THE STATE OF SOUTH CAROLINA
In the Court of Appeals



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

Case No. 2013-GS-21-01353
Appellate Case No. 2015-000235

The State,

Respondent,

v.

Bryant Christopher Gurley,

Appellant.

RETURN TO PETITION FOR REHEARING *EN BANC*

Appellant, Bryant Christopher Gurley, respectfully submits this return to the petition of Respondent, the State of South Carolina, for rehearing, *en banc*, of the unpublished decision of a panel of the Court of Appeals filed August 9, 2017, Opinion No. 2017-UP-342. The Court of Appeals granted appellant leave to serve and file a return to the state's petition for rehearing *en banc* by October 9, 2017. The state's petition should be denied in all respects.

Appellant appealed his conviction for committing a lewd act on a child. He raised multiple issues on appeal. The Court of Appeals reversed the conviction, finding error in the admission of a video recording of a forensic interview of the complaining witness

(Issue 1), and finding error with respect to one aspect of the argument that the state erred in admitting the testimony of the child's counselor (Issue 2). The state seeks rehearing of the issues decided by the panel, and it further seeks to have the Court of Appeals rehear this matter *en banc*.

I. Rehearing *en banc* is not appropriate in this case.

This case was decided by a unanimous panel of the Court of Appeals, Judges Geathers, McDonald, and Hill. It was decided in an unpublished opinion, which has no precedential value both pursuant to the South Carolina Appellate Court Rules and by its own terms. *See* Rule 268(d)(2), SCACR; Opinion, p. 1. The extraordinary and disfavored remedy of rehearing *en banc* is not appropriate in this case.

The South Carolina Appellate Court Rules provide:

> A hearing or rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

*See* Rule 219(a), SCACR. In this case, neither of these criteria is met. First, the unpublished decision has no precedential weight, therefore there is no necessity for the full Court of Appeals to address the issues decided unanimously by the panel. An unpublished decision does not impact the uniformity of the Court's decisions, since it has no precedential value and may not be cited in any future case. *See* Rule 268(d)(2), SCACR. Moreover, contrary to the state's contentions, the grounds the state asserts for rehearing are consistent with and not contrary to any of the Court of Appeals' or the Supreme Court's precedents, as more fully discussed with respect to the substantive issues, below. Second, the proceedings do not involve a question of exceptional importance. To the contrary, as discussed below, the state seeks to stretch the rules of

error preservation and shift its own burden to the defendant, a position that has no support in the law and is contrary to principles of due process. Because the state's arguments do not fit within the narrowly drawn criteria for rehearing *en banc*, that aspect of the state's petition for rehearing should be denied.

II. Rehearing should be denied as to the video (Issue I).

Appellant contended and the Court held the video of an interview with the complaining witness was inadmissible because of a comment by the interviewer that was improper bolstering of the child's credibility. The state contends appellant's claim of error as to the admission of the video is unpreserved because appellant failed also to raise on appeal a claim of error as to the rulings on other objections the defense raised at trial with respect to the video, including objections that the requirements of S.C. Code Ann. § 17-23-175 were not satisfied. To the contrary, the objection that formed the basis for the appellate challenge to admission of the video was raised in the court below as an additional ground for exclusion of the video, apart from the court's evaluation of the statutory criteria, and it was argued separately by counsel. Both attorneys argued their positions on the admissibility or inadmissibility of the video under the statute. *See* R. p. 135, line 24 – p. 136, line 19 (defense's argument); R. p. 137, line 6 – p. 138, line 1 (state's argument). The defense also raised the ***separate*** and ***distinct*** objection that the video contained inadmissible bolstering testimony in the comment by the interviewer that "B.G. broke the rules." *See* R. p. 136, line 20 – p. 137, line 1. The court asked for argument by the state as to that objection. *See* R. p. 138, line 2. The state made its argument as to this aspect of the defense's objection. *See* R. p. 138, lines 3-23. The court agreed with the state's position as to this objection, stating, "I think so too." R. p.

138, line 24. This ruling was clearly preserved for appellate review, and the issue was squarely raised on appeal. The appellant's decision not to challenge the trial court's rulings on the other grounds of the defense objections at trial did not waive the objection to the offending, bolstering comment by the interviewer. That claim of error was properly preserved, and the unanimous panel of the Court correctly decided the issue on its merits.

The state next argues that, when the court overruled the defense's objection to the video based on the offending, bolstering comment by the interviewer, the burden rested on the defense to ask the court to redact that comment and allow the remainder of the video to be admitted, and by failing to do so, the defense somehow forfeited the right to appellate review of the trial court's ruling on its objection. This argument is baseless, for multiple reasons.

First, the burden of proof in a criminal prosecution rests on the state, not on the defense. U.S. Const. amend. XIV; *see Sandstrom v. Montana*, 442 U.S. 510, 520 (1979), *quoting In Re Winship*, 397 U.S. 358, 364 (1970); *State v. Belcher*, 385 S.C. 597, 608, 685 S.E.2d 802, 807-08 (2009). The state is required to present evidence to establish each and every element of the crime. *State v. Attardo*, 263 S.C. 546, 550, 211 S.E.2d 868, 870 (1975). Subject to exceptions not applicable here, the burden rests on the prosecution and never shifts. *Id.*, 263 S.C. at 551, 211 S.E.2d at 870. If the state offers a piece of evidence that is inadmissible, the proper remedy for the defense is to object to its admission and obtain a ruling by the trial judge, and nothing more is required to preserve the claim of error. *See State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011); *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010); *Hubbard v. Rowe*, 192

S.C. 12, 19, 5 S.E.2d 187, 189 (1939); *State v. Taylor*, 338 S.C. 624, 626 n.1, 527 S.E.2d 395, 396 n.1 (Ct. App. 2000). It is ***not*** the defendant's responsibility to suggest to the court how to make the evidence admissible and thereby assist the state in meeting its burden of proof. No authorities of this state have ever so held, and this Court should reject the state's burden-shifting argument out of hand.

Second, in all trial proceedings, the burden rests on the proponent of evidence to establish the admissibility of the evidence it offers. *See, e.g, State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (party offering fungible items into evidence has burden of establishing complete chain of custody as far as practicable); *State v. Davis*, 371 S.C. 170, 178-79, 638 S.E.2d 57, 62 (2006) (burden of establishing facts which qualify a statement as an excited utterance rests with the proponent of the evidence); *Clark v. Cantrell*, 339 S.C. 369, 384-87, 529 S.E.2d 528, 536-38 (2000) (announcing four-part test proponent must meet before court will admit computer-generated animation as demonstrative evidence); *State v. Kinloch*, 338 S.C. 385, 388-89, 526 S.E.2d 705, 706-07 (2000) (party offering statement against penal interest by unavailable declarant to exculpate the accused must meet corroboration requirement and demonstrate statement was actually made for statement to be admissible); *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 64-65, 773 S.E.2d 607, 610 (Ct.App. 2015) (proponent of evidence has burden to offer satisfactory foundation to authenticate the evidence). Neither this Court nor the South Carolina Supreme Court has adopted a rule that requires a defendant to seek redaction of inadmissible information contained in an exhibit offered by the state against him in his criminal prosecution.

Here, the state offered the video. If the admissibility of a portion of that video was in question, the burden rested upon the state, as its proponent, to suggest to the court that a redacted version of the video should be admitted rather than the full video, in order for the court to evaluate the admissibility of the redacted version and the merits of any defense objection to the redacted version. The rule of procedure the state now asks the Court to adopt is simply not part of this state's criminal and appellate procedure jurisprudence. Under the clear principles governing the burdens of proof and production of evidence, this Court should not adopt the rule the state now seeks.

On the merits of the issue, the state contends the Court misunderstood its explanation as to the interviewer's purpose in commenting that "B.G. broke the rules." Contrary to the state's argument, the Court did not interpret the interviewer as "acting" in the sense of performing for the child. Rather, the Court correctly found that the state's explanation as to the reason for her action – to ease the child's fears – did not alter the outcome of the ruling on the admissibility of the video containing the offending comment. Regardless of the interviewer's purpose or motivation, the expression of her belief that the child was telling the truth amounted to improper vouching for the child's credibility and rendered the video inadmissible. The Court correctly held there was no way to interpret the comment other than as the interviewer's opinion that the child was being truthful, in keeping with the controlling precedents. *See State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015); *State v. Kromah*, 401 S.C. 340, 358-360, 737 S.E.2d 490, 499-501 (2013); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011); *State v. McKerley*, 397 S.C. 461, 464-65, 725 S.E.2d 139, 141-42 (Ct. App.

2012). The Court correctly reversed as to the admission of this improper bolstering evidence.

III. Rehearing should be denied as to the testimony about coaching (Issue II).

Appellant challenged the admission of testimony of a counselor as to whether there was evidence the complaining witness had been coached. The Court of Appeals correctly held the counselor's answer to the question was impermissible bolstering of the child's credibility, in violation of the parameters of *Kromah*. *See Kromah*, 401 S.C. at 358-59, 737 S.E.2d at 500; *cf. McKerley*, 397 S.C. at 463, 725 S.E.2d at 141.

The state claims the Court improperly distinguished *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct.App. 2011), *overruled on other grounds*, *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016). In *Hill*, the witness gave no opinion as to a child's having been coached. The Court correctly distinguished *Hill*, based on the state's specific question posed to the counselor as to whether the counselor saw evidence of coaching and the counselor's response pointing out the factual bases for her opinion that the child had not been coached. This distinction is important, and the Court correctly found the testimony elicited by this question was improper.

The state claims the answer to the question about coaching was cumulative to other passages of the witness's testimony as to the same factual details. To the contrary, the other testimony was not in the context of the counselor's giving an answer to having seen evidence of coaching. In the context of the prosecutor's question about coaching, the only way to view the witness's answer as to the factual observations she described was that, based on those observations, she believed the child had not been coached. The context of the question posed by the state about coaching sets the answer apart from the

counselor's other testimony, and that testimony is not cumulative to the impermissible bolstering that resulted from the counselor's answer to the question about coaching.

The state further complains of the Court's reference to other testimony by the counselor to which the state claims there was not an objection. To the contrary, this testimony was elicited over multiple objections to the counselor's testimony. R. pp. 95-113. Moreover, the Court's reference to this testimony merely showed that other testimony supported the Court's conclusion the counselor suggested appellant had coached the child. This reference does not undermine the validity of the Court's analysis of the offending answer to the question about coaching, and the Court correctly reversed on the basis of the resulting impermissible bolstering of the child's credibility.

## CONCLUSION

For all the reasons set forth above, and based on all the arguments and authorities cited in the final brief and reply brief of appellant, this Court correctly addressed the two issues it decided and correctly found reversible error as to each. No basis exists for the Court of Appeals to rehear this case, and no basis exists for rehearing *en banc*. The petition for rehearing filed by the state should be denied in every particular.

Respectfully submitted,

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PROOF OF SERVICE

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I certify that I have served the Return to Petition for Rehearing *En Banc*, by mailing a copy, postage prepaid, to counsel for Respondent, Assistant Attorney General William M. Blitch, Jr., Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211-1549, on October 9, 2017.

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October 9, 2017



**VIA HAND-DELIVERY**
The Honorable Jenny A. Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: The State v. Bryant C. Gurley
Appellate Case No.: 2015-000235

Dear Ms. Kitchings:

Enclosed for filing are the original and six (6) copies of a Return to Petition for Rehearing *En Banc*, along with the Proof of Service, in the above referenced matter.

By copy of this letter, I am serving William M. Blitch, Jr., Assistant Attorney General, with a copy of same.

If you have any questions, do not hesitate to contact me.

Very truly yours,

Jack B. Swerling

JBS/kas
Enclosures

cc: William M. Blitch, Jr., Assistant Attorney General
Katherine Carruth Goode, Esquire
Bryant C. Gurley #00362856
Kenrick K. Gurley