate showing of necessity." Id. at 855.

To make a showing of necessity: (1) the state must present case specific evidence from which the trial court can determine whether admission of videotaped evidence is necessary to protect the welfare of the particular child witness; (2) the trial court must find that the child witness would be traumatized by the presence of the defendant; and (3) the trial court must find that the trauma suffered by the child witness in the presence of the defendant is more than "mere nervousness or excitement or some reluctance to testify." Id. at 856.

South Carolina courts agree that a particularized showing of necessity is needed before videotaped or closed circuit testimony can be used to avoid face-to-face confrontation with a defendant. Although S.C. Code Ann. § 16-3-1550(E) does not preclude the use of videotaped testimony for certain witnesses, the judge must make proper findings before such procedures can be used.[2] In State v. Murrell, 302 S.C. 77, 393 S.E.2d 919 (1990), our Supreme Court affirmed the trial court's ruling allowing videotaped testimony of a child witness where the judge heard expert testimony that the child would be significantly harmed by an in-court confrontation. In Murrell, the child witness was placed in a courtroom setting and the defendant was in an adjacent room viewing the child on video. The defendant's attorney was present in the courtroom for direct and cross-examination and the attorney's law partner was in the room with the defendant with three way communication available at all times between the attorneys and the defendant. Id. at 71, 393 S.E.2d at 920-921.

[2] S.C. Code Ann. § 16-3-1550(E) reads: "The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate. The prosecuting agency or defense attorney must notify the court when a victim or witness deserves special consideration."

In State v. Bray, 342 S.C. 23, 535 S.E.2d 636 (2000), our Supreme Court determined that although the record contained sufficient evidence to support a finding that testimony of a child witness should be given by closed circuit television, reversal was required because the trial judge failed to make specific findings for its ruling allowing testimony outside the presence of the defendant, specifically failing to cite to testimony that the child would be traumatized if required to testify in the presence of the defendant. Id. at 31-32, 535 S.E.2d at 641.

These requirements for case specific findings of necessity for admission of videotaped or closed circuit television testimony should limit S.C. Code Ann. § 17-23-175 in a similar manner. Because S.C. Code Ann. § 17-23-175 does not require a finding of necessity for admission of videotaped forensic interviews, it contravenes the provisions of Craig and therefore violates Appellant's constitutional right of confrontation. Because the statute is unconstitutional, the trial court should have excluded the videotaped forensic interviews of Minor 1 and Minor 2.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

Lara M. Caudy

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Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of February, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 4, 2016

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE, RESPONDENT,

V.

WAYLAND PURNELL, APPELLANT

APPELLATE CASE NO 2014-001501

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon V. Henry Gunter, Jr., Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of February, 2016.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of February, 2016.

_____ (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of General Sessions

Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-001501

THE STATE,

Respondent,

v.

WAYLAND PURNELL,

Appellant.

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STATEMENT OF ISSUES ON APPEAL

I.

The trial judge did not err in qualifying Dr. Allison Foster as an expert in the dynamics of child sexual abuse where Dr. Foster testified only to common behavioral characteristics of juvenile victims of sexual abuse and Dr. Foster was qualified to testify on that subject based on her education, knowledge, training, and experience and because her testimony was beyond the common knowledge of the typical juror, could have assisted the jury in understanding the evidence presented during trial, and met a threshold level of reliability.

II.

The trial judge did not err in qualifying Allison Foster as an expert where her testimony assisted the trier of fact and did not improperly bolster the Victims' credibility

III.

The trial judge did not err in admitting the videotaped forensic interviews where the statute is constitutional and does not violate the Confrontation Clause of the Sixth Amendment.

STATEMENT OF THE CASE

Wayland Purnell was indicted at the October 2012 term of the grand jury for Richland County for two counts of criminal sexual conduct with a minor in the first degree and one count of lewd act upon a child. Purnell proceeded to a trial by jury from July 7-10, 2014, in Columbia, South Carolina. At the conclusion of trial, Purnell was found guilty of lewd act upon a child and one count of criminal sexual conduct with a minor. He was sentenced by the Honorable Clifton Newman to imprisonment for a term of twenty-five years for criminal sexual conduct with a minor in the first degree and fifteen years imprisonment for lewd act upon a child, with all sentences running concurrently. Purnell timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Sometime in 2010, Mother began dating Wayland Purnell, the appellant in this case. ROA. p. 61. Mother explained that the two dated via Facebook and text message communications. ROA. p. 61. Mother and Appellant also spent a few weekends together in Atlantic City. ROA. p. 61. Mother and Appellant eventually got married on March 18, 2011. ROA. p. 61. Once they were married, Appellant permanently came to live with Mother and her children at her home in New Jersey. ROA. p. 61. Mother has five children: K.B., B.M., Victim 1, Victim 2, and B.S. ROA. p. 29. At the time Appellant moved into Mother's home, B.M., Victim 1, Victim 2, and B.S. were all living with her. ROA. p. 62. Prior to moving into Mother's residence, Appellant never stayed in or spent extended time at the home. ROA. pp. 61-62. On September 2, 2011, Mother and Appellant moved to South Carolina with Mother's children. ROA. p. 63.

On April 30, 2012, D.H. was at an after-school reading club with Victim 1. ROA. p. 40. During a conversation while they were at the reading club, Victim 1 disclosed to D.H. that she knew what a man's private was. ROA. p. 42. D.H. was immediately concerned and told her mother what Victim 1 disclosed to her at reading club. ROA, p. 43. D.H.'s mother, Danielle Jackson, is a friend of Mother. ROA. p. 46. Following D.H.'s disclosure regarding her concerns that Victim 1 was sexually abused, Jackson immediately called Mother. ROA. p. 49. Mother came directly to Jackson's house where Jackson detailed D.H.'s disclosure. ROA. p. 49. Mother then spoke with Victim 1 and took her home. ROA. p. 49.

After arriving home, Mother talked to both Victim 1 and Victim 2 who confirmed that they were abused. ROA. p. 69. Following the conversation at her home with Victim

1 and Victim 2, Mother contacted police. ROA. pp. 69-70. Mother testified she made contact with the police within half an hour of her conversation with Jackson. ROA. p. 70. Officer David Rogers, a patrolman with the City of Columbia Police Department, was dispatched to Mother's home on April 30, 2012. ROA. p. 54. Officer Rogers testified he was dispatched to investigate a sexual assault. ROA. p. 54. Investigator Barbara Coleman was also dispatched to Mother's home on April 30, 2012. ROA. p. 160. Investigator Coleman advised Mother to not interview her daughters any further regarding the assault, as she was going to refer the girls to the Assessment Resource Center for a forensic interview and a medical interview. ROA. pp. 160-161. Investigator Coleman subsequently faxed the investigative report to the Assessment Resource Center and scheduled appointments for Victim 1 and Victim 2. ROA. p. 163.

While investigators were at Mother's home, Appellant arrived at the home. ROA. p. 55. Appellant was given a ride to police headquarters after he agreed to speak with investigators. ROA. p. 55. Appellant told investigators he wanted to travel to Delaware to tend to his ill father. ROA. p. 164. Police had not set up the interview for Victim 1 and Victim 2 at the Assessment Resource Center at the time, so they agreed to let Appellant travel to Delaware on the condition that he check in with investigators on a weekly basis. ROA. p. 164.

On May 22, 2012, Victim 1 was interviewed by Dr. Alicia Benedetto and Victim 2 was interviewed by Ray Olszewski at the Assessment Resource Center. ROA. pp. 179-180; ROA. p. 230. A videotape of the forensic interviews was played for the jury. ROA. p. 186; ROA. p. 231. Victim 1 and Victim 2 both testified at trial regarding Appellant's inappropriate conduct that was disclosed in the interviews. ROA. pp.98-121; ROA. pp.

121-138. Victim 1 was eleven years old at the time of trial. ROA. p. 99. Victim 1 testified that Appellant touched her "private part" with his "private part." ROA. p. 106. Victim 1 also testified that Appellant touched her "butt" with his "private part." ROA. pp. 106-107. Victim 1 recounted one specific incident in South Carolina where Appellant forced her to pull down her pants and "put his private part into my butt." ROA. p. 108. Victim 1 also recalled one specific incident when the family was living in New Jersey where Appellant attempted to penetrate her anus but was unable to. ROA. p. 108. After assaulting her, Appellant told Victim 1 not to tell anyone about what he had done. ROA. p. 111. Victim 1 also witnessed Appellant sexually abuse Victim 2. ROA. p. 110. Victim 1 testified that Appellant entered the bedroom she shares with Victim 2 and "put his private part in her (Victim 2's) butt." ROA. p. 110.

Victim 2 was ten years old at the time of trial. ROA. p. 122. When asked to identify various parts of the body, Victim 2 identified both male and female genitals as "the middle part." ROA. pp. 125-126. Victim 2 testified that Appellant "sticks his middle part in my behind." ROA. p. 127. According to Victim 2, Appellant sexually abused Victim 2 on one occasion in New Jersey and on more than one occasion in South Carolina. ROA. p. 127. Victim 2 recounted the occasion in New Jersey where Appellant sexually abused her, stating that "he pulled my pants down and stick his middle part in my butt." ROA. p. 129. Victim 2 also detailed one of the occasions where Appellant sexually abused her in South Carolina, stating "He was like fake playing with me and my sister tickling us and so as we got to our room he pulled my pants down and stuck his middle part in my behind." ROA. p. 130. Appellant told Victim 2 to never tell anyone

what he did to her. ROA. p. 130. Victim 2 testified she never told her mother because she feared Appellant would do something to them. ROA. p. 130.

Susan Luberoff, the pediatrician at the Assessment Resource Center, examined Victim 1 and Victim 2 on May 22, 2012. ROA. p. 143. Dr. Luberoff did not notice any injury to the genitals or anus of Victim 1 or Victim 2. ROA. pp. 146-147. Dr. Luberoff testified that when children are sexually abused, the sexual aggressor is usually someone that knows the child and takes some amount of care not to cause the child pain. ROA. p. 147. Dr. Luberoff further testified that it is very rare to see an injury to the anus because children do not usually disclose the abuse immediately and that area of the body heals very quickly. ROA. p. 147.

Following the Assessment Resource Center interviews, Investigator Coleman reviewed the video and made contact with Appellant to check in. ROA. p. 164. Appellant told Investigator Coleman that his father's health had improved and that he wanted to come back to South Carolina for an interview. ROA. p. 164. Upon Appellant's return, Investigator Coleman picked up Appellant, took him to the police station, and placed him under arrest. ROA. p. 165.

At trial, the defense made a motion to exclude the qualification of any expert regarding child abuse accommodation syndrome. ROA. p. 189. The defense asserted the evidence was inadmissible on several grounds. Firstly, the defense argued that any testimony regarding children's behavioral characteristics is an attempt to circumvent State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). ROA. p. 189. Secondly, the defense argued the testimony violated Rule 702, SCRE, as it did not assist the trier of fact in understanding some component of the trial. ROA. p. 191. Thirdly, the defense made

vague arguments concerning the reliability of the expert testimony, asserting it was a "junk science." ROA. pp. 245-246.

To clarify what her testimony would be, the State called its expert, Allison Foster, to testify in camera. ROA. p. 192. Dr. Foster is employed as the chief psychologist at the Assessment Resource Center and also maintains a private practice. ROA. p. 193. Dr. Foster completed her undergraduate studies at Emory University and received a Ph.D. in clinical psychology from the University of South Carolina. ROA. p. 195. Over 90% of her career has been devoted to children who have been abused. ROA. p. 195. Dr. Foster frequently conducts lectures and training outside of the Assessment Resource Center for organizations like the National Children's Advocacy Center in Huntsville, Alabama, the National District Attorney's Association, and the National Child Protection Center. ROA. p. 195. Dr. Foster has conducted more than 1,000 forensic interviews and testified as an expert witness in more than 100 trials. ROA. p. 199. Dr. Foster's training includes the dynamics of child sexual abuse. ROA. p. 196. The study of the dynamics of child sexual abuse includes the disclosure of abuse by child victims, the study of how memories are encoded and retrieved, and child sexual abuse accommodation syndrome. ROA. p. 196.

Dr. Foster explained that the process of delayed disclosure is a professional terminology to describe the propensity of some children to not disclose instances of abuse. ROA. p. 197. There is also a phenomenon known as "piecemeal disclosure" where there are stages of disclosure that range from denial to more tentative or active stages of disclosure. ROA. pp. 197-198. Dr. Foster explained that her opinions regarding the process of disclosure are supported by research that is commonly accepted in the scientific community. ROA. p. 199. With respect to her expertise on how memories are

encoded and retrieved, Dr. Foster testified there is research to back up the information she would provide to the jury and the research was peer reviewed. ROA. p. 197. The research supporting Dr. Foster's position is commonly accepted in the psychology community. ROA. p. 198.

Dr. Foster also explained the concept of child abuse accommodation syndrome. ROA. p. 200. Child sexual abuse accommodation syndrome is a term coined by a psychiatrist by the name of Roland Summit. ROA. p. 200. Dr. Summit coined the term "child abuse accommodation syndrome" to describe the dynamics he observed in victims of interfamilial chronic child sexual abuse. ROA. p. 200. The phenomenon has five components: secrecy, helplessness, entrapment in accommodation, delayed tentative unconvincing disclosure, and recantation. ROA. p. 200. The concept of child abuse accommodation syndrome is a concept that continues to be considered clinically acute and helpful. ROA. p. 201. It is commonly taught in forensic interview academies as an aspect that investigators should understand about the dynamics of child sexual abuse. ROA. p. 201. The five characteristics discussed above are not used for diagnostic purposes. ROA. p. 201. Dr. Foster explained she would not be testifying as to whether a child had been abused if the child demonstrated any or all of the five characteristics of child abuse accommodation syndrome. ROA. p. 201.

In an effort to discredit the testimony of Dr. Foster, the defense called Dr. Julie Buck of San Diego, California, to testify in camera. Dr. Buck traveled from San Diego, California to testify in this case. ROA. p. 222. Dr. Buck has a Master's Degree in Research Psychology from the University of Tennessee-Chattanooga and a Ph.D. in psychology from Florida State University. ROA. p. 222. Dr. Buck currently works full

time as a consultant in eyewitness memory cases. ROA. p. 222. Dr. Buck agreed with Dr. Foster's testimony that most children don't disclose during childhood, agreeing that around 60% of children wait until after childhood to disclose. ROA. p. 226. When a child is interviewed in a high-quality interview setting around 85% of children will disclose the abuse to their interviewer. ROA. p. 226. Dr. Buck opined that she believed the 1983 article written by Dr. Roland Summit on child abuse accommodation syndrome was not supported by research. ROA. pp. 225-226. Dr. Buck further explained that the scientific community is not likely to support the theory of child abuse accommodation syndrome because the research is not there.

After hearing the in camera testimony of Dr. Foster and Dr. Buck, the trial judge ruled:

> I find that the testimony is admissible as far as this witness is allowed to testify as an expert witness in this case. I'm not prepared to go so far as to say that South Carolina should adopt this child abuse accommodation syndrome, I don't think that's particularly relevant to the issues in this case or the issues upon which the expert is likely to offer testimony. She is imminent qualified in the field of evaluating child sexual abuse cases and the behavioral characteristics of abused children. She had the necessary expertise, training, experience and skills that involves the subject matter based on the testimony of both experts here today that clearly involved matters that would be helpful to the jury in understanding issues in this case, it's involving matters in which the trier of fact may be assisted by a person with specialized knowledge and training. Though the whole field of behavioral characteristics of children who may have been sexual assault victims, child sexual abuse victims, it's difficult to place a scientific knowledge test to evaluate the reliability of the testimony based on the fact that it involves a particularized area of expertise. But I believe that from what I've heard I believe the testimony to be offered is sufficiently reliable that it meets the test for the Court in its gatekeeper function. There has been an adequate amount of scientific research and skills employed to assess the nature of the problems with child sexual abuse victims, this witness can testify generally to those issues involved without seeking to usurp the decision making function of the jury.

ROA. p. 254.

At trial, Dr. Foster was qualified as an expert in the area of the dynamics of child abuse.

ROA. p. 260. Following her qualification as an expert, the trial judge provided the jury a limiting instruction, stating:

> The testimony of this witness, Dr. Foster, is being offered to you and may be considered by you only for the purpose of understanding the behavior or the dynamics of the child sexual abuse victims in general and not as proof that molestation occurred as to any or more of the victims in this case.

ROA. p. 260. Dr. Foster's testimony before the jury mirrored her in camera testimony. Dr. Foster did not testify concerning specific details of Victim 1 and Victim 2's case. Dr. Foster did not review the interviews with Victim 1 or Victim 2. ROA. pp. 271-272. Dr. Foster also did not speak with Ray Olszewski or Alicia Benedetto about the facts of the case nor did she discuss the facts of the case with the State or hear testimony from any of the fact witnesses in the case. ROA. p. 272.

At the conclusion of trial, the jury found Appellant guilty of lewd act upon a child with respect to Victim 2. ROA. pp. 329-330. The jury found Appellant not guilty of criminal sexual conduct in the first degree with regard to Victim 2. ROA. p. 330. As to Victim 1, the jury found Appellant guilty of criminal sexual conduct with a minor in the first degree. ROA. p. 330.

ARGUMENT

I.

The trial judge did not err in qualifying Dr. Allison Foster as an expert in the dynamics of child sexual abuse where Dr. Foster testified only to common behavioral characteristics of juvenile victims of sexual abuse and Dr. Foster was qualified to testify on that subject based on her education, knowledge, training, and experience and because her testimony was beyond the common knowledge of the typical juror, could have assisted the jury in understanding the evidence presented during trial, and met a threshold level of reliability.

Appellant asserts the trial judge erred in qualifying Dr. Allison Foster as an expert in the dynamics of child abuse because there was insufficient evidence of the reliability of her testimony and there was insufficient evidence that the research Dr. Foster relied upon in her testimony was subjected to peer review. The State submits this argument is without merit, as Dr. Foster possessed expert qualifications based on her education, knowledge, training, and experience and her testimony regarding the common behavioral characteristics exhibited by juvenile victims of sexual abuse was sufficiently reliable to warrant its admission. Furthermore, any alleged error in admitting Foster's testimony is harmless due to overwhelming evidence of Appellant's guilt.

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably

relied upon in the field to make opinions." Id. at 445-446, 699 S.E.2d at 175. "The qualification of a witness as an expert falls largely within the discretion of the trial judge." State v. Myer, 301 S.C. 251, 255, 391 S.E.2d 551, 554 (1990).

Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

> If 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. Before admitting expert testimony, the trial judge must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has the 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); see also State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 819 (2001) ("Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, applying the factors found in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect.").

A witness can properly be qualified as an expert where "the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). In determining whether a witness's knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Henry, 329 S.C. at 274, 495

S.E.2d at 467. Instead, an expert can become sufficiently qualified to be able to provide an opinion helpful to the trier of fact in many ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). "[D]efects in the amounts and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility." Henry, 329 S.C. at 274, 495 S.E.2d at 467.

In addition to ensuring the expert is qualified, the trial judge must also ensure the testimony "meets a threshold level of reliability, regardless of whether it is scientific or nonscientific." State v. Tapp, 387 S.C. 159, 165, 691 S.E.2d 165, 168 (Ct. App. 2010). In cases involving scientific expert testimony, the trial court should consider the following factors: (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 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, in cases involving nonscientific expert testimony, the factors applied in an analysis of scientific evidence cannot readily be applied. See State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009) ("The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony."). Accordingly, no formulaic approach can or must be applied to determine reliability in cases involving nonscientific expert testimony. Id.

In Appellant's case, the trial judge properly qualified Dr. Foster as an expert witness in light of her education, knowledge, training, and experience in regard to the

common behavioral characteristics exhibited by juvenile victims of sexual abuse. Based on that education, knowledge, training, and experience, Dr. Foster was qualified and able to testify before the jury in regard to an area of expertise that was beyond the common knowledge of the typical juror and was critical for the jurors in order to evaluate and understand the behavior exhibited by the victims prior to their disclosures of the sexual abuse.

Critically, in cases such as Appellant's case where there are allegations of juvenile sexual abuse, "[e]xpert testimony concerning child abuse typically comes from two sources: medical evidence provided by physicians and **behavioral science evidence** provided by psychiatrists, psychologists, and social workers." State v. Morgan, 326 S.C. 503, 508, 485 S.E.2d 112, 115 (Ct. App. 1997) (emphasis added), overruled on other grounds by State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). Significantly, in South Carolina, our appellate courts have consistently recognized "[e]xpert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." 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 State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) ("The purpose of rape trauma evidence is to prove the elements of criminal sexual conduct since such evidence may make it more or less probable the offense occurred."). Rape trauma and behavioral characteristic evidence is often crucial in child sexual abuse cases because "[t]he inexperience and impressionability of children often render them unable to effectively

articulate the events giving rise to criminal sexual behavior." White, 361 S.C. at 414-15, 605 S.E.2d at 544. Furthermore, rape trauma and behavioral characteristic evidence is also particularly important to explain the often unusual behavior exhibited by victims of sexual abuse that might be beyond the knowledge of the average juror. See Weaverling, 337 S.C. at 475, 523 S.E.2d at 794 ("It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor."); see also People v. Carroll, 95 N.Y.2d 375, 387, 740 N.E.2d 1084, ___ (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[.]"); see generally United States v. Lukashov, 694 F.3d 1107, 1117 (9th Cir. 2012) ("[The expert witness'] testimony was helpful to the jury because some jurors would not have a general understanding of an eight-year-old's sexual knowledge and vocabulary and the level of sensory detail to look for in a child's allegations of sexual abuse."); People v. Baenziger, 97 P.3d 271, 275 (Colo. Ct. App. 2004) ("Because the 'lay notion of what behavior logically follows the experience of being raped may not be consistent with the actual behavior which social scientists have observed from studying rape victims,' expert testimony explaining these reactions is helpful to the jury in determining whether this delay should support the conclusion that the sexual assault did not occur.'" (citations omitted)). Accordingly, as this Court has recognized, "both 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).

Dr. Foster had specialized knowledge regarding the common behavioral characteristics exhibited by juvenile victims of sexual abuse based on her education, knowledge, training, and experience. Dr. Foster is the chief psychologist at the Assessment Resource Center at the Children's Advocacy Center in Columbia. She has a Ph.D. in clinical psychology from the University of South Carolina and was the program director at the Assessment Resource Center from 1995 to 2012. She conducted forensic interviews, therapy with child victims of sexual abuse, and training on things like child development, language, memory, dynamics of child sexual abuse, and the process of disclosure. Dr. Foster has conducted more than 1,000 forensic interviews and testified as an expert witness in more than 100 trials. In addition to testifying in South Carolina, she has testified in Utah, District Courts in Chicago, Colorado, Iowa, Georgia, and proceedings in the U.S. court martial system. ROA. pp. 259-260.

Dr. Foster did not conduct a forensic interview in this case nor was she proffered as an expert in forensic interviewing. The State did not call Dr. Foster to lend credibility to the testimony of Victim 1 and Victim 2. Instead, she simply explained the dynamics of sexual abuse and how being abused may affect a child's behavior. Dr. Foster testified only generally about the dynamics of child sexual abuse and how it led to things like delayed disclosure. She did not review any of the interviews with the victims, speak with the forensic interviewers about the case, discuss the facts of the case with the State prior to trial, or hear testimony from any of the fact witnesses.

Appellant greatly relies on the recent decision of the South Carolina Supreme Court in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015). Appellant's comparisons of the current case to Chavis are inapposite. In Chavis, the expert testified she was unable

to discern an error rate, and when asked what her quality control procedures were, she responded she uses RATAC every time. Peer review of her use of the RATAC technique was minimal. Id. at 107. The Supreme Court opined "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. We find no evidence in this record as to [the forensic interviewer's] ability to draw reliable results from the RATAC procedures she consistently follows, and thus find that the threshold reliability requirement of Rule 702 is not met." Id. at 108. In the present case there is no "procedure" employed such as RATAC and no "result" was drawn. Instead, Dr. Buck only provided background information about the disclosure process of abused children.

Even if the trial judge erred in qualifying Dr. Foster as an expert, any error would be harmless. Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) (citations and internal quotations are omitted)." The alleged error in this case did not contribute to the jury's verdict whatsoever, as the jury was presented with overwhelming evidence of Appellant's guilt. The jury heard unrebutted testimony from Victim 1 and Victim 2 vividly detailing personal accounts of sexual abuse by Appellant in both New Jersey and South Carolina. Victim 1 also recounted an occasion where Appellant sexually abused Victim 2, making her a third party witness to sexual abuse by Appellant. Appellant's only defense at trial

was an attempt to argue in his opening and closing statements that Mother somehow convinced her children to fabricate the story because she was angry at Appellant for engaging in an affair with a woman in Chicago. Appellant offered no evidence to support this theory. Mother offered unrebutted testimony at trial that she did not discover Appellant had been in communication with another woman until June 21, 2012, nearly two months after Victim 1 and Victim 2 initially disclosed Appellant had been abusing them. All the foregoing provides overwhelming evidence of Appellant's guilt.

II.

The trial judge did not err in qualifying Allison Foster as an expert where her testimony assisted the trier of fact and did not improperly bolster the Victims' credibility

Appellant next contends the trial judge abused his discretion in qualifying Dr. Foster as an expert on the grounds that her testimony did not assist the trier of fact as required by Rule 702, SCRE, and that her testimony improperly bolstered the credibility of the victims. Specifically, Appellant asserts the general knowledge provided by Dr. Foster could not assist the jury in determining whether Victim 1 and Victim 2 were telling the truth. Appellant also argues the jury did not need expert knowledge to explain the subject matter because it did not involve scientific, technical, or other specialized knowledge. Appellant further avers the only purpose of Dr. Foster's testimony was to improperly bolster the credibility of Victim 1 and Victim 2. The State submits these arguments are without merit, as Dr. Foster's testimony assisted the trier of fact and did not constitute improper bolstering of the credibility of Victim 1 and Victim 2. Furthermore, any alleged error in admitting Foster's testimony is harmless due to overwhelming evidence of Appellant's guilt.

Firstly, Dr. Foster's testimony assisted the trier of fact and assisted the jury in understanding the behavior of sexual abuse victims. Expert testimony concerning common behavioral characteristics of sexual assault victims, and the range of responses to sexual assault encountered by experts, is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787, 794 (Ct. App. 1999). It assists the jury in understanding some of the aspects of victims' behavior, and provides insight into a sexually abused child's often strange demeanor. Id. See also State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859, 862 (1993) (expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value outweighs the prejudicial effect).

Dr. Foster's testimony in this case is the type of expert behavioral testimony approved in Schumpert and Weaverling. Her testimony was relevant and assisted the jury in understanding the evidence and determining a fact in issue. Dr. Foster had specialized knowledge in the form of her intimate knowledge of the dynamics of child abuse, an area beyond the ken of a typical lay juror, thus necessitating an expert witness to familiarize the jury with the concept. See Rule 702, SCRE (expert with specialized knowledge may testify if it will assist the trier of fact to understand the evidence or determine a fact in issue). Therefore, the trial judge did not abuse his discretion in qualifying her as a witness.

Secondly, Dr. Foster's general testimony about the behavioral characteristics of child sexual abuse victims did not constitute improper bolstering. All of the case law cited by Appellant in support of his assertion that Dr. Foster improperly bolstered the

credibility of the victims is inapplicable to the current case. Petitioner relies on Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), and State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012), as support for his contention Dr. Foster's testimony improperly bolstered the victims' testimony. Those cases involved forensic interviewers who actually interviewed the victims, and their testimony in some way indicated they believed the victims' allegations of sex abuse. Therefore, those cases are factually and legally inapplicable to the instant case.

Similarly, Petitioner's reliance on State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989), and State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000), is misplaced. In Jennings, this Court held the report prepared by a forensic interviewer regarding her interviews of the victims was inadmissible hearsay, and impermissibly vouched for the victims' credibility by concluding the victims "provided a 'compelling disclosure of abuse.'" 716 S.E.2d at 94. Both Dawkins and Dempsey involved testimony from therapists who were actually treating the victims, and their testimony clearly indicated they believed the victims were telling the truth. Dawkins, 377 S.E.2d at 302 (therapist testified his impression was that victim's symptoms were genuine); Dempsey, 532 S.E.2d at 308-310 (therapist testified children alleging sexual abuse were truthful 95% to 99% of the time, and he concluded victim was reliable). In this case, Dr. Foster was not testifying as a forensic interviewer. She never interviewed the victims, did not prepare a report, and did not express any opinion or belief regarding the credibility of victims' allegations in general or these victims in particular. Therefore, the analysis and holdings in Jennings, Dawkins and Dempsey do not apply to this case.

Dr. Foster's testimony about general behavioral characteristics did not rise to the level of improper bolstering. "Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror.'" State v. Taylor, 404 S.C. 506, 745 S.E.2d 124, 128 (Ct. App. 2013) (quoting State v. Douglas, 367 S.C. 498, 626 S.E.2d 59(Ct. App. 2006), rev'd in part on other grounds, 380 S.C. 499, 671 S.E.2d 606 (2009). Dr. Foster gave general testimony on the dynamics of child sexual abuse, specifically testifying about the disclosure of abuse by child victims, the study of how memories are encoded and retrieved, and child sexual abuse accommodation syndrome. Dr. Foster offered no testimony where she offered any opinion on whether the victims were telling the truth. In fact, she specifically testified she had not reviewed the forensic interviews, spoken with the forensic interviewers about the facts of the case, or heard any testimony from the fact witnesses in the case. This establishes that Dr. Foster was testifying generally and was disengaged from the facts in this particular case. The fact that Dr. Foster's testimony provided insight into the behavioral characteristics does not equate improper bolstering.

As Appellant concedes in his brief, this issue was recently addressed by this Court in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), cert denied August 6, 2015. The appellant in Brown argued the circuit court abused its discretion in allowing a witness qualified as an expert in child abuse dynamics and delayed disclosure to testify regarding the general behavioral characteristics of sexual abuse victims. Id. at 339. At trial, the expert witness testified she did not review any incident reports or statements associated with this case, never met with or interviewed the minor victims prior to trial,

and was not present for their testimony during trial. Id. at 337. The expert's only knowledge concerning the case came from discussions with the Solicitor's office. Id. In support of this argument, Brown asserted the trial judge erred in allowing an expert to testify because the subject matter of her testimony was not beyond the ordinary knowledge of the jury and the jury did not require an expert's knowledge or opinions to understand why minor victims delayed disclosing abuse. Id. This Court held that the trial court properly admitted the expert's testimony because child abuse dynamics and delayed disclosure were subjects beyond the ordinary knowledge of the jury. Id. at 342. Brown also argued the trial judge erred in admitting the testimony of the expert witness because the testimony constituted improper bolstering. Id. at 343. This Court found the trial judge properly admitted the expert's testimony because she did not inappropriately vouch for the victims' allegations and therefore did not bolster their testimony. Id. In the instant case, like Brown, Dr. Foster did not improperly vouch for the victims' credibility when she merely provided general background information on the behaviors of abused children.

As discussed in Respondent's Issue I, the State submits that any alleged error with respect to the qualification of Dr. Foster as a witness is harmless due to overwhelming evidence of Appellant's guilt.

III.

The trial judge did not err in admitting the videotaped forensic interviews where the statute is constitutional and does not violate the Confrontation Clause of the Sixth Amendment.

Appellant's final contention is that the trial judge erred in admitting the videotaped forensic interviews of the victims under S.C. Code Ann. § 17-23-175, alleging

the statute is unconstitutional as it is violative of the Confrontation Clause of the Sixth Amendment. In support of his argument, Appellant makes four separate arguments. Firstly, Appellant asserts S.C. Code Ann. § 17-23-175 is unconstitutional because it violates the Confrontation Clause of the Sixth Amendment to the Constitution as interpreted in Crawford v. Washington, 541 U.S. 36, (2004). Secondly, Appellant argues the "particularized guarantees of trustworthiness" enumerated in S.C. Code Ann. § 17-23-175 are not adequate to protect a defendant's right of confrontation under Crawford. Thirdly, Appellant avers S.C. Code Ann. § 17-23-175 violates Maryland v. Craig, 497 U.S. 836 (1990), because it does not require the child to be under oath or subject to contemporaneous cross-examination. Lastly, Appellant contends the admission of videotaped interviews pursuant to S.C. Code Ann. § 17-23-175 should be limited to situations where the court makes specific findings regarding the necessity of admitting the evidence. The State submits that all four of these arguments are without merit. Appellant's first three arguments were conclusively dealt with in the recent decision by the South Carolina Supreme Court in State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), which found that S.C. Code Ann. § 17-23-175 did not violate the Confrontation Clause. As to Appellant's fourth Argument, this argument is not preserved for appellate review. Even if it were preserved, it would be error to limit the admission of the evidence to situations where the court makes specific findings regarding the necessity of admitting the evidence, where the legislature has already pre-determined the evidence is necessary.

A. The South Carolina Supreme Court's decision in State v. Anderson conclusively establishes S.C. Code Ann. § 17-23-175 does not violate the Confrontation Clause of the Sixth Amendment of the Constitution as interpreted by the U.S. Supreme Court in Crawford and Craig (Appellant's Issue IIIA, IIIB, and IIIC).

In Anderson, the appellant contended the trial court erred in admitting the forensic video of the minor victim because the admission violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. 413 S.C. at 215-16. As in the current case, the appellant in Anderson cited Crawford and Craig in support of his proposal that despite the fact the victim testified and was subject to cross-examination regarding the video recordings, the admission of the video still somehow violated the Confrontation Clause. The Court found that Appellant's reliance on Craig as requiring contemporaneous cross-examination during the statutory videotaping process or at trial immediately following the playing of the videotape is misplaced, finding:

> Here, the minor testified under oath in open court and was subject to cross-examination. Thus, Appellant's right to the opportunity for effective cross-examination was satisfied during the minor's actual trial testimony. That is all the Confrontation Clause requires.. That Appellant would have to recall the child as an adverse witness in order to examine her about her videotaped statement does not render the statute or the procedure followed here violative of a defendant's right to cross examination.

Id. at 217-18

Appellant also contends the "particularized guarantees of trustworthiness" contained in § 17-23-175 do not adequately protect the right of confrontation under Crawford. Again, Appellant ignores crucial facts in this case: the minor victim actually testified under oath at trial and was subject to the crucible of cross-examination. As the Court held in Anderson, under those facts, there simply is no confrontation issue.

B. Appellant's argument that the application of S.C. Code Ann. §17-23-175 should be limited to situations where the Court makes specific findings regarding the necessity of admitting the evidence is not preserved for Appellate review. Even if the issue were preserved, in codifying §17-23-175, the legislature has already made a clear determination that the evidence is necessary (Appellant's Issue IIID).

Appellant failed to argue at trial that the application of S.C. Code Ann. § 17-23-175 should be limited to situations where the trial court makes specific findings regarding the necessity of admitting the evidence. An argument not raised and ruled on by the trial court is not preserved for appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (objection must be entered on a specific ground at trial to preserve an appeal); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). Appellant's failure to include this argument in his objection to the admission on the basis of Crawford and Craig precludes him from being able to make the argument for the first time on appeal.

Even if Appellant's argument were preserved, the argument lacks merit. Citing Craig, Appellant argues § 17-23-175 should be limited to cases where the trial court specifically finds admitting the forensic interview videotape in evidence is a "necessity." As support for this argument, Appellant conflates the investigative interview videotape admissible under § 17-23-175, with closed circuit testimony where the minor testifies at trial, but outside the courtroom and the defendant's presence, to avoid traumatizing the minor. This conflation is readily apparent from the fact Appellant seeks to apply a "necessity" test.

Imposing a rule that requires a trial judge to make specific findings regarding the necessity of admitting the evidence is clearly contrary to the intent of the Legislature. The South Carolina Legislature has determined the type of videotape at issue is necessary to protect minor victims under the age of twelve and is admissible as evidence if it meets the requirements of § 17-23-175. The statute was enacted as part of the "Sex Offender Accountability and Protection of Minors Act of 2006," 2006 S.C. Act 342, section 8, which clearly reveals the legislative intent to protect minor victims by allowing

admission of investigative interview videotapes under specific guidelines expressly intended to provide "particularized guarantees of trustworthiness," and the statute must be construed accordingly. See State v. Elwell, 403 S.C. 606, 743 S.E.2d 802, 806 (2013) ("The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature.") (quoting State v. Scott, 351 S.C. 584, 571 S.E.2d 700, 702 (2002)). The Legislature, thus, already made a threshold determination that the admission of the investigative interview videotapes is necessary so long as the statement provides "particularized guarantees of trustworthiness."

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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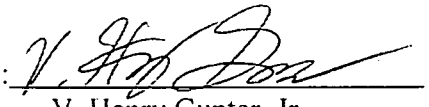
BY: 
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January 28, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
Clifton Newman, Circuit Court Judge

THE STATE, Respondent,

v.

WAYLAND PURNELL, Appellant.

CERTIFICATE OF COUNSEL

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

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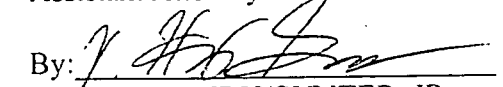
By: 

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THE STATE, Respondent,

v.

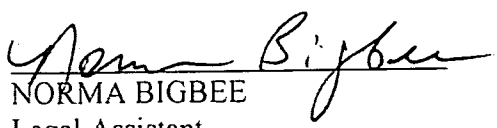
WAYLAND PURNELL, Appellant.

PROOF OF SERVICE

I, Norma Bigbee, 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: Lara M. Caudy, Esquire, Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

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

This 28TH day of January, 2016.



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