STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County
Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No. 2017-000738

THE STATE,

Respondent,

vs.

BRIAN CHRISTOPHER DAUGHERTY,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge committed no error by qualifying a witness as an expert in child sexual abuse and permitting her to testify about general behavioral characteristics exhibited by juvenile victims of sexual abuse, such as delayed and incomplete disclosures, because the witness was personally qualified to testify on that subject matter 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, met a threshold level of reliability, did not improperly vouch for or bolster the victims' testimony, and was not unduly prejudicial to Appellant.

STATEMENT OF THE CASE

In April of 2015, Appellant Brian Christopher Daugherty was arrested following an investigation into allegations he sexually abused two minor children with whom he had previously shared a home. In September of 2015, the Charleston County Grand Jury indicted Appellant for three counts of first-degree criminal sexual conduct with a minor, three counts of second-degree criminal sexual conduct with a minor, and two counts of lewd act upon a minor. In March of 2017, the Charleston County Grand Jury additionally indicted Appellant for another count of first-degree criminal sexual conduct with a minor. On March 13, 2017, a jury trial was commenced in the Charleston County Court of General Sessions with the Honorable Roger L. Couch, circuit court judge, presiding. During the course of trial, the trial judge dismissed one count of second-degree criminal sexual conduct with a minor. Thereafter, at the conclusion of the three-day trial, the jury convicted Appellant of the eight remaining offenses. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of twenty-five years for each count of first-degree criminal sexual conduct with a minor, twenty years for each count of second-degree criminal sexual conduct with a minor, and fifteen years for each count of lewd act upon a minor. Appellant then filed a timely notice of appeal.

STATEMENT OF FACTS

In February of 2015, an eleven-year-old girl ("Victim 1") living in Goose Creek, South Carolina, spoke with her fifteen-year-old older sister ("Victim 2") one evening, and, during their conversation, the two revealed to each other they had been sexually abused by Appellant, who was the boyfriend of their aunt ("Aunt"), a few years earlier when they shared an apartment with him and several of their family members, including their grandmother ("Grandmother"). (Tr. pp. 78-81; pp. 101-103; pp. 129-132; pp. 166-167; p. 184; p. 193; pp. 212-213; pp. 244-246; p. 254; p. 286). Following the disclosures, the girls began to cry, and their stepfather ("Stepfather") checked on them to see what was wrong. (Tr. p. 101; p. 167; pp. 197-199; pp. 258-259). When he did so, the girls revealed the sexual abuse to him, and he promptly alerted their mother ("Mother") of the disclosures. (Tr. p. 101; p. 167; pp. 197-199; pp. 260-261). Thereafter, upon speaking with the girls about the abuse, Mother contacted law enforcement in regard to their disclosures, and the girls were then taken to the Dorchester Children's Center for forensic interviews in which they again disclosed they were sexually abused by Appellant. (Tr. pp. 102-103; p. 168; pp. 173-174; pp. 261-263; p. 286; pp. 318-320).

Subsequently, Appellant was arrested and indicted for multiple counts of criminal sexual conduct with a minor and lewd act upon a minor, and he elected to proceed forward to trial. (Tr. pp. 7-8; Indictments). During trial, Victim 1 and Victim 2 recounted the details of the sexual abuse they were subjected to by Appellant, including at their apartment and in Appellant's vehicle, when they were sharing a home with him.[1] (Tr. pp. 78-127; pp. 129-192). Specifically, Victim 1 discussed various times in which Appellant showed her pornography, digitally penetrated her vagina, attempted to insert his penis into her vagina, forced her to perform oral

[1] At the time of trial, Victim 1 was thirteen years old and Victim 2 was eighteen years old. (Tr. p. 78; p. 129).

sex on him, performed oral sex on her, groped her breasts, and kissed her on the mouth when she was between the ages of six and eight. (Tr. pp. 85-95). Additionally, Victim 1 revealed she did not disclose the abuse because Appellant threatened to hurt her if she ever did so. (Tr. p. 88). Furthermore, she acknowledged she continued to spend time with Appellant both after the abuse began and after she moved away from the apartment, and she noted she did not reveal the abuse to Mother and Stepfather until 2015 and had only earlier revealed the abuse to a friend on one prior occasion before quickly recanting when that friend indicated he had to alert others about it.[2] (Tr. pp. 99-101). Similarly, Victim 2 discussed various times in which Appellant exposed her to pornography, rubbed and fondled her breasts and vagina, digitally penetrated her vagina, performed oral sex on her, partially inserted his penis into her vagina, forced her to "sort of grind against" his penis in his vehicle, and exposed his penis to her in a pool beginning when she was around the ages of nine or ten. (Tr. pp. 134-156). Additionally, Victim 2 confirmed she did not finally reveal the abuse until 2015, and she acknowledged she had previously denied being sexually abused by Appellant to a law enforcement officer after one of her friend's mother's contacted authorities following a disclosure of the abuse to her friend. (Tr. pp. 163-169, p. 173; pp. 181-182). Furthermore, Victim 2 conceded her first detailed disclosure of the abuse did not occur until she participated in the forensic interview, and she indicated she regretted making the disclosure because she felt like it was tearing her family apart.[3] (Tr. p. 168; pp. 185-186).

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[2] On cross-examination, defense counsel elicited testimony from Victim 1 establishing Victim 1 did not immediately disclose the sexual abuse to Grandmother after it occurred. (Tr. p. 115). Furthermore, defense counsel elicited testimony from Victim 1 establishing Victim 1 both did not reveal all the details of the abuse and revealed details inconsistent with her trial testimony during her forensic interview. (Tr. p. 109; pp. 119-120).

[3] Notably, defense counsel elicited the testimony regarding when Victim 2's first detailed disclosure was made on cross-examination. (Tr. pp. 185-186). Furthermore, defense counsel

In addition to the victims' testimony, Stepfather and Mother testified about the girls' disclosures of the abuse and their ensuing responses, and a recording of Victim 1's forensic interview was admitted into evidence and played for the jury. (Tr. pp. 197-200; pp. 212-213; pp. 258-264; pp. 318-319). Additionally, consistent with the victims' testimony, each of the friends Victim 1 and Victim 2 made earlier disclosures to confirmed the victims had revealed the sexual abuse to them in the past, and Victim 2's friend indicated the authorities were contacted about it after her mother discovered evidence of the disclosure. (Tr. pp. 233-237; pp. 240-243). Furthermore, testimony was presented establishing several items, including a laptop computer and multiple pornographic movies, were collected from Appellant's residence after the disclosures were made, and a forensic analyst confirmed the laptop contained 241 pornographic videos, over 9,000 pornographic images, and evidence of over 5,000 searches for pornographic websites conducted between May of 2009 and May of 2011. (Tr. pp. 226-229; pp. 292-294).

As the trial continued forward, the solicitor called Dr. Carole Swiecicki, the executive director of the Dee Norton Lowcounty Children's Center, to the witness stand. (Tr. p. 328). At the outset of her testimony, Dr. Swiecicki discussed her background in the field of child sexual abuse and explained she had three years of experience as the executive director of a children's advocacy center, had received specialized training in regard to sexual abuse, and possessed a bachelor's degree in psychology, a master's degree in clinical psychology, and a doctorate in clinical psychology. (Tr. pp. 329-330). She further indicated she had been a licensed psychologist in South Carolina for nearly a decade, was a member of multiple professional organizations related to psychology and child abuse, had drafted several published peer-reviewed articles on topics related to child sexual abuse, had testified as an expert in regard to the

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elicited testimony from Victim 2 establishing she did not reveal all the details of the sexual abuse during her forensic interview. (Tr. p. 174).

dynamics of child sexual abuse on approximately fifteen prior occasions, and had given multiple presentations about child sexual abuse, including in regard to the reasons why children disclose sexual abuse and how children respond to sexual abuse. (Tr. pp. 329-331).

Following the presentation of that testimony, the solicitor moved for Dr. Swiecicki to be qualified as an expert in the field of child sexual abuse, and defense counsel objected. (Tr. pp. 331-332). In support of his objection, defense counsel asserted he was not challenging the witness's personal qualifications but, instead, was contending the field in which she was being offered was allegedly not an area of expertise and was not outside the common knowledge of the typical juror. (Tr. p. 332). In response, the trial judge conducted an in camera hearing to get additional clarification regarding the objection, and defense counsel explained he did not believe the witness would testify to anything the common juror would not know and would not provide testimony that would help the jurors decide "something that they didn't already know." (Tr. p. 333). However, defense counsel readily conceded his position was directly contradicted by relevant South Carolina case law. (Tr. p. 334). In rebuttal, the solicitor asserted the subject matter of Dr. Swiecicki's testimony was, in fact, beyond the knowledge of the average juror, had been recognized as proper by prior appellate decisions in South Carolina, and had already been made pertinent by the questions asked earlier during trial by defense counsel. (Tr. pp. 334-336). Thereafter, upon confirming the expert knew nothing about Appellant's case, the trial judge overruled defense counsel's objection and qualified Dr. Swiecicki as an expert in the identified field.[4] (Tr. pp. 338-339).

After she was properly qualified as an expert, Dr. Swiecicki specifically informed the jury she was solely offering general testimony and was not making any statements regarding the

[4] As part of his ruling, the trial judge cautioned the expert witness to avoid bolstering any stories or statements that had been made during the course of trial. (Tr. p. 338).

credibility of any of the witnesses who testified during trial. (Tr. pp. 339-340). Then, during her ensuing testimony, Dr. Swiecicki explained a disclosure of abuse is considered to be delayed if it is over a month old, stated slightly over half of abused children delayed disclosing abuse for over a month, and confirmed she had personally observed delays in disclosure during the course of her career. (Tr. pp. 340-341). Dr. Swiecicki further explained studies had indicated children fail to disclose for a variety of reasons, including fear of getting in trouble, fear of angering a parent, fear of upsetting a parent, fear of consequences to the offender, or fear of no longer being liked. (Tr. pp. 341-342). She also noted the offender is frequently someone known to the child and indicated it was more common for disclosures to be delayed when a family member, such as an uncle or stepparent, is the abuser.[5] (Tr. pp. 342-343). Similarly, Dr. Swiecicki explained younger children and chronically-abused children are more likely to delay disclosure, and she stated threats to hurt the child, a family member, or a pet sometimes can lead to a delayed disclosure while noting delays can also occur even when no threats are made. (Tr. p. 344). Additionally, Dr. Swiecicki explained disclosures are sometimes not initially complete and all the details, which tend to be revealed over time, are not revealed as a way for the child to gauge how the person to whom the disclosure is being made will react, and she noted the factors affecting disclosures may still be applicable even when the abuse is no longer occurring or the victim is no longer in contact with the abuser. (Tr. pp. 344-346; pp. 349-350). Likewise, she explained disclosure is a process, noted disclosures can be purposeful or accidental, and indicated research suggests children most frequently initially disclose to their mothers or peers. (Tr. pp. 347-349). Furthermore, Dr. Swiecicki indicated memory can be affected by whether the

[5] When that testimony was introduced, defense counsel raised an objection on the grounds of bolstering, and the trial judge overruled the objection in light of the general nature of the testimony. (Tr. p. 343).

abuse occurs only once or more frequently, and she noted sexual abuse can result in "sexual behavioral outcomes," outbursts, self-injurious behavior, thoughts of self-harm, acts of self-harm, tantrums, acts of defiance, sadness, nervousness, jumpiness, nightmares, depression, and post-traumatic stress disorder. (Tr. pp. 352-353). However, Dr. Swiecicki expressly cautioned no behavior exhibited by a child can be used to diagnose whether someone had been sexually abused. (Tr. p. 352). Finally, Dr. Swiecicki indicated children frequently exhibit a flat affect or emotionlessness during forensic interviews as opposed to crying and being upset, and she explained a child's reaction to sexual abuse often is dependent on the child's individual thought process. (Tr. pp. 353-354).

Following the presentation of that testimony, defense counsel cross-examined Dr. Swiecicki and again elicited testimony establishing no behavior—including the behavior she had discussed during her testimony—was diagnostic of sexual abuse. (Tr. pp. 355-356). Additionally, defense counsel elicited testimony from Dr. Swiecicki indicating research existed on children making false accusations, and the expert noted it was possible for a child both to make a false accusation and to identify the wrong abuser. (Tr. pp. 356-357). However, in responding to defense counsel's questions, Dr. Swiecicki noted research had indicated false disclosures only occur in a small minority of cases while indicating some specific research found false disclosures in just two to seven percent of cases. (Tr. p. 357; p. 360).

At the conclusion of Dr. Swiecicki's testimony, defense counsel moved in camera for the trial judge to strike the expert's testimony in its entirety in light of the fact the testimony he admittedly elicited regarding the percentages of false disclosures was purportedly improper. (Tr. pp. 361-363). After considering the matter, the trial judge declined to strike Dr. Swiecicki's testimony as a whole due to the fact it was general testimony about an area of psychology and

could not be construed as a comment about the specifics of Appellant's case but agreed to strike the response defense counsel elicited regarding the percentages of false disclosures. (Tr. pp. 368-370). Thereafter, the trial judge instructed the jury to disregard the questions and answers related to research indicating certain percentages of disclosures had been found to be false. (Tr. pp. 379-680).

Subsequently, Appellant testified in his own defense, asserted he never raped or molested Victim 1 and Victim 2, denied ever inappropriately touching the girls, alleged he never went to or left the pool alone with the girls, and claimed he never exposed either girl to pornography. (Tr. pp. 382; pp. 385-389). However, Appellant conceded he was frequently alone with the girls in his car, and he readily acknowledged there was pornography on the laptop in his home and on his cell phone. (Tr. p. 387; pp. 399-401; p. 405). In addition to his own testimony, Aunt and Grandmother also testified on Appellant's behalf. (Tr. pp. 413-463). During her testimony, Aunt claimed she could not recall Appellant ever being alone with either of the girls at the pool, alleged she and Appellant viewed pornography as part of their relationship, and acknowledged Appellant frequently picked her up from work with Victim 1 in the car.[6] (Tr. p. 420; pp. 423-424; p. 431). Furthermore, Aunt asserted the girls continued to visit with them after they moved to their new home, and she stated she elected to stay in a relationship with Appellant after the allegations arose in light of the fact she did not believe them. (Tr. pp. 426-427; p. 432). Similarly, Grandmother claimed Appellant never escorted the girls to and from the pool alone, noted she continued her relationship with Appellant after the allegations arose, and maintained

[6] Following Aunt's testimony, Michelle Harder, the district manager of Aunt's place of employment, testified in rebuttal, confirmed Appellant frequently arrived to pick Aunt from work nearly an hour early with one of the girls in the car with him, and noted Aunt was often upset about Appellant's habit of viewing pornography. (Tr. pp. 465-468; p. 470).

the girls continued to regularly visit after they moved to their home in Goose Creek. (Tr. p. 444; pp. 448-450; pp. 455-456).

Thereafter, at the conclusion of the evidentiary phase of trial, the parties presented their closing arguments to the jury. (Tr. pp. 475-519). During the solicitor's closing remarks, the solicitor noted the victims delayed disclosing the abuse and acknowledged the delays made the prosecution more difficult while also supporting an accusation of fabrication. (Tr. pp. 477-478). However, relying on Dr. Swiecicki's testimony, the solicitor pointed out delayed disclosures were common in sexual abuse cases, and she noted the expert explained chronic abuse can lead to memory issues. (Tr. p. 476; p. 480). Then, during defense counsel's closing remarks, defense counsel called the jury's attention to Dr. Swiecicki's testimony, noted he objected to it because it focused on things the jurors "kn[e]w as jurors," and asserted: "[W]e all know that memories can be defective. We all know that we can forget things and that as we tell stories we can add to them or take away from them as we talk about them. That's common sense. That's not expertise." (Tr. p. 503). At that point, defense counsel accused the solicitor of bringing Dr. Swiecicki to trial to "explain away" discrepancies, contradictions, exaggerations, failures, and lies, and he further alleged the expert had tried to convince them children do not lie or exaggerate. (Tr. p. 504). After making those remarks, defense counsel asserted the jurors should not believe Victim 1 because inconsistencies existed between her testimony and her statements during the forensic interview and should not believe Victim 2 because she testified to details she did not reveal in her forensic interview.[7] (Tr. pp. 504-506; pp. 511-512).

[7] At the conclusion of the parties' closing arguments, the trial judge instructed the jurors on the applicable law and, as part of his jury charge, presented an instruction to the jury that improperly singled out the testimony of juvenile witnesses while appearing to incorrectly suggest the testimony of such witnesses warranted more scrutiny than the testimony of other witnesses. (Tr. pp. 520-542). Specifically, the trial judge instructed the jury: "[D]uring the trial you heard

Subsequently, at the conclusion of trial, the jury convicted Appellant of four counts of first-degree criminal sexual conduct with a minor, two counts of second-degree criminal sexual conduct with a minor, and two counts of lewd act upon a minor. (Tr. pp. 565-566). Following the verdict, the trial judge sentenced Appellant to an aggregate term of imprisonment of twenty-five years. (Tr. pp. 578-579).

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testimony from witnesses who were under the age of 18. They would be considered to be a child or a minor in this state. Where a witness is a child you the jury must determine as with any other witness whether the testimony given is believable. In deciding believability you can consider not only matters that I have already discussed about believability, you may also consider the age of the child testifying, the child's ability to observe and remember the facts, the child's ability to understand and answer questions, because children sometimes don't understand the procedures in a courtroom. It is up to you to decide whether the child understood the seriousness of appearing as a witness in a criminal trial, whether the child understood the questions, whether the child had a good memory and whether the child understands the difference between the truth and untruthful matters. So it's up to you to decide whether or not the child understood the questions being asked; in other words, you should weigh that testimony as part of your determination of the facts. You should determine the credibility of all of the witnesses in the case." (Tr. pp. 536-537).

ARGUMENT

The trial judge committed no error by qualifying a witness as an expert in child sexual abuse and permitting her to testify about general behavioral characteristics exhibited by juvenile victims of sexual abuse, such as delayed and incomplete disclosures, because the witness was personally qualified to testify on that subject matter 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, met a threshold level of reliability, did not improperly vouch for or bolster the victims' testimony, and was not unduly prejudicial to Appellant.

Appellant contends the trial judge abused his discretion by qualifying Dr. Swiecicki as an expert in the field of child sexual abuse and permitting her to testify about that subject matter during trial. In support of that contention, Appellant maintains Dr. Swiecicki's testimony was not outside the common knowledge of the typical juror, could not have assisted the jury in understanding the evidence presented, and improperly vouched for and bolstered the victims' testimony. To the contrary, Dr. Swiecicki was highly qualified as an expert in child sexual abuse based on her education, training, and experience, and her testimony addressed a reliable area of specialized behavioral and psychological knowledge beyond the common knowledge of the typical juror, was critical for the jurors to be able to properly evaluate and understand the victims' seemingly unusual behavior following the sexual abuse, and did not improperly bolster or vouch for the victims in any way. Under those circumstances, the trial judge did not abuse his broad discretion by qualifying Dr. Swiecicki as an expert in child sexual abuse and permitting her to testify before the jury during trial, and Appellant suffered no undue prejudice as a result of the expert's testimony. Appellant's convictions should be affirmed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's

ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); see also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). Likewise, a decision as to whether to admit or exclude expert testimony rests within the trial judge's sound discretion and will not be reversed on appeal absent a prejudicial abuse of that discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); see State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) ("A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair.").

ANALYSIS

"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. 1997). In determining whether a witness's

knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Id. at 274, 495 S.E.2d at 467; see State v. Peer, 320 S.C. 546, 554-555, 466 S.E.2d 375, 380 (Ct. App. 1996) ("The criteria for admitting the testimony of an expert is not whether the expert holds a degree in the specialty field he seeks to testify about, but whether he has such expertise in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony."). Instead, an expert can become sufficiently skilled or knowledgeable to be able to provide an opinion helpful to the jury in a multitude of ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). Significantly, "[t]he test for qualification [as an expert] is a relative one that is dependent on the particular witness's reference to the subject[,]" and "defects in the amount and quality of education and experience go to the weight of the expert's testimony and not its admissibility." Lee v. Suess, 318 S.C. 283, 285-286, 457 S.E.2d 344, 346 (1995).

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, 398 S.C. 376, 388, 728 S.E.2d 468, 474-475 (2012). 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 White, 382 S.C. at 274, 676 S.E.2d at 688 ("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.

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). Regarding such testimony, appellate courts in South Carolina have consistently and repeatedly 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) (emphasis added); see also State v. Anderson, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) ("Certainly we recognize that there is such an expertise [in the field of child abuse assessment]: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims.").

Significantly, "[s]uch testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault." Weaverling, 337 S.C. at 475, 523 S.E.2d at 794; see also 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."). Moreover, rape trauma or 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 414-415, 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 jurors. 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 United States v. Lukashov, 694 F.3d 1107, 1117 (9th Cir. 2012) ("[The expert witness's] 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 or 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)); State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984) ("The nature . . . of the sexual abuse of children places lay jurors at a disadvantage. . . . [T]he common experience of the jury may represent a less than adequate foundation for assessing the credibility of a young child who complains of sexual abuse. If the victim of a burglary failed to report the crime promptly, a jury would have good reason to doubt that person's credibility. A young child subjected to sexual abuse, however, may for some time be either unaware or uncertain of the criminality of the abuser's conduct. . . . [U]ncertainty becomes confusion when an abuser who fulfills a caring-parenting role in the child's life tells the child that what seems wrong to the child is, in fact, all right. Because of the child's confusion, shame, guilt, and fear, disclosure of the abuse is often

long delayed. When the child does complain of sexual abuse, the mother's reaction frequently is disbelief, and she fails to report the allegations to the authorities. By explaining the emotional antecedents of the victim's conduct and the peculiar impact of the crime on other members of the family, an expert can assist the jury in evaluating the credibility of the complainant."); 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[.]"). Accordingly, both expert testimony and behavioral evidence can be admitted in child sexual abuse cases "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).

In the case sub judice, testimony was presented—including through defense counsel's cross-examination of the victims—establishing the victims did not immediately disclose the sexual abuse inflicted upon them by Appellant and, instead, delayed disclosing that abuse for a number of years. Additionally, testimony was presented—including through defense counsel's cross-examination of the victims—establishing the victims did not reveal all the details of the abuse immediately and, instead, offered disclosures that progressed over time, that were somewhat inconsistent, and that were recanted at various points. Based on that testimony regarding seemingly strange and inconsistent behavior exhibited by the victims following the sexual abuse, expert testimony was needed in Appellant's case to educate the jury in regard to delayed disclosures and other behavior characteristics commonly exhibited by juvenile victims of sexual abuse so the jurors would be able to appropriately consider and evaluate the evidence regarding the victims' behavior in light of the fact the subject matter of the dynamics of child sexual abuse is a field of specialized psychological and behavioral knowledge outside the

common knowledge and experience of ordinary jurors. See State v. Brown, 411 S.C. 332, 341, 768 S.E.2d 246, 251 (Ct. App. 2015) (finding expert testimony in a child sexual abuse case, including testimony in regard to delayed disclosures, was necessary and relevant to a fact in issue because Brown's victims delayed disclosing the abuse for nearly three years and because ordinary jurors might not have experience with issues such as delayed disclosure); see also State v. McDonnell, 141 Haw. 280, __, 409 P.3d 684, 698 (Haw. 2017) (finding expert testimony regarding the disclosure process of juvenile victims of sexual abuse was probative, not unduly prejudicial, and properly admitted where "there was no other testimony to explain why Minor may have failed to initially disclose the full extent of the abuse" aside from the expert witness's behavioral science testimony). For that reason, the State was required to—and did—present an expert in the field of child sexual abuse in order to educate the jury on that subject matter and to ensure the jury was capable of properly understanding and evaluating the evidence presented. See Anderson, 413 S.C. at 221, n. 6, 776 S.E.2d at 80 (recognizing it is necessary for a witness to be an expert to testify in regard to delayed disclosures in sexual abuse cases); see also Rule 702, SCRE ("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." (emphasis added)).

Beyond the necessity of the expert testimony in Appellant's case, Dr. Swiecicki, the expert offered by the State, was indisputably personally qualified to testify as an expert in the field of child sexual abuse as she possessed specialized knowledge regarding the behavior of juvenile victims of sexual abuse, including in regard to the disclosure process and the behavioral characteristics exhibited by juvenile victims of sexual abuse, based on her education, knowledge,

training, and experience. Specifically, Dr. Swiecicki had an extensive educational background that included a doctorate in clinical psychology, was the executive director of a children's advocacy center that regularly dealt with sexually abused children, was a licensed psychologist in South Carolina, was a member of multiple professional organizations related to psychology and child abuse, was the author of several peer-reviewed articles on topics related to child sexual abuse, had taught others about child sexual abuse, and had previously testified as an expert in child abuse dynamics on multiple occasions. See State v. Barrett, 416 S.C. 124, 130, 785 S.E.2d 387, 390 (Ct. App. 2016) (finding the trial judge properly found a forensic interviewer to be qualified as an expert in the field of "behavioral characteristics displayed by child abuse victims" where the forensic interviewer testified she was a licensed professional counselor, she had a master's degree in clinical psychology, she had training that involved working with children in situations involving allegations of sexual abuse, she had worked on multiple cases involving sexually abused children, and she had attended training seminars and educational courses regarding sexual abuse); see also State v. Carpenter, 147 N.C. App. 386, 393, 556 S.E.2d 316, 321 (N.C. Ct. App. 2001) ("Vaughn was adequately qualified in the area of child sex abuse evaluations and interviews based on her extensive experience, training, and education. Vaughn had received a masters degree in social work and later had an internship lasting two years at Duke University Medical Center where she interviewed suspected victims of child sexual abuse. At the time of trial, Vaughn was a licensed clinical social worker and her job involved evaluating and interviewing children and families when it was suspected that the children had been maltreated. Prior to this employment, Vaughn had several other jobs in which she interviewed and evaluated child victims of sexual abuse. In fact, Vaughn estimated that she had interviewed a couple thousand children throughout her career. Thus, Vaughn was properly

qualified as an expert in the area of child sex abuse evaluations and interviewing."); see generally State v. Morris, 376 S.C. 189, 204, 656 S.E.2d 359, 367 (2008) ("Despite Appellant's argument to the contrary, the status of [the witness's] law license is completely irrelevant to his qualification as an expert. The evidentiary rule governing the qualification of experts says nothing about professional licensing requirements, and a licensing requirement seems wholly incompatible with Rule 702's operational framework."). As a result, Dr. Swiecicki possessed specialized knowledge in an area of expertise beyond the common knowledge of the average juror. See Brown, 411 S.C. at 342, 768 S.E.2d at 251 (holding the subject of delayed disclosure is beyond the ordinary knowledge of a jury and necessitates expert testimony from a qualified expert); see also Schumpert, 312 S.C. at 505-506, 435 S.E.2d at 861 ("[The witness] testified she had a master's degree in social work and specialized in child and adolescent services. She attended training seminars regarding sexual abuse survivors and worked on more than one hundred cases involving sexually abused children. We find no abuse of discretion in her qualification as an expert [in the field of sexual abuse]."). Furthermore, Dr. Swiecicki's specialized knowledge was in an area that was critical for the jury to be able to properly evaluate and understand the evidence and testimony related to the victims' failure to immediately disclose what had been done to them and other seemingly unusual behavior that would not typically be expected from a victim of a crime. See State v. Rogers, 293 S.C. 505, 506, 362 S.E.2d 7, 8 (1987) ("Evidence of behavioral traits of a sexual abuse child victim may be offered to explain inconsistencies in the behavior of the alleged victim."), overruled on other grounds by State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); see also State v. Roenfeldt, 241 Neb. 30, 39, 486 N.W.2d 197, 204 (Neb. 1992) ("The reasoning for a rule allowing an expert to testify about sexual abuse in generalities, without being familiar with the alleged victim, is that '[f]ew jurors

have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship,' and 'the behavior exhibited by sexually abused children is often contrary to what most adults would expect.' " (brackets in original and citation omitted)); State v. Kaufman, 187 Ohio App. 3d 50, 85, 931 N.E.2d 143, 170 (Ohio Ct. App. 2010) (holding an expert witness was properly permitted to testify on general background information regarding delayed disclosure by juvenile victims of sexual abuse even though the expert did not know any of the specific facts related to Kaufman's victims). Accordingly, the trial judge did not abuse his broad discretion in finding Dr. Swiecicki was personally qualified to testify as an expert in regard to child sexual abuse.

Likewise, in addition to Dr. Swiecicki being personally qualified to testify as an expert, Dr. Swiecicki's testimony on the subject matter of child sexual abuse was sufficiently reliable to warrant its admission as it was based on her own education, training, experience, and participation in and knowledge of research and studies conducted on cases of sexual abuse involving juvenile victims. See John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45-46 (2010) ("Psychological research demonstrates that delayed reporting is common among sexually abused children. Frequently when children finally disclose, they give slightly different versions of the abuse to different interviewers. Finally, although there is debate about how many sexually abused children recant, it is undisputed that some children recant and some recant their recantation. Thus, from a psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such testimony is not worrisome." (footnotes omitted)). Moreover, behavioral science evidence, including behavioral science evidence regarding child sexual abuse victims, has historically been

recognized as admissible by the majority of courts in the United States, including courts in South Carolina. See Schumpert, 312 S.C. at 505-506, 435 S.E.2d at 861-862 (holding an expert in the field of sexual abuse was properly qualified to testify in regard to the victim's behavioral characteristics and the fact those characteristics were typical for victims of sexual abuse); Weaverling, 337 S.C. at 474-475, 523 S.E.2d at 794 (instructing expert testimony concerning the common behavioral characteristics exhibited by juvenile victims of sexual abuse was relevant, helpful, and admissible); see also State v. Crespo, 114 Conn. App. 346, 373, 969 A.2d 231, 248 (Conn. App. Ct. 2009) ("Such expert testimony, related to the issue of delayed reporting of sexual abuse, falls within the type of social framework testimony that has been deemed relevant in assessing a victim's conduct in cases of sexual abuse."); Harris v. State, 283 Ga. App. 374, 381, 641 S.E.2d 619, 625 (Ga. Ct. App. 2007) (recognizing experts are properly permitted to testify in regard to the typical patterns of behavior exhibited by rape victims); People v. Spicola, 16 N.Y.3d 441, 465, 947 N.E.2d 620, __ (N.Y. 2011) (recognizing the majority of states allow the introduction of expert testimony to explain delayed disclosure and other behavioral characteristics exhibited by juvenile victims of sexual abuse). Notably, demonstrating the general acceptance and reliability of such evidence, defense counsel's challenge to Dr. Swiecicki's testimony during trial was based on his unsupported contention the testimony addressed a subject matter that **everyone already knew**, and defense counsel conceded to the trial judge such testimony had already been found to be proper in South Carolina.[8] Cf. State v.

[8] Significantly, if defense counsel's contention everyone, including the jurors, already knew the things about which Dr. Swiecicki testified, it is entirely unclear how the admission of her testimony could have resulted in any meaningful prejudice of any kind to Appellant. See Thomasko v. Poole, 349 S.C. 7, 17, 561 S.E.2d 597, 602 (2002) ("It is well established that an appellant seeking reversal of a decision by the trial court must show both error and prejudice."); cf. State v. Myles, 894 So. 2d 515, 521 (La. Ct. App. 2005) (finding the admission of the

Jones, 273 S.C. 723, 732, 259 S.E.2d 120, 125 (1979) (finding the trial judge properly exercised his discretion in admitting expert testimony on "bite-mark" evidence where "[t]here was no showing that the techniques and theories employed were other than accepted by the photographic and dental communities"). Under those circumstances, Dr. Swiecicki's testimony regarding child sexual abuse was sufficiently reliable to be admitted during trial, and the trial judge committed no error by doing so.

Finally, beyond satisfying all the necessary requirements to be admitted as expert testimony, Dr. Swiecicki's testimony did **not** improperly bolster or vouch for the victims' credibility or result in any undue or unfair prejudice to Appellant. Specifically, Dr. Swiecicki, who had no personal experience with victims or Appellant's case, did not testify she believed the victims, the victims had actually been sexually abused, the victims were telling the truth, the victims' behavior suggested they were telling the truth, or the victims' disclosures were compelling. Cf. State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (finding testimony to constitute improper bolstering in a child sexual abuse case where the witness testified she recommended Chavis not be around the victim for any reason, which could only be interpreted as a statement the witness believed the victim's claim Chavis had sexually abused her); State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013) (instructing forensic interviewers should not testify about a child's veracity or tendency to tell the truth, vouch for a child's believability, state they made a compelling finding of abuse, assert they believed the child, or indicate the child's behavior suggests the child was telling the truth); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding a forensic interviewer's testimony constituted improper vouching where the interviewer testified the victims provided compelling

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challenged testimony could not have been prejudicial in light of the fact the jurors already knew precisely what the testimony revealed).

disclosures of abuse by Jennings and provided details consistent with the background information provided by the victims' mother, the police report, and other children); State v. McKerley, 397 S.C. 461, 465-466, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding a forensic interviewer's testimony to be improper where the interviewer testified about giving an opinion as to whether something happened and about consistent information and compelling findings). Instead, Dr. Swiecicki simply explained juvenile victims of sexual abuse frequently delay disclosing abuse and engage in other seemingly unusual behavior while specifically cautioning the jury on multiple occasions **no** behavior exhibited by juvenile victims could be used to diagnose sexual abuse. See Brown, 411 S.C. at 344-345, 768 S.E.2d at 252-253 (holding expert testimony regarding the high frequency of delayed disclosures in child sexual abuse cases did not constitute improper bolstering); State v. Smith, 411 S.C. 161, 171, 767 S.E.2d 212, 218 (Ct. App. 2014) (finding an expert witness did not improperly vouch for the juvenile victim in a sexual assault case where the expert did not give an indication as to his belief in regard to the victim's truthfulness and, instead, offered testimony that was "an appropriately general explanation of the medical or scientific reasons a child might not immediately disclose sexual trauma"); see also United States v. Nation, 543 F. App'x 677, 679 (9th Cir. 2013) ("Knapp testified as to the general behavioral characteristics of victims of sexual violence she had encountered during her career. No improper buttressing occurs when the expert witness testifies only about a class of victims generally, and not the particular testimony of the child victim in this case." (citations, brackets, and internal quotations omitted)). As a result, Dr. Swiecicki did not improperly bolster or vouch for the credibility or believability of the victims, and the probative value of her testimony, which was very high in light of the fact the victims delayed disclosing the sexual abuse and engaged in other seemingly unusual behavior by not fully disclosing from the outset

and by recanting at various points in time, outweighed any potential for undue or unfair prejudice.[9] See State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006) ("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."), rev'd in part on other grounds, 380 S.C. 499, 671 S.E.2d 606 (2009); see also Brown, 411 S.C. at 347, 768 S.E.2d at 254 (holding expert testimony regarding the field of delayed disclosure had a high probative value because it "was relevant to help the jury understand various aspects of the victims' behavior and provided insight into the often strange demeanors of sexually abused children"); see generally State v. Gonzalez, 150 N.H. 74, 78, 834 A.2d 354, 358 (N.H. 2003) ("We have recognized that a layperson is not capable of making such observations because 'a child's delayed disclosure of abuse, and recantation of statements about abuse, may be puzzling or appear counterintuitive to lay observers when they consider the suffering endured by a child who is continually being abused.' Because of its counterintuitive nature, expert testimony may be permitted to educate the jury about apparent inconsistent behavior by a victim following an assault ant to 'provid[e] useful information that is beyond the common experience of an average juror.' " (brackets in original and citations omitted)). Accordingly, the trial judge did not abuse his broad discretion on evidentiary matters by admitting Dr. Swiecicki's expert testimony, which

[9] Importantly, any prejudice that could have resulted to Appellant from the jury being aware of the often unusual behavior exhibited by juvenile victims of sexual abuse was from the legitimate probative force of that evidence in relation to the issues raised by the evidence presented in his case. See State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) ("The prejudice Gilchrist seeks to escape is the prejudicial impact any criminal defendant faces when the State produces relevant evidence that implicates guilt of a crime charged. 'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.' " (citation omitted)).

could have only served to assist the jury in understanding and evaluating the evidence that had been presented.[10] See State v. Artz, 54 N.E.3d 784, 800 (Ohio Ct. App. 2015) ("Artz also argues that the State called Dr. Miceli to testify solely to bolster A. and L.'s testimony. However, there is a distinction between expert testimony that a child witness is telling the truth and evidence which bolsters a child's credibility insofar as it supports the prosecution's efforts to prove that a child has been abused. Expert testimony is admissible as to the latter. That is, testimony that provides additional support for the truth of the *facts testified to* by the child, or which assists the fact finder in assessing the child's veracity is admissible. Such testimony does not usurp the role of the jury, but rather gives information to a jury which helps it make an educated determination." (citations, internal quotations, and internal parentheticals omitted)); cf. People v. McAlpin, 53 Cal. 3d 1289, 1302, 812 P.2d 563, 570 (Cal. 1991) (finding expert testimony to be admissible in a juvenile sexual abuse case where "[m]ost jurors, fortunately, have been spared the experience of being the parent of a sexually molested child" and, thus, lacked the experience needed to properly evaluate the evidence that had been presented). Appellant's convictions should be affirmed.

[10] Notably, the trial judge's admission of Dr. Swiecicki's testimony in no way interfered with defense counsel's ability to fully cross-examine the witness about that testimony, and, therefore, defense counsel was capable of exposing any flaws in regard to the expert's conclusions and opinions assuming such flaws actually existed. See People v. Gooley, 156 A.D.3d 1231, __, 69 N.Y.S.3d 127, __ (N.Y. App. Div. 2017) ("[The expert's] testimony was appropriately limited to educating the jury about child sexual abuse accommodation syndrome generally, and defendant was afforded the opportunity to cross-examine the expert witness. Under such circumstances, the testimony was properly admitted."); see also Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

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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March 12, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No. 2017-000738

THE STATE,

Respondent,

vs.

BRIAN CHRISTOPHER DAUGHERTY,

Appellant.

PROOF OF SERVICE

I, Destiny Blue, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Lara M. Caudy, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 12th day of March, 2018.

Destiny Blue

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March 12, 2018

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RE: State v. Brian Christopher Daugherty – Appellate Case No. 2017-000738

Dear Ms. Caudy:

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

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)
Victim Services