STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Court of General Sessions
Robert E. Hood, Circuit Court Judge

Appellate Case No. 2017-000823

THE STATE,

Respondent,

v.

JAMIE L. STROMAN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Is a trial court required to make specific findings on the record of 702 threshold factors before admitting expert testimony where opposing counsel does not contest the witness's qualifications or reliability or request specific findings thereof and record shows that witness was qualified?

STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Appellant for two counts of Criminal Sexual Conduct with a Minor in the first degree. Appellant proceeded to jury trial on March 27, 2017, before the Honorable Robert E. Hood. Appellant was represented by Aimee Zmroczek, Esquire. Respondent (the State) was represented by Assistant Solicitors Rhonda Patterson and Bradley Pogue. Following a four-day trial, a jury convicted Appellant on both counts. Judge Hood sentenced Appellant to concurrent 35 year terms of incarceration. Appellant filed a timely notice of appeal and submitted an initial brief. This initial brief of Respondent follows.

STATEMENT OF FACTS

The victim in this case (Victim) was between six and eight years old when she was molested by Appellant. (Tr. 364). Appellant was in a long-term relationship with Victim's mother (Mother), and lived with Mother, Victim, and Mother's second child at an apartment in the town of Lexington from 2012 through early 2014. (Tr. 362, 553). Victim would sometimes stay with her biological father, who had an informal shared custody arrangement with Mother. (Tr. 556).

In March 2014, Victim began experiencing vaginal discharge at school. (Tr. 558). Mother was called, and she picked up Victim from school to take her to see a doctor. (Tr. 558). On the way to the hospital, Victim disclosed to Mother that she had been sexually abused by her biological father. (Tr. 558). Biological father was subsequently charged and his case was pending at the time of Appellant's trial. (Tr. 96).

Victim began counseling with Lacy Musgrove at the Dickerson Children's Advocacy Center in Lexington in April 2014. (Tr. 367). On May 7, 2014, Appellant was arrested and jailed pursuant to an unrelated arrest warrant. (Tr. 538). At a counseling session in June 2014, Musgrove learned from Mother that Appellant would soon be returning to the household. (Tr. 367). When Musgrove asked Victim how this made her feel, Victim became very upset and disclosed to Musgrove that she had also been sexually abused by Appellant. (Tr. 368). Musgrove reported the incident to law enforcement. (Tr. 370).

On June 18, 2014, Brooke Wymer conducted a forensic interview. (Tr. 385). Victim disclosed that Appellant had sexually assaulted her in her bedroom. (Tr. 385-86). On June 26, 2014, Victim was examined by Kate Chappell, a nurse affiliated with the Dickerson advocacy center. (Tr. 459). Victim's exam was normal. (Tr. 463). Chappell explained this was not

surprising because of the amount of time that had passed since the time of the alleged abuse. (Tr. 463).

Christopher Ellisor, a detective at the Lexington Police Department, was assigned to investigate Victim's case. (Tr. 475-77). After receiving a report of Victim's forensic interview, Ellisor arranged an interview with Appellant. (Tr. 478). After first denying the allegations, Appellant eventually admitted to digitally penetrating Victim, and rubbing her bottom and clitoris. (Tr. 488). Ellisor testified Appellant exhibited non-verbal clues during the interview, rubbing his crotch when detailing the acts he performed on Victim. (Tr. 489). Victim testified at trial that Appellant penetrated her with his penis, fingers, and tongue on more than one occasion when she was six, seven, and eight years old. (Tr. 360-364). Victim testified the abuse continued until Appellant's May 2014 arrest. (Tr. 364).

Appellant testified he had not molested Victim, and claimed his admissions to police were falsely made in an attempt to minimize the amount of time he would spend incarcerated. (Tr. 548-549). Appellant also offered Alan Hirch, a college professor from Massachusetts, as an expert witness in the field of interrogation and false confessions. (Tr. 338). Hirsch testified to his knowledge of false confessions, and stated he believed Ellisor's interrogation of Appellant was "aggressive." (Tr. 345). Appellant called Victim's mother as a witness. (Tr. 552-576). Mother testified about the facts of Victim's disclosures and subsequent interactions with Victim's biological father and biological father's mother (Nana). (Tr. 566). Mother testified she had a falling out with Nana in the aftermath of Victim's initial disclosure, and eventually obtained a restraining order against her, but that Victim was allowed to communicate with Nana on several occasions thereafter. (Tr, 566-570). Finally, Appellant called Detective Tricia Stoner from the Lexington Police Department, who investigated the case against Victim's biological

father. (Tr. 577). Stoner testified she and Ellisor had little communication regarding the two cases, but that Ellisor notified her about the confrontation between Mother and the biological father's mother. (Tr. 579).

In a pre-trial motion, Appellant requested that the court preclude the State from calling Heather Smith as an expert witness. The court held heard arguments from the parties regarding the admissibility of Smith's testimony. Citing *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), the State told the court it intended to offer Smith as a blind expert in child abuse dynamics and disclosure, and argued that her testimony would assist the jury in understanding the general behavioral characteristics of child abuse victims. (Tr. 207-208). Appellant argued that the State was attempting to "backdoor Kromah." (Tr. 209). Appellant initially argued that Smith should not be allowed to testify at all because, as a blind expert, she had no personal knowledge of the case. (Tr. 209). Later, Appellant argued that because Smith was provided some of the facts of the case from the solicitor's office, she wasn't a true blind expert, and should not be allowed to testify for that reason.[1] (Tr. 212). The court indicated its belief the testimony would be appropriate pursuant to case law because the phenomenon of delayed disclosure is not within the ordinary knowledge of a lay person.[2] (Tr. 213). The Court ruled Smith's testimony would be strictly limited to explaining delayed disclosure, and explained there was little danger of bolstering because Smith had no contact with Victim and was going to testify generally about

[1] "My concern is that she's going to testify to situations that mirror— that happen to hypothetically mirror this case as opposed to all— do you understand my concern?"

[2] "I mean it's hard for— listen, we all do these cases more than we all like to remember them, okay. I mean, that's a fair statement. So when we all hear a child delay disclose, none of us have a panic attack about it. But people on the street— I mean, you go home— you're in the restaurant tonight and you tell seven people that a child delay disclosed, they're all like that doesn't make any sense."

common characteristics of child sexual abuse victims and delayed disclosure of sexual abuse. **At no point did Appellant object to Smith's qualifications or the reliability of her testimony.**

The State proceeded to call Heather Smith at trial. She testified she is a forensic interviewer and treatment services coordinator at the Children's Advocacy Center in Richland County, where she had been employed for fourteen years. (Tr. 431). Smith testified she was trained to conduct child forensic interviews, including a forty-hour course known as the Child First Protocol, and completed advanced courses on interviewing children with special needs. (Tr. 432). A licensed professional counselor, Smith had conducted over 3,000 forensic interviews and counseled over 1,000 children. (Tr. 432-33). Her education included a master's degree in counseling from the Medical University of South Carolina. (Tr. 434). After conducting voir dire, Appellant renewed his objection to Smith's testimony based on "what we argued previously." (Tr. 435). **Appellant never requested the court make specific findings regarding his decision to qualify Smith as an expert.** Smith testified that child sex abuse victims often delay disclosing abuse for a variety of reasons, and that this phenomenon was common. (Tr. 436-444).

ARGUMENT

Appellant's argument that the trial court erred by not making specific findings on the record when qualifying expert witness is not preserved for review because he did not object on this basis at trial. Even had Appellant properly preserved this issue, the trial court did not err by qualifying witness as an expert in child abuse dynamics because the court conducted a proper analysis under Rule 702 SCRE, and was not required to make formal findings regarding its ruling. Finally, even if the court erred, any error was harmless because Appellant's proposed procedure would not have changed the result of the trial.

Appellant argues that the trial court erred by not making specific findings on the record regarding the admission of Heather Smith's expert testimony. However, trial courts are not required to make specific findings of their analysis under Rule 702 SCRE. Furthermore, Appellant did not object on this basis at trial, and therefore the issue is not preserved for review. Finally, any error was harmless because Appellant's proposed procedure would not have changed the result of the proceedings. For these reasons, the conviction and sentence should be affirmed.

Issue Preservation

An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. SCRE 103; *State v. Nichols*, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997). An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. *State v. Byers*, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011). A party may not argue one ground at trial and an alternate ground on appeal. *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). Where a party does not challenge a specific aspect of the court's qualification of a witness as an expert at trial, the issue is waived. *State v. Brown*, 411 S.C. 332, 340, 768 S.E.2d 246, 250 (Ct. App. 2015)

(holding "[b]ecause Appellant did not challenge [witness]' qualifications as an expert in child abuse dynamics and delayed disclosures, we decline to address the second prong of the *Watson* test."); *Tucker v. Doe*, 413 S.C. 389, 406, 776 S.E.2d 121, 130 (Ct. App. 2015). Likewise, the issue whether the trial court failed to make specific findings may not be raised for the first time on appeal. *Auten v. Snipes*, 370 S.C. 664, 674, 636 S.E.2d 644, 649 (Ct. App. 2006). Because Appellant made, at best, a generic objection under *Kromah*, this issue is not properly before this Court. Even if preserved for appellate review, the issue is without merit.

Expert Testimony

"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." SCRE 702. The trial court, in its gatekeeper role, must "decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010). Before a witness is qualified as an expert, the trial court must find (1) the expert's testimony will assist the trier of fact, (2) the expert possesses the requisite knowledge, skill, experience, training, or education, and (3) and the expert's testimony is reliable. *State v. White,* 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009). Nonscientific expert testimony must be evaluated on an ad hoc basis. *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 75, 735 S.E.2d 650, 656 (2012).

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. *State v. Barrett*, 416 S.C. 124, 129, 785 S.E.2d 387, 389 (Ct. App. 2016) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable

prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (citations omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." *State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App.2003) (citations omitted). "There is no abuse of discretion as long as 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. Goode*, 305 S.C. 176, 178, 406 S.E.2d 391, 393 (Ct. App. 1991).

There are some situations where trial courts are required by statute or precedent to make specific findings on the record. *See, e.g. State v. Bray,* 342 S.C. 23, 31, 535 S.E.2d 636, 640–41 (2000) (allowing testimony via closed-circuit television); *State v. Hill*, 314 S.C. 330, 333, 444 S.E.2d 255, 257 (1994) (setting bail in capital cases); *State v. Colf*, 337 S.C. 622, 627-29, 525 S.E.2d 246, 248-49 (2000) (impeachment with prior convictions). However, these are the exception, not the rule. Trial courts are not required to publish specific findings of 702 threshold factors before allowing expert testimony. Rather, the court is simply required to consider the relevant factors and rule on any objections raised. *State v. Cope*, 385 S.C. 274, 289, 684 S.E.2d 177, 185 (Ct. App. 2009) (finding no error where the trial court "conscientiously considered the proffered anecdotal evidence before excluding this testimony"). There is no abuse of discretion where it is evident from the record that the trial court performed the required analysis. *State v. White*, 382 S.C. 265, 271, 676 S.E.2d 684, 687 (2009) ("The finding of reliability is well

supported by the record, and we find no abuse of discretion in the admission of the dog tracking evidence."); *State v. Cain*, 413 S.C. 508, 523, 413 S.E.2d 374, 382 (Ct. App. 2015) (reversed on other grounds) (no error where trial court had "sufficient evidence" to support admission of expert testimony); *State v. Tillman*, 304 S.C. 512, 519, 405 S.E.2d 607, 611 (Ct. App. 1991) ("We find the record here supports the trial judge's qualification of Hall as an expert in distinguishing tire patterns."). Rather, an abuse of discretion occurs only when the trial court abandons its duty as gatekeeper. *State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) ("The trial judge declined to hold a hearing on the existence of this expertise, much less whether Smith possessed the necessary qualifications. The trial judge's refusal to determine Smith's qualification as a 'child abuse assessment' expert was patent error.").

Absent a specific finding of an expert's qualifications, the trial court's findings will be implied in its ruling admitting the testimony. *State v. Moorer*, 241 S.C. 487, 494–95, 129 S.E.2d 330, 334 (1963) (explaining that "[b]y permitting the doctor to testify, concerning the results of certain medical tests and examinations, the trial Judge by inference ruled that he was qualified as an expert witness"); *State v. Crandell,* 702 S.E.2d 352, 359 (N.C. App. 2010) (holding "absent a request by a party, the trial court is not required to make a formal finding as to a witness' qualification to testify as an expert witness. Such a finding has been held to be implicit in the court's admission of the testimony in question"); *Commonwealth v. Salcedo,* 540 N.E.2d 1304 (Mass. 1989) ("It is evident from the transcript that the judge believed the ... officer was qualified, and his allowing the testimony implies he made that finding"). Particularly when a party does not object to an expert's qualifications or the reliability of the proposed testimony, the trial judge is not required to make specific findings or hold unnecessary hearings. *United States v. Moore*, 521 F.3d 681, 685 (7th Cir. 2008) (holding that while courts must fulfill their

gatekeeping role, "[a] judge is not obliged to look into the questions posed by Rule 702 when neither side either requests or assists"); *United States v. Gadson*, 763 F.3d 1189, 1202 (9th Cir. 2014) (noting the inquiry into whether expert testimony is sufficiently reliable is "a flexible one" and may not require a separate pretrial hearing); SCRE 104(c) (providing trial courts should hold separate hearings on preliminary matters "when the interests of justice require"). Furthermore, it is improper for a trial judge admitting expert testimony to announce his reasoning in front of the jury. *United States v. Bartley,* 855 F.2d 547, 552 (8th Cir.1988) (noting that "[a]lthough it is for the court to determine whether a witness is qualified to testify as an expert, there is no requirement that the court specifically make that finding in open court upon proffer of the offering party. Such an offer and finding by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgment of the witnesses' expertise by the Court"). Where the propriety of certain types of expert testimony is firmly established, a trial court is not required to re-invent the wheel each time it qualifies a witness as an expert in that area. *Kumho Tire Company v. Carmichael*, 526 U.S. 137, 152 (1999) (explaining trial courts have discretion to "avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises."); *State v. Morgan*, 326 S.C. 503, 513, 485 S.E.2d 112, 118 n.4 (Ct. App. 1997) (overruled on other grounds) (noting that trial courts may rely on prior precedent when determining the reliability of expert testimony).

South Carolina courts have consistently recognized that expert testimony may be "crucial in assisting the jury's understanding of why children might delay disclosing sexual abuse, as well as why their recollections may become clearer each time they discuss the instances of abuse."

State v. Jones, 417 S.C. 319, 328, 790 S.E.2d 17, 22 (Ct. App. 2016) (quoting *State v. Brown*, 411 S.C. 332, 341–42, 768 S.E.2d 246, 251 (Ct. App. 2015)). "Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible. Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault." *State v. Berry*, 413 S.C. 118, 131, 775 S.E.2d 51, 57 (Ct. App. 2015) (quoting *State v. Weaverling*, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999)); *State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015). *See also State v. Schumpert*, 312 S.C 502, 506, 435 S.E.2d 859, 862 (1993) (holding "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. White*, 361 S.C. 407, 414, 605 S.E.2d 540, 544 (2004) (noting "[e]xpert testimony on rape trauma may be more crucial in situations where children are victims"). The propriety of expert testimony offered to explain a child's otherwise counterintuitive and impeaching reaction to sexual abuse is a cornerstone of our state's jurisprudence in this area, *see State v. Hudnall*, 293 S.C 97, 100, 359 S.E.2d 59, 61-62 (1987) (overruled on other grounds), yet Appellant cites no case requiring trial courts to make formal findings when admitting this evidence.

Here, the court heard pretrial arguments on Appellant's objection to Smith's testimony. Appellant's objection, while not articulated in specific terms, was that Smith's testimony would bolster the child victim. Appellant never objected to Smith's qualifications or the reliability of her testimony, and never requested that the court make specific findings thereof. The court ruled that Smith's testimony would be limited to the general behavioral characteristics of child abuse victims, and ruled the subject matter was relevant and outside the knowledge of lay witnesses.

The court made clear that it was familiar with Smith and her qualifications. Before being qualified as an expert, Smith testified that, in addition to her educational background and training, she had extensive experience in interviewing and counseling child victims. Her testimony was based on firsthand knowledge stemming from the more than 3,000 interviews she conducted and the more than 1,000 child victims she counseled. Smith's extensive experience, training, education, and personal knowledge of the general behavioral characteristics of child sexual abuse victims make her testimony exceedingly reliable. The trial court's ruling is well supported by the record and applicable precedents, and was an appropriate exercise of its broad discretion.

Harmless Error

Finally, any error was harmless. Even when a court is required to make specific findings, failure to do so does not warrant automatic reversal. *Marchant v. Marchant*, 390 S.C. 1, 13, 699 S.E.2d 708, 715 (Ct. App. 2010) (holding family court's failure to include specific findings does not require reversal of an attorney's fee award "as long evidence in the record supports each factor"). An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result. *State v. Kromah*, 401 S.C. 340, 360, 737 S.E.2d 490, 501 (2013); *State v. Davis*, 309 S.C. 326, 422 S.E.2d 133 (1992) (explaining even if evidence was wrongly admitted, its admission may constitute harmless error if the evidence did not affect the outcome of the trial). Because it is clear from the record that the trial court performed its gatekeeping role by conscientiously considering the scope and substance of the proposed testimony, the only purpose for remand would be for the court to formally announce its findings on the record. This would not change the result of the proceeding, and does not warrant reversal. *United States v. York*, 572 F.3d 415, 422 (7th Cir. 2009) (holding any error harmless where witness "would have

easily qualified as an expert had the court conducted the formal Rule 702 analysis"). When combined with the overwhelming evidence of guilt produced by Appellant's verbal and nonverbal admissions and the direct evidence of abuse given by Victim's testimony, any error in the trial court's procedure was harmless.

CONCLUSION

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

Respectfully submitted,

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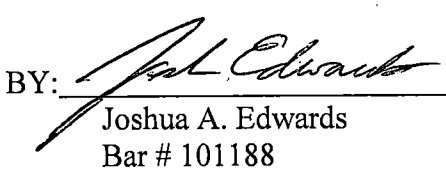
BY: 
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ATTORNEYS FOR RESPONDENT

January 16, 2018

STATE OF SOUTH CAROLINA
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APPEAL FROM LEXINGTON COUNTY
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Robert E. Hood, Circuit Court Judge

Appellate Case No. 2017-000823

THE STATE,

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v.

JAMIE L. STROMAN,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to Kathrine H. , Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.
This 16th day of January, 2018.

Anne Mueller

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ALAN WILSON
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January 16, 2017

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RE: State v. Jamie L. Stroman
Appellate Case No. 2017-000823

Dear Ms. Hudgins:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Joshua A. Edwards
Assistant Attorney General
Bar # 101188

JAE/aam
Enclosures

cc: Honorable Jenny A. Kitchings (with original and one enclosed)
Victim Services (with enclosure)