STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Florence County
Hon. William H. Seals, Jr., Circuit Court Judge
Appellate Case Tracking No. 2015-000235

The State, Petitioner,

v.

Bryant Christopher Gurley, Respondent.

Opinion No. 2017-UP-342 (S.C. Ct. App. filed August 9, 2017)

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

E.L. CLEMENTS, III
Solicitor, Twelfth Judicial Circuit

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies that a Petition for Rehearing was filed in the South Carolina Court of Appeals on August 29, 2017. The Petition for Rehearing was denied by Order filed November 22, 2017.

STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals erred in finding the forensic video should have been suppressed based on a comment by the interviewer at the end of the video. The video was properly admitted under section 17-23-175 of the South Carolina Code, which governs admissibility, and any issue with the content did not render the video inadmissible as a whole and should have been corrected by redaction which was never asked for by Gurley.

II. The Court of Appeals erred in finding comments by the State's expert regarding coaching impermissibly bolstered or vouched for the child victim. The responses were not impermissible bolstering or vouching. The Court of Appeals erred in failing to find the comments, even if in error, were harmless in light of other testimony in the record.

STATEMENT OF THE CASE

Procedural History

A Florence County Grand Jury indicted Gurley for lewd act on a minor. (App.5-6) On January 26–29, 2015, Gurley proceeded to a trial before the Honorable William H. Seals, Jr., and a jury. Marcus Woodson, Esquire, represented Gurley, and Assistant Solicitor Catherine Wyse, represented the State. The jury found Gurley guilty, and Judge Seals sentenced him to eight years' imprisonment. (App.302-303.)

Gurley filed a timely Notice of Appeal. After briefing and oral argument, the Court of Appeals issued its opinion reversing Gurley's conviction and remanding for a new trial. State v. Gurley, Op. No. 2017-UP-342 (S.C. Ct. App. filed August 9, 2017). Both parties timely filed a Petition for Rehearing. Gurley filed his Petition on August 23, 2017, and the State filed its Petition on August 29, 2017. By Order dated November 22, 2017, the South Carolina Court of Appeals denied both Petitions.

The State submits this Petition for Writ of Certiorari to the South Carolina Supreme Court to consider the Opinion issued by the South Carolina Court of Appeals.

Factual Background

One morning when Victim's mother (Mother) was getting her ready for school, Victim reported to her mother that Gurley, a family friend, had touched her private area. (App.16, line 18–App.17, line 8.) Mother first called Gurley's mother, Denise Gurley, and had Victim tell Denise what happened. (App.17, lines 14–24.) Mother then spoke to someone at a children's center who advised her to call law enforcement. (App.18, lines 1–3.) She met with an officer at her home and he filed a report. (App.18, lines 4–8; App.39, line 18–App.40, line 14.) The officer, Deputy John Austin Meggs of the Florence County Sheriff's Office, then contacted

Investigator Jennifer Floyd. (App.39, line 4–App.40, line 25; App.42, lines 16–19.) Based on information she received, Investigator Floyd got a warrant for Gurley's arrest for lewd act on a minor. (App.44, line 16–App.45, line 15.)

Gurley was charged as an adult and proceeded to trial. (App.46, lines 4–7.) The State began by calling Mother to the stand. (App.9.) She explained how she and her daughters had stayed with her friend Denise and her family after Mother was divorced. (App.12, line 8–App.13, line 23.) Gurley would spend weekends at the Gurley home. (App.14, lines 14–16.) Mother testified Victim disclosed to her that Gurley had touched her inappropriately. (App.16, lines 17–23.) When the solicitor asked Mother to describe where the incidents took place, defense counsel objected on hearsay grounds. (App.19, lines 22–25.) The trial court overruled the objection, citing the time and place exception to hearsay in this type of case. (App.20, lines 2–3.) Mother then began describing the incidents: one in the living room, one in the back seat of the car, one in her bedroom. (App.20, line 9–App.21, line 7.)

One of the incidents Mother described was when she drove Victim and Gurley to her mother's house in Lake City. She recounted that when they were ready to leave, Victim started crying and kicked the car door, saying she did not want to get in the back seat. (App.20, lines 17–25.) Victim's grandmother, Lillie Daniels, also testified about the incident where Victim did not want to get in the car and cried. (App.27, lines 1–8.) Samantha Toney, Victim's sister, likewise testified about the incident. (App.30-31.) She recalled that when they left to go back to Florence, Victim was not happy about getting in the back seat and begged not to ride back there. (App.31, lines 1–9.)

Investigator Jennifer Floyd of the Florence County Sheriff's Office testified regarding her involvement in the case. She made appointments for Victim to have a forensic interview and a

medical examination. (App.43, lines 6–11.) Based on what Victim disclosed during the forensic interview, Investigator Floyd secured a warrant for Gurley's arrest for lewd act on a minor. (App.44, lines 16–25.)

The State called Victim to the stand. (App.73, lines 9–10.) Victim testified she was sexually assaulted by Gurley. (App.75, line 5–18.) She testified he put his hands on her private parts four times. (App.76, lines 18–23.) She recounted that the incidents happened "[f]irst upstairs, then on the couch, then under the covers, then in the back of the car." (App.76, line 24–App.77, line 6.) The State showed Victim three pictures she had drawn and asked her to identify them. (App.77, lines 7–9.) Victim explained that Exhibit Number 2 showed her under the covers with Gurley; that Exhibit Number 3 showed her telling her mom about what was happening, specifically that she was sexually assaulted; and that Exhibit Number 4 showed her in the back of the car with Gurley, feeling scared. (App.77, line 10–App.78, line 7.) The trial court admitted the exhibits into evidence without objection. (App.78, lines 9–16.)

On cross-examination, defense counsel questioned Victim about Exhibit Number 4, the drawing of the car trip to Lake City. (App.83, lines 7–18.) Victim testified that she had drawn her mother in the front seat behind the wheel, but she stated her mother was not actually in the car when the incident took place because she was inside the house talking to her grandmother. (App.83, line 19–App.84, line 8.) Defense counsel asked her whether they were getting ready to leave at that point or if they had just gotten there, and Victim told him they were getting ready to leave. (App.84, line 23–App.85, line 1.) She then explained that the only one who got out of the car was her mother and that everyone else stayed in the car the whole time. (App.85, lines 13–25.) Victim testified Gurley slid over toward her in the back seat and touched her. (App.86, lines 9–17.) The next incident defense counsel questioned her about happened in the music room

upstairs during a family get-together. (App.88, lines 12–18.) He asked her whether she remembered saying that a friend walked up and that was why it stopped and she said, "Yes, sir." (App.89, lines 5–8.) Victim remembered another incident in the living room but could not remember the fourth incident. (App.91, line 17–App.92, line 25.)

Next the State offered Kathy Crawford, a licensed counselor, as an expert in the area of sexual assault trauma, to which Gurley objected. (App.100, lines 9–13.) He argued her testimony was improper bolstering and that her testimony should be limited. (App.101, lines 14–18.) He made a motion *in limine* that "she not be allowed to testify to anything regarding this child because she's going to have to get into statements the child made." (App.101, lines 19–22.) Specifically, he complained that none of her interviews were recorded "like the statute says." (App.101, lines 22–23.) The State explained it was offering her as an expert witness to talk about how children disclose, what "normal" behavior is for a child abuse victim, and some questions about time and place regarding Victim and whether Victim drew the pictures. (App.102, lines 1–16.) The trial court overruled Gurley's objection but encouraged him to continue to object if something specific came up that needed addressing. (App.102, lines 21–23.)

After engaging in *voir dire* with Crawford, Gurley then argued he only got her records last week and did not have time to obtain his own expert to refute her testimony. (App.104, lines 5–14.) The solicitor maintained she provided everything about the expert timely and the only new material provided in the last week was some information regarding PTSD Crawford had just given her the week before trial. (App.104, lines 16–23.) The trial court overruled Gurley's objection. (App.105, lines 24–25.) The trial court qualified Crawford as an expert in the area of child sexual trauma over Gurley's objection. (App.106, lines 17–24.)

Crawford testified about patterns of behavior for victims of sexual trauma and cited some studies that indicated about 75% of children do not disclose immediately. (App.107, lines 1–25.) At that point, Gurley objected to the studies as hearsay, which the trial court overruled. (App.107, lines 12–20.) Gurley also objected when the State asked what kinds of indicators might make her think sexual abuse is going on, but the trial court overruled it. (App.108, lines 21-25.) Crawford testified she began working with Victim in May 2013 and described how Victim chose to draw pictures rather than talk or write about what happened to her. (App.112, lines 11-15; App.113, lines 2-13.) She identified three drawings Victim had done depicting incidents of abuse. (App.113, line 18-App.114, line 24.) The State asked Crawford if she had ever worked with a child who had been coached, and she answered, "The times that I believed that I have worked with children that have been coached is usually when they are coached by the offender not to tell." (App.116, lines 7-11.) The State then asked if she saw any signs of coaching with Victim, and Gurley objected, arguing she could not render an opinion on that and that it was a jury question. (App.116, lines 17-22.) The trial court overruled the objection. (App.116, line 21.) Crawford testified Victim was very detailed in her descriptions of the incidents, even remembering what she was wearing at the time and what pictures were on the wall. (App.117, lines 2-24.)

Crawford also explained she was able to diagnose patients through her state licensure as a counselor and that her normal business practice was to submit a date of service and a diagnosis to insurance companies. (App.119, lines 8-15.) She diagnosed Victim based on the symptoms she presented with. (App.119, lines 16-22.) Gurley objected when the State asked what Victim's diagnosis was, and the trial court overruled. (App.119, lines 23-25.) Crawford testified her diagnosis of Victim was adjustment disorder with anxiety and depression with traits of

PTSD, post-traumatic stress disorder. (App.120, lines 2-8.) When the State asked if Victim was consistent with other children who have been sexually abused, Gurley objected and the trial court held the following bench conference:

> The Court: Is that getting into the credibility and the believability of the child?
>
> [The State]: Well--
>
> The Court: It's touching on it.
>
> [The State]: If you want me to stay away from it, I will.
>
> The Court: That would probably be a good idea based on recent case law.

(App.120, lines 17-25.) The State agreed, and the trial court sustained the objection. (App.121, lines 1-5.)

Next, the State proffered the testimony of Sally Williamson in order to introduce the forensic interview video so that the trial judge could watch it and make a ruling. (App.135, line 15-App.138, line 23.) Gurley had no objection. (App.138, lines 24-25.) After the trial court viewed the video, Gurley objected on several bases. (App.139, lines 14-23.) First, he argued the third prong of the statute was not complied with because Victim did not testify regarding the making of the statement. (App.139, line 24-App.140, line 5.) Second, he argued that after Victim talked about the third incident, she answered, "No," when asked if there were any other incidents, but the interviewer questioned her about whether something happened in the bedroom. (App.140, lines 6-11.) He argued that the statement was inconsistent with her testimony at trial. (App.140, lines 11-19.) Third, he argued the interviewer gave her opinion by saying Gurley broke the rules. (App.140, line 20-App.141, line 1.)

The solicitor argued the third prong of the statute was satisfied because the victim was made available for cross-examination such that Gurley could have asked her about her statement in the video, and she also pointed out the statute does not mandate having to ask the victim about the video. (App.141, lines 6-13.) As for the second objection about a leading question concerning the fourth incident, she explained that Victim began the interview by telling the interviewer all the places the incidents took place, so when the interviewer asked about the bedroom she was merely reminding Victim about something she had already said earlier. (App.141, lines 15-23.) She further pointed out that any inconsistencies between the video and the trial testimony could be addressed in closing argument. (App.141, lines 24-25.) Finally, the State explained the interviewer's statement, "B.G. broke the rules" as a way to make the child victim feel safe rather than making her own statement about Gurley. (App.142, lines 3-23.) The trial court agreed with the State, ruled that the statute had been complied with, and found the video admissible. (App.142, lines 24-25.) Gurley did not move to redact the statement "B.G. broke the rules."

Ms. Williamson then testified before the jury, confirming Exhibit 1 was a DVD of a video of her forensic interview with Victim on March 12, 2013, and explaining her interview approach. (App.147, line 1-App.150, line 25.) The State then moved Exhibit 1 into evidence without objection. (App.150, line 25-App.151, line 9.) Williamson described Victim's demeanor during the interview and testified regarding the time and place of the disclosures she made. (App.151, lines 11-25.) She stated she believed four separate disclosures were made and testified she submitted a written report to law enforcement. (App.152, lines 1-7.) The State then published the video to the jury, subject to Gurley's previous objections, which the trial court overruled. (App.152, lines 9-19.) Following the viewing of the video, Gurley conducted cross-

examination. (App.152, line 24-App.155, line 19.) After a brief redirect, the State rested. (App.155, line 21-App.156, line 16.)

Gurley renewed all motions and specifically revisited his objection regarding coaching when Kathy Crawford was on the stand. (App.156, lines 21-25.) He argued that even though Crawford was not a forensic interviewer, any expert should not indicate her opinion about whether a child victim is telling the truth, based on State v. Kromah.[1] He asserted that by saying the child was not coached, Crawford was basically saying she believed the child was telling the truth. (App.158, lines 3-11.) He then moved for a directed verdict "based on the gross inconsistency of the testimony." (App.158, lines 12-14.) The trial court denied all motions. (App.159, lines 8-14.)

Gurley presented a defense, calling multiple witnesses including family members, a neighbor, two pastors, and two witnesses who testified regarding their knowledge of Victim's mother. After the defense rested, the State decided it needed to call two rebuttal witnesses based on what the defense put into evidence. (App.288, line 24-App.289, line 2.) The State wanted to call Victim's former teacher to rebut allegations and inferences made by the defense that Victim's mother was not a good mother because she used to leave her alone in a hotel room. (App.291, lines 2-8.)

Ultimately, the jury found Gurley guilty, and the trial court sentenced him to eight years' imprisonment. (App.302-303.)

---

[1] 401 S.C. 340, 737 S.E.2d 490 (2013).

ARGUMENT

I. The Court of Appeals erred in finding the forensic video should have been suppressed based on a comment by the interviewer at the end of the video. The video was properly admitted under section 17-23-175 of the South Carolina Code, which governs admissibility, and any issue with the content did not render the video inadmissible as a whole and should have been corrected by redaction which was never asked for by Gurley.

The Court of Appeals erred finding the video recording of Victim's forensic interview was rendered inadmissible based on a comment by the interviewer at the end of the video. Admissibility of the video is governed by section 17-23-175 of the South Carolina Code, and the trial court properly found the video admissible under the statute. Further, any issue with the content of the video, including the alleged improper comment, did not render the video inadmissible as a while and could have been corrected by redaction which was never asked for by Gurley. In ruling on the admissibility of the forensic video, the Court of Appeals improperly conflated the concepts of admissibility of the entire video with whether a particular portion of the video should be redacted.

Admissibility of the video is governed by section 17-23-175 of the South Carolina Code, which provides:

> (A) In a general sessions court proceeding or a delinquency proceeding in family court, an out-of-court statement of a child **is admissible** if:
>
> (1) the statement was given in response to questioning conducted during an investigative interview of the child;
> (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
> (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and

> (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

S.C. Code Ann. § 17-23-175(A) (2014) (emphasis added). The statute provides factors for the trial court to consider in determining whether sufficient guarantees of trustworthiness are present:

> (B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, but is not limited to, the following factors:
>
> (1) whether the statement was elicited by leading questions;
> (2) whether the interviewer has been trained in conducting investigative interviews of children;
> (3) whether the statement represents a detailed account of the alleged offense;
> (4) whether the statement has internal coherence; and
> (5) sworn testimony of any participant which may be determined as necessary by the court.

S.C. Code Ann. § 17-23-175(B) (2014).

The trial court here properly considered the above factors and determined the video was admissible. Importantly, Gurley has **not** challenged on appeal the trial court's determination that the four factors provided in section 17-23-175(A) have been met. See State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) (holding an unchallenged ruling, "right or wrong," becomes the law of the case and will not be considered by the appellate court); State v. Fripp, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct. App. 2012) (stating the appellant's failure to challenge the trial court's ruling in the appellate brief renders the unchallenged ruling the law of the case). The trial court's unchallenged finding that the video recording met the requirements of section 17-23-175, and therefore was **admissible**, should have been determined by the Court of Appeals to be the law of the case.

Further, Gurley's only objection on appeal to the video recording centers around the inclusion of a single line of commentary by the forensic interviewer. The proper means for addressing Gurley's concerns was not for the trial court to declare the entire video inadmissible as asked by Gurley, and as found by the Court of Appeals, but rather would have been to redact the allegedly objectionable commentary from the video and show the remaining video to the jury. Gurley, however, never asked the trial court to redact the objectionable portion. See Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (" 'Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.' " (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006))); State v. Morgan, 282 S.C. 409, 412, 319 S.E.2d 335, 337 (1984) ("Inasmuch as the trial judge had no opportunity to pass upon the issue, the question will not be considered on appeal."). Accordingly, Gurley failed to request the one properly available remedy. The Court of Appeals erred in failing to find Gurley cannot now complain regarding the admissibility of the video when he failed to request the complained-of comment be redacted and its inclusion did not impact the trial court's determination under section 17-23-175 that the video was admissible.

Further, the commentary by the interviewer did not vouch for Victim, but instead was meant as a means of providing solace and comfort for the child. The State did not maintain the forensic interviewer was "acting" in the sense of putting on a play or a stage performance, as was found by the Court of Appeals. At trial, the State explained:

> And as far as B.G. broke the rules, I mean I think given the totality of the circumstances and the fact that she was in that room and the interviewer needed to make the child feel safe, needed to make the child feel as if she could say whatever she wanted to and that it would be okay, and she told her the rules are you have to tell the

> truth, I think that she was **acting**, you know, **as she should and would in any other circumstance, just like this**.

(App.142, 3–10). A clear reading of the statement indicates the solicitor argued the forensic interviewer was behaving as she should or treating the child as she should, not auditioning for the theater. While the Court of Appeals correctly cited State v. McKerley, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (Ct. App. 2012), for the proposition: "If 'there is no way to interpret [the witness]'s testimony other than as her opinion that the victim was telling the truth,' the testimony is inadmissible," this statement of law is not applicable in this case where there is a clear interpretation of the statement that is not vouching or impermissible bolstering. See Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) ("[A] court should not lightly infer . . . an ambiguous remark to have its most damaging meaning . . . from the plethora of less damaging interpretations."). As the State has continuously argued, there is another way to interpret the testimony. Indeed, it is clear the trial judge did interpret it another way. The State's argument all along has been the comment was made to help the child feel safe and comfortable. The trial court clearly did not believe the forensic interviewer was vouching for the victim and, instead, interpreted the comment as merely a calming or reassuring comment. The Court of Appeals erred in focusing solely on the one interpretation which would lead to the comment being considered impermissible vouching or bolstering, and failing to recognize other interpretations of the comments which would not need redacting, and certainly not impact the admissibility of the entire video.

The State submits the Court of Appeals improperly found the comment at issue rendered the video inadmissible. Admissibility of the video as a whole is governed by section 17-23-175, and Gurley has not challenged the trial court's findings that the video met the four requirements of that section for admissibility. As a result, the Court of Appeals should have determined the

admissibility of the video to be the law of the case. The Court of Appeals overlooked the requirement and burden for Gurley to ask for redaction of the specific comment if it is considered improper. The ruling by the Court of Appeals places the burden on the State to redact any possibly improper comment to prevent later reversal instead of placing it on Gurley to establish the comment was improper and should be redacted. The effect of the Court's opinion in the instant case is to potentially render the entire video inadmissible on remand for a new trial, when the appropriate remedy should have been to redact only the allegedly improper comment. This Court should grant the Petition for Writ of Certiorari, find the video was correctly determined to be admissible by the trial court under section 17-23-175, find redaction would have been the proper remedy but Gurley failed to request redaction, and reverse the decision of the Court of Appeals.

II. The Court of Appeals erred in finding comments by the State's expert regarding coaching impermissibly bolstered or vouched for the child victim. The responses were not impermissible bolstering or vouching. The Court of Appeals erred in failing to find the comments, even if in error, were harmless in light of other testimony in the record.

The Court of Appeals erred in finding comments by the State's expert impermissibly vouched for or bolstered Victim. Even if the comments were improperly admitted, the Court of Appeals erred in not finding the error harmless in light of other testimony in the record.

The Court of Appeals considered the question in this case in light of its prior opinion in State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011), and attempted to distinguish the current case from Hill. The Court of Appeals erred in finding Hill was not directly on point in this case as the testimony from the experts involved in both cases were remarkably similar. In Hill, as explained by the Court of Appeals' opinion, the Court considered a similar argument that improper testimony was admitted regarding coaching. Specifically, the Court explained:

> Hill argues that the State was wrongly permitted to ask the expert about the red flags he looked for to indicate a child was coached in the offered testimony, and that one of the things he looked for in an un-coached, truthful child was detailed account. **He contends, upon the expert answering the question so as to indicate that he did see the details in the interview with Victim, the jury was clearly informed the expert believed the child was uncoached and truthful.** Under these circumstances, Hill asserts the trial judge erred in allowing the State to offer expert testimony that could be construed as indicating the expert's opinion was that the child witness was truthful and had not been coached.

Id. at 294, 715 S.E.2d at 376 (emphasis added). In finding the testimony was properly admitted, this Court explained:

> [T]he forensic interviewer never addressed the veracity of Victim. He testified only that **he saw the types of details** in Victim's interview that he would look for to determine whether a child had been coached. **He gave no opinion** on whether Victim was being truthful, or even that Victim had not, in fact, been coached.

Id. at 295, 715 S.E.2d at 376–77 (footnote omitted and emphasis added). The same type of statement occurred in this case, and the Court of Appeals improperly distinguished the clear holding of Hill in finding error in the admission of Crawford's testimony.

The Court of Appeals distinguished Hill by finding the State asked for an opinion from Crawford on whether Victim had been coached. In other words, while not distinguishing the answer, which would be the only source of the impermissible bolstering, the Court of Appeals instead distinguished the question asked. The Court of Appeals ignored the response from Crawford. Even assuming the question asked by the State was not the best formed, the **answer** by the expert certainly did not provide for vouching or bolstering of Victim because Crawford offered **no opinion**. When asked: "Did you see any evidence of coaching with Victim?" Crawford responded:

> **All I can say is** that when I met with Victim and when she drew these pictures, we went back over and only Victim and I were in the room. The mother was not in the room at all. And Victim was very detailed about the location of where it happened, and she was so detailed she even told me what pictures were on the walls, what clothes she wore the time that she was in the car.
>
> . . . .
>
> And she was consistent.

(App.117) (emphasis added).

Crawford's response makes it clear she could not give an opinion regarding whether Victim was coached. Had she chosen to give an opinion, it would have necessitated a simple yes or no response. Instead, she did not respond to the question with an opinion on whether the child was actually coached, but instead explained to the jury her personal observations and other factual information, which the jury could then use to determine whether the child victim was

coached. Crawford indicated who was in the room and who was not in the room—personal observations and statements of a fact. She indicated the child was detailed about the location and could describe pictures on the wall and clothes that she wore—again not an opinion about the veracity of the child but merely personal observations and statements of the type of information Crawford was supplied by Victim. Crawford, just as the expert in Hill, "gave no opinion on whether Victim was being truthful, or even that Victim had not, in fact, been coached." Crawford merely related to the jury what she observed and what she was told as "[a]ll I can say," and then properly allowed the jury to reach the conclusion on whether the child was coached.

This Court has recognized that witnesses, even ones involved in child sexual abuse cases, can provide the jury with testimony regarding their personal experiences and observations and the "particulars of their examinations." See State v. Anderson, 413 S.C. 212, 221 n.6, 776 S.E.2d 76, 80 n.6 (2015) ("fact-based testimony can include, . . . the 'particulars' of their examinations, and their personal observations.'"); State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013) (even allowing forensic interviewers to testify to "any personal observations regarding the child's behavior or demeanor"); Nickles v. Seaboard Air Line Ry., 74 S.C. 102, 54 S.E. 255, 264 (1906) ("As a rule, witnesses are expected to testify to facts, and it is for the court or jury to draw conclusions and form opinions upon the facts thus brought before them.").

Further, one of the particular portions of the testimony found objectionable by the Court of Appeals was Crawford's testimony that the child victim's testimony was consistent. The use of the word "consistent" in this case is significantly different than the use of that word or similar words this Court has found harmful in the past. For example, in Kromah, this Court found similar testimony regarding a "compelling finding" to be impermissible vouching. Kromah, 401

S.C. at 360, 737 S.E.2d at 500. Other cases have referenced similar language: State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) (finding statement that the children provided a "compelling disclosure" to be inappropriate and inadmissible bolstering); Smith v. State, 386 S.C. 562, 564–65, 689 S.E.2d 629, 631 (2010) (finding a statement by the forensic interviewer that the victim's disclosure was "believable" to be impermissible bolstering). In this case, the testimony merely indicated the child's statements to Crawford were consistent each time they were given by the child. This testimony was also permissible to refute the clear implications from Gurley's cross-examination of the victim and later witnesses regarding the accuracy and inconsistencies in Victim's testimony.

In this case, Crawford only testified to her personal observations, the demeanor of the child, and the particulars of her examination of the child. Nothing in her testimony indicated to the jury her belief the child was or was not coached or that the child was or was not telling the truth. As a result, the testimony admitted was entirely proper and the Court of Appeals erred in finding it was improper testimony.

Further, any error was harmless because all the objectionable testimony was otherwise admitted without objection. The Court of Appeals found four main comments by Crawford forced its conclusion that her answer can only be interpreted as an opinion that the Victim had not been coached. Two of the four, the fact she and Victim were alone in the room and the fact the mother was not in the room, were previously discussed without objection while Crawford discussed the pictures drawn by Victim. Crawford was specifically asked whether the mother was in the room with her and Victim when the pictures were drawn and Crawford responded: "Oh, no. No, ma'am" without objection. (App.114-115). Additionally, Crawford indicated only she and Victim were in the room discussing the abuse for all but the first session when the

mother was present to make the child comfortable. (App.115). In addition, Crawford began discussing the incidents relayed to her by Victim and specifically indicated Victim "was very detailed about the room that it occurred in." (App.117). Gurley did not raise any objection to this testimony. This comment is remarkably similar to the third comment relied upon by this Court to find error in Crawford's testimony, and is again admitted without objection. Finally, the fourth statement this Court found error in was the fact Victim was consistent. However, this exact statement came in without objection from Gurley during Crawford's testimony. Crawford testified: "she was very consistent with that." (App.117). As a result, even if the statements could be interpreted as an opinion regarding Victim not being coached, all four of the statements were admitted without objection by Gurley. See State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other un-objected to evidence is harmless); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 443 (1978) (stating that admission of improper evidence in harmless when it is cumulative to other, unobjected-to testimony). Any error would be entirely harmless as the jury would have the exact same information to consider even if the trial court had prohibited the response to the question on coaching. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (Error is considered harmless where it could not reasonably have affected the outcome of the trial.); State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."); State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996) (stating that error is harmless beyond a reasonable doubt if it does not contribute to the verdict).

Finally, the Court of Appeals seems to take issue with Crawford's testimony that children are usually coached by the offender not to tell. Gurley never objected during Crawford's discussion of the contents of the pictures drawn by Victim. After Crawford was asked whether she had worked with a child who has been coached, she responded: "The times that I believe that I have worked with children that have been coached is usually when they are coached by the offender not to tell." Gurley **never** objected to the question or the answer. The Court of Appeals should not have relied on them to support its conclusion Crawford's testimony was in error.

This Court should grant the petition for writ of certiorari because the Court of Appeals erred in finding the testimony impermissible vouching or bolstering. Even if improper, the Court of Appeals should have concluded any error was entirely harmless.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Attorney General
S.C. Bar No. 15608

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

December 20, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Florence County
Hon. William H. Seals, Jr., Circuit Court Judge
Appellate Case Tracking No. 2015-000235

The State, Petitioner,

v.

Bryant Christopher Gurley, Respondent.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Petition For Writ of Certiorari to the Court of Appeals and Appendix by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jack B. Swerling, Esquire
1720 Main Street, Suite 301
Columbia, South Carolina 29201

Katherine Carruth Goode, Esquire
Post Office Box 1175
Winnsboro, South Carolina 29180

I further certify that all parties required by Rule to be served have been served.
This 20th day of December, 2017.

Anne Mueller

ANNE A. MUELLER
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

December 20, 2017

Jack B. Swerling, Esquire
1720 Main Street, Suite 301
Columbia, South Carolina 29201

Katherine Carruth Goode, Esquire
Post Office Box 1175
Winnsboro, South Carolina 29180

Re: State v. Bryant Christopher Gurley
Appellate Case Tracking No. 2015-000235

Dear Mr. Swerling and Ms. Goode:

I am enclosing two (2) copies of the Petition for Writ of Certiorari to the Court of Appeals and the Appendix in the above-referenced case.

If you have any questions concerning this matter, please contact me.

Sincerely,

William M. Blitch, Jr.
Senior Assistant Attorney General
S.C. Bar No. 15608

WMB/aam

cc: Honorable Daniel E. Shearouse (original and six enclosed)
Honorable Jenny A. Kitchings
Victim Services (enclosure)