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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

Respondent,

vs.

GABRIEL BETANCOURT, JR.,

Appellant.

Appellate Case No. 2017-001016

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in allowing the therapist who diagnosed and treated the victim for post-traumatic stress disorder (PTSD) to provide expert testimony on PTSD and the symptoms of PTSD the victim suffered.

II.

The trial court did not err in allowing a therapist with extensive experience counseling victims of sexual abuse to testify about delayed disclosure and the behaviors of sexually abused children. There is no error rate in counseling, and the area of expert testimony is reliable. The testimony aided the finder of fact and was not bolstering.

III.

Because Appellant failed to show the prior accusation by Victim was false, and because the prior accusation was too remote and not similar to the present case, the trial court did not err in declining to admit evidence Victim made a prior allegation of sexual abuse.

IV.

Because defense counsel did not object to the law clerk remaining in the jury room while the jury viewed the forensic interview on a laptop, the issue is not preserved for review. Further, the trial court did not abuse its discretion, and Appellant fails to show he was prejudiced by the procedure.

STATEMENT OF THE CASE

Appellant Betancourt was indicted for three counts of criminal sexual conduct with a minor in the first degree (CSC 1st), one count of criminal sexual conduct in the third degree, one count of lewd act on a minor, and one count of disseminating pornographic material to a minor. Following trial on March 20-24, 2017, before the Honorable Donald B. Hocker, the jury found Betancourt guilty of each charge except one count of CSC 1st and the dissemination charge. Judge Hocker sentenced Betancourt to an aggregate sentence of forty-five years imprisonment.

STATEMENT OF FACTS

Caitlin Sauer was a student teacher in teacher Casey Page's classroom. The class was watching a presentation by the Julie Valentine Center. Afterwards, Victim pulled Sauer aside and told her she wanted to talk. Victim, who was ten years old, appeared timid and apprehensive when she reported she was sexually abused in her home when she was five years old. R. pp. 61-65. Sauer testified about the conversation, explaining, "She had approached me and said that she was scared at the time but now, after seeing the presentation, she knew she had to tell someone." R. p. 65, lines 22-25. Sauer told Victim she was brave and assured her she would be protected. R. p. 65, line 19 – p. 66, line 2. Sauer went through the proper channels to report the allegation. R. p. 66, lines 2-3.

Teacher Casey Page confirmed Sauer advised her Victim disclosed abuse. R. p. 83. Victim told Page she was the victim of sexual assaults occurring at her house since she was five years old. R. pp. 84-85. School counselor Clair Burnette confirmed Victim disclosed sexual abuse to her and Page. Victim said the abuse started when she was five years old and was still occurring. R. p. 92-93.

Investigator David Piccone responded to Victim's school on January 14, 2015. R. p. 104.

Victim's mother (Mother) was summoned to the school. When Investigator Piccone advised her that Victim disclosed she was sexually abused, Mother was shocked and mad at the perpetrator. R. p. 107. Subsequently, based on information he learned from the forensic interview, Investigator Piccone went to Vicitm's home to conduct a search. He found a hole in the bedroom door, and recovered a red dress, a purple tank top, and a compact disc with pornography, all serving to corroborate Victim's forensic interview. R. pp. 120-26; p. 133.

Victim was twelve years old at the time of trial. R. p. 172. She testified she lived with Mother, Betancourt, and her two brothers. They lived in several different places between the time she was five and ten years old. R. p. 174. Victim testified Betancourt touched her in ways she did not like. Betancourt started touching her when she was only five or six years old. Mother would be at work or the store. R. pp. 175-176. Victim testified the sexual abuse occurred for about five years until she was about ten years old. R. p. 177. She testified Betancourt licked her "wrong spot" and put his penis in her "wrong spot." R. p. 184. He also put his hand in her "wrong spot." R. p. 188. He put his fingers in her backside. R. p. 189. She testified she saw him ejaculate. R. p. 190. Betancourt made Victim get on her knees to perform fellatio on Betancourt. R. p. 193.

She identified a red dress. She testified the red dress was her mother's Halloween costume and Betancourt made her wear the dress with nothing on underneath. R. pp. 186-87. Betancourt showed Victim videos of "naked girls and naked guys." R. p. 392, lines 1-11. She testified Betancourt made her look through a hole in the bedroom door to watch Betancourt have intercourse with Mother. R. pp. 191-92.

Betancourt threatened to lock Victim in her room if she told anyone. R. pp. 193-94. Victim

testified she told her teacher about the abuse because, "I just felt like it was time that it should stop happening." R. p. 194, lines 9-10. Victim did not want to be at the trial, but felt it was important to testify so the jury knew the truth. R. p. 194, lines 14-21. Asked how she felt about Betancourt, Victim replied, "I feel it is just horrible that he has done that." R. p. 195, lines 1-3.

Not surprisingly, the video of the forensic interview shows Victim more comfortable and conversational compared to when she testified in front of a jury and courtroom full of strangers. She described the abuse in detail and related incidents at different residences she lived during the years Betancourt assaulted her. See State's Exhibit 3A. For instance, she described how Betancourt put his mouth on her "wrong spot" and told her she tasted good and said he needed to get inside her. (16:00 to 16:45). She said this made her feel weird and slimy. She said it happened more than one time. (16:30-17:00; 18:30). Later in the interview, she demonstrates how Betancourt told her to rub his penis and told the interviewer that Betancourt told her to move her hand up and down, like shaking a milk bottle. (47:00-47:30). Although Victim seemed relaxed during the interview, the gravity of her experience resounds chillingly when she tells the interviewer that when Betancourt made her do this, she felt like she did not want to live anymore. (47:45). Near the end of the interview, she admitted she could not wait until it was all over, and she said she wanted to "press charges" against Betancourt. (54:00-54:15).

Mother testified she divorced Betancourt's biological father when Victim was two years old. Mother testified she told Victim she left the biological father because she did not think a guy should change a daughter's diaper. Mother explained her reason for the belief was because she was raped when she was younger. R. pp. 239-40. On cross-examination, Mother confirmed she was sexually

assaulted twice. She told Victim it happened to her and told Victim she had to watch out for people. R. p. 263.

Mother met Betancourt when she was a dancer at a strip club. R. p. 240. Victim was still two years old at the time. R. pp. 240-41. Betancourt lived with Mother and Victim. Mother confirmed they moved around a lot. Betancourt watched Victim when Mother was working. Mother also was in jail for eighteen days in 2009 for an assault, and Betancourt took care of Victim during that time. R. pp. 243-48.

Mother testified on January 14, 2015, she was summoned to Victim's school. She did not know why until she was told Victim disclosed she was abused. She was hurt and angry when she was told what happened. She wanted to kill Betancourt. R. p. 251. Betancourt later came to the house to pick up his belongings. Mother confronted him and asked if he did it. Betancourt admitted he did. When she asked why, Betancourt replied, "I don't know why." Betancourt was crying. Mother testified, "He said that he had touched her was all that he told me." R. p. 253. She asked how long, and Betancourt replied it was awhile. R. p. 253.

Betancourt's mother owned the trailer they lived in – Mother was quickly evicted. Mother lived on the streets for six months while the children lived with Victim's paternal grandfather. Mother lost custody of her children as a result of these events. R. pp. 255-56. She subsequently was awarded custody again. R. p. 260.

Mother identified the red dress as a Halloween costume she never wore because it was too small. R. p. 256. She also confirmed there was a hole in the bedroom door. R. p. 258. Mother testified she followed law enforcement's advice to not talk about the abuse with Victim unless

Victim brought it up. However, Victim told her she was abused and described how Betancourt touched her as if he was turning on a light switch. R. pp. 268-69.

Robin Smith conducted a forensic interview with Victim on February 2, 2015. This interview was published to the jury as State's Exhibit 3A. R. pp. 320-23.

After the State rested its case, Betancourt testified. He admitted the pornography was his. He watched it with Mother. He denied keeping pornography on his phone. He testified when he was told about the allegations, it hurt. He admitted crying when he picked up his items, but he denied admitting to Mother that he sexually abused Victim. R. pp. 414-418. Betancourt claimed he never saw the red dress. R. pp. 431-32.

Defense counsel also called Dr. David Price. He testified about Oppositional Defiance Disorder (ODD) – which Victim was diagnosed with at five years old – and false allegations. R. pp. 501-07. On cross-examination, he testified in his experience, only between one and five percent of allegations of sexual abuse are false. R. pp. 524-25. He admitted that if a child diagnosed at five years old with ODD was not having any problems at school or home, then "maybe" the child no longer had ODD. R. pp. 525-26. Dr. Price agreed that whether or not a child lies was not criteria for ODD under DSM-IV. R. p. 522. In reply, Casey Page, Victim's teacher, testified Victim was a well-behaved child in her class. She was familiar with ODD and testified Victim did not show any traits of ODD. R. pp. 540-42.

ARGUMENT

I.

The trial court did not err in allowing the therapist who diagnosed and treated the victim for post-traumatic stress disorder (PTSD) to provide expert testimony on PTSD and the symptoms of PTSD the victim suffered.

Betancourt argues the trial court erred in allowing Dr. Erica Van Wagner, a mental health therapist, to testify that Victim suffered from post-traumatic stress disorder (PTSD) and to describe the symptoms Victim suffered. This testimony is admissible pursuant to State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Although Betancourt attempts to argue the testimony was bolstering, Dr. Van Wagner never commented on Victim's credibility.

Dr. Van Wagner testified she started treating Victim in March, 2015. R. pp. 207-08. Dr. Van Wagner testified Victim disclosed to her during therapy she was abused at her home from the time she was five years old until she was ten years old. R. p. 236. After five months, Victim stopped coming to therapy. R. p. 208. Dr. Van Wagner testified it was common for victims of sexual abuse to want to forget about the abuse. R. p. 209.

Dr. Van Wagner explained the treatment she provided, Trauma Focused Cognitive Behavior Therapy. R. pp. 209-10. She testified symptoms of PTSD include fear, anxiety, avoidance, depression, anger, and irritability. R. p. 211.

Dr. Van Wagner testified Victim reported suffering "symptoms of flashbacks, nightmares, she had trouble sleeping. She was having irritability and anger. There was a high score for avoidance symptoms, which is working to avoid things that remind her of trauma. People, places, events, things that would remind her of the event that happened." R. p. 232, lines 5-15. Dr. Van

Wagner diagnosed Victim with PTSD and ADHD. R. p. 232, lines 18-19. She scored high on the PTSD index. R. p. 233.

Counsel objected when the prosecutor asked Dr. Van Wagner if Victim displayed any symptoms of PTSD. R. p. 211. In making his objection, defense counsel complained: "My only fear is that the only conclusion that the jury's going to be left with is that the reason that she has these characteristics is because what she said happen[ed] did happen. Otherwise, she'd have no behavioral characteristics." R. p. 218, lines 5-10. In other words, defense counsel was complaining about the legitimate probative value of the evidence. See State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (finding rape trauma evidence is admissible to show that a sexual offense occurred) *overruled on other grounds by* State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016).

In Schumpert, a mental health counselor who interviewed the victim was qualified as an expert in child sexual abuse and testified the victim "was tearful, nervous, and **had fluctuating eating habits, nightmares**,[1] lethargy, hypervigilance, and problems with anger and guilt." Id. at 505, 435 S.E.2d at 861. She testified the behavioral symptoms were typical for a sexual abuse victim. Id. The Supreme Court rejected Schumpert's argument that trauma testimony could not be admitted to prove the crime occurred and held "that 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." Id. at 505, 435 S.E.2d at 862.

The trial court in the instant case found Schumpert to be "pretty close on point." R. p. 216,

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[1] Betancourt claims in his brief that Schumpert is distinguishable because the counselor's testimony in that case was limited to the counselor's observations. However, considering it is unlikely the counselor was watching the victim eat and could not observe the victim having nightmares, this

lines 4-5. The trial court's ruling was correct, because evidence Victim suffered symptoms of PTSD was admissible precisely as evidence that a crime occurred. In State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), the Supreme Court found the victim's testimony about mental trauma she suffered after she was sexually assaulted was relevant to prove the elements of criminal sexual conduct. The Supreme Court noted, "Evidence of behavioral and personality changes tend to establish or make more or less probable that the offense occurred." Id. at 381, 401 S.E.2d at 149. In State v. Henry, 329 S.C. 266, 277-78, 495 S.E.2d 463, 469 (Ct. App. 1997), this Court noted the State's expert was allowed to opine that the victim suffered from PTSD based on history provided from the victim, her mother, and the symptoms exhibited by the victim's behavior.

This Court rejected arguments the trial court should not have allowed the person who conducted a forensic interview of the victim to be qualified as an expert in child abuse characteristics and provide testimony on the behaviors of sexually abused children in State v. Barrett, 416 S.C. 124, 785 S.E.2d 387 (Ct. App. 2016). This Court concluded the trial court did not err in qualifying the interviewer as an expert, the testimony she offered regarding general behavioral characteristics was admissible, and she did not improperly vouch for the victim's credibility. Id. at 130, 785 S.E.2d at 389.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004).

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purported distinction does not ring true. Br. of App. p. 17.

Qualification of a witness as an expert and the subsequent admission of that witness's testimony are matters within the sound discretion of the trial court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

In the instant case, Dr. Van Wagner's testimony was not bolstering because, as in Barrett, Dr. Van Wagner did not comment on Victim's credibility. Further, the testimony was admissible pursuant to Schumpert as expert and factual testimony of trauma, and therefore, the trial court did not err in allowing the testimony.

II.

The trial court did not err in allowing a therapist with extensive experience counseling victims of sexual abuse to testify about delayed disclosure and the behaviors of sexually abused children. There is no error rate in counseling, and the area of expert testimony is reliable. The testimony aided the finder of fact and was not bolstering.

Betancourt claims it was error to allow therapist Linda Hutton to provide expert testimony about the behaviors of sexually abused children and delayed disclosure. Betancourt overlooks case law that advises an expert may gain their expertise through practical experience. Ample authority holds the area of expertise is reliable and aids the finder of fact. This Court's precedent rejects similar claims that such testimony is bolstering.

Linda Hutton testified she is a therapist for the Bay Laurel Center for Psychotherapy. She has been a clinical social worker for forty-two years. She received her master's degree in social work from Florida State University in 1974. She had two internships at the Department of Child Psychiatry at the Shands Teaching Hospital at the University of Florida. She is licensed in South Carolina for Social Work. She is a past member of the Rape Crisis Counsel in Greenville. She is also a past board member with the South Carolina Society of Clinical Social Workers. Her emphasis is on treatment. She engaged in a year-long training on trauma-focused behavioral therapy. Hutton's conservative estimate is she treated about 900 to 1,000 children with a concern about abuse. R. pp. 376-79. She testified about fifty to seventy-five times in family court and in about ten to fifteen criminal trials. R. pp. 379-80.

Hutton confirmed she never met Victim and did not know about the case. R. p. 481. Hutton testified that delayed reporting of sexual abuse is common and defined it as when the victim of the

abuse does not tell right away. R. p. 381. She testified delayed disclosure is common. Common reasons Victims may not disclose abuse include the perpetrator has threatened them, the victims are worried they will be in trouble, or they may be afraid they will not be believed. R. p. 382. She further testified the perpetrator of the abuse will use psychological coercion and may even tell the victims their mother will leave if they tell or that they will end up in foster care. R. p. 383, lines 13-24. In her experience, children take the perpetrator's threats seriously. R. p. 385, lines 8-11. The fact children are typically abused by someone they know and trust, and who may be in a position of authority, makes it difficult for those children to disclose abuse. R. pp. 387-88.

Hutton testified she has worked with child sexual abuse cases since 1992 and testified it was common children did not tell for years. She told the jury that adults in their forties have made first-time disclosures of child abuse to her. R. p. 383, lines 1-9. Although in recent years the amount of delay in disclosure has shrunk to weeks or months in many instances, Hutton testified she still sees children delaying reporting for years. R. pp. 383-84.

Expert testimony on the behaviors of sexually abused children and delayed disclosure was found admissible in 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). Like the instant case, the expert did not personally interview the victim and was unaware of the facts of the case.

Nonetheless, Betancourt claims the testimony did not meet the standards of Rule 702, SCRE.

Under Rule 702:

> 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.

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).

"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). "A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). "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) (emphasis added).

An expert can become sufficiently qualified to be able to provide an opinion helpful to the trier of fact in many ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). In Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988), Prior contended the

circuit court erred in qualifying two social workers as experts to testify on a victim's mental condition. However, the Court of Appeals observed: "A witness may be competent to testify as an expert although the witness acquired his or her knowledge **through practical experience** and not by scientific study, training, or research." Id. at 530, 369 S.E.2d at 849 (emphasis added). The Court of Appeals found each social worker was qualified based on her education, post-graduate training, and clinical experience with victims of sexual assault, as well as her opportunities to observe the victim. Id. at 531, 369 S.E.2d at 849.

In the instant case, Linda Hutton testified she had forty-two years of experience as a social worker and saw 900-1,000 sexually abused children. Her testimony provided sufficient evidence of practical experience like the social workers in Honea to allow Hutton to be qualified as an expert.

Further, the subject matter of the expert testimony – the behaviors of sexually abused children and delayed disclosure – is reliable and aids the finder of fact. The Court of Appeals observed, "Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999). "Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault . . . . 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." Id. at 475, 523 S.E.2d at 794 (internal citation omitted).

Betancourt misconstrues the application of the reliability requirement. The requirement of showing reliability only relates to the area of expertise, and not the reliability of an expert witness'

testimony. State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012) ("To be clear, the reliability of a witness's testimony is not a prerequisite to determining whether or not the witness is an expert."). Further, the trial court must take care in its undertaking of the gatekeeper function without infringing on the jury's duty as a factfinder, the gatekeeper role merely requires the trial court "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).

Betancourt errantly relies on State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) to claim that Hutton should have been able to testify as to some sort of "error rate." In Chavis, a forensic interviewer testified about a particular interviewing methodology, the RATAC method, but was unable to provide an error rate for her interviews. In the instant case, Hutton was not executing any methodology or procedure, or even making any findings or conclusions. Instead, the nature of the expert testimony falls under what a Texas court aptly described as "educator expert" evidence. Coble v. State, 330 S.W.3d 253 (Tx. Crim. App. 2010) (finding expert testimony about the prison classification system and prison violence admissible despite not relating to appellant personally, but was "educator-expert" evidence). Hutton merely provided reasons, based on her experience, why children delay disclosing abuse. Hutton did not make any conclusions or implement any sort of test or procedure in the instant case as in Chavis, but merely provided background information on the behaviors of sexually abused children.

Not only is general expert testimony about the behaviors of sexually abused children and more specifically delayed disclosure considered reliable, it also receives near universal approbation

as the kind of testimony that will aid the finder of fact. The Supreme Court of Hawaii observed in 1990 that "sexual abuse of children 'is a particularly mysterious phenomenon.'" State v. Batangan, 799 P.2d 48, 51 (Haw. 1990) (quoting State v. Castro, 756 P.2d 1033, 1044 (Haw. 1988)). The Hawaii Supreme Court quoted with approval the observations of other courts as follows:

> While jurors may be capable of personalizing the emotions of victims of physical assault generally, and of assessing witness credibility accordingly, tensions unique to trauma experienced by a child sexually abused by a family member have remained largely unknown to the public. . . . [T]he routine indicia of witness credibility – consistency, willingness to aid the prosecution, straight forward rendition of the facts – may, for good reason, be lacking. As a result jurors may impose standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion.

Batangan, 799 P.2d at 51 (quoting State v. Moran, 728 P.2d 248, 251 (Ariz. 1986) and State v. Middleton, 657 P.2d 1215, 1222 (Or. 1983) (Roberts, J., concurring)). The Minnesota Supreme Court found: "Background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children." State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984).

Generally, "[e]xpert testimony that abused children often delay reporting the abuse . . . informs the jury that the victim's failure to disclose in a timely fashion does not necessarily exonerate the defendant without suggesting that the particular child witness in the case was or was not abused." Commonwealth v. Bougas, 795 N.E.2d 1230, 1236 (Mass. App. Ct. 2003). "Further . . . [because] disclosure in child sexual abuse cases is generally delayed because of coercion, guilt, or some other reason, there will be no physical evidence to corroborate the victim's allegations.

Therefore . . . expert testimony will . . . assist the jury in understanding the evidence." People v. Beckley, 456 N.W.2d 391, 402 (Mich. 1990); see also State v. Carpenter, 556 S.E.2d 316, 321 (N.C. Ct. App. 2001) (finding expert testimony on delayed disclosure is "clearly instructive and helpful to the jury in understanding the evidence since the nature of the sexual abuse of children places lay jurors at a disadvantage").

In State v. Cardany, 646 A.2d 291 (Conn. App. Ct. 1994), Connecticut's Appellate Court found expert testimony on delayed disclosure admissible in the state's case-in-chief, noting: "It is natural for a jury to discount the credibility of a victim who did not immediately report alleged incidents of abuse whether or not the defense emphasizes the delay in cross-examination. Thus, testimony that explains to the jury why a minor victim of sexual abuse might delay in reporting the incidents of abuse should be allowed as part of the state's case-in-chief." Id. at 294.

A law review article confirms the soundness of expert testimony on delayed disclosure:

> 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.

John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y, 45-46 (2010) (footnotes omitted).

Of course, South Carolina courts allow this testimony. 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); 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.").

Contrary to Betancourt's claims, such testimony is not bolstering merely because it helps explain Victim's behavior. This is the proper probative purpose of such testimony. See State v. Jones, 417 S.C. 319, 790 S.E.2d 17 (Ct. App. 2016) (finding expert witness never commented on the credibility of victim or her mother but merely offered reasons why children might delay disclosing instances of sexual abuse and why a non-offending caregiver may have an unusual reaction when learning about the abuse. The testimony assisted the jury's understanding of the complex dynamics of sexual abuse cases).

On point with the present case is State v. Brown, 411 S.C. 332, 768 S.E.2d 246, 252-53 (Ct. App. 2015). In Brown, an expert witness who did not interview the victim provided testimony on the behaviors of sexually abused children. This Court distinguished State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) upon which Betancourt heavily relies and similar cases, noting that unlike those cases the expert: (1) did not testify as a forensic interviewer, (2) never interviewed the victims, (3) did not prepare a report of the interview, (4) did not express any opinion regarding the credibility of the allegations, and (5) did not express an opinion regarding the child victims. Id. at 344-45, 768 S.E.2d at 252-53. Ultimately, the Brown court found the expert's testimony, which merely provided

broad testimony about the behaviors of sexually abused children, did not bolster the victims' testimony even though the expert's testimony did corroborate some of the reasons for the victims' delayed disclosure. Id. at 345, 768 S.E.2d at 253.

The admission of expert testimony is within the sound discretion of the trial court. State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). The need for this standard is astutely explained by the United States Supreme Court as follows:

> [The abuse of discretion] standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both 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.

Kumho Tire Company v. Carmichael, 526 U.S. 137, 152 (1999). In the instant case, the reliability and admissibility of expert testimony on delayed disclosure is so well established that the trial court may properly take reliability for granted. The trial court did not err in allowing Hutton to testify as an expert because she was qualified by her extensive experience, she provided the sort of expert testimony that is routinely provided in South Carolina courts and is reliable, and her testimony aided the finder of fact.

Because of her experience, Betancourt was qualified to give an opinion about the behaviors of sexually abused children and delayed disclosure. Honea. This testimony is reliable to the degree that a trial court does not need to hold "reliability" proceedings. Kumho. Further, the testimony clearly aids the finder of fact and is not considered bolstering. Schumpert, Brown.

III.

Because Appellant failed to show the prior accusation by Victim was false, and the prior accusation was too remote and not similar to the present case, the trial court did not err in declining to admit evidence Victim made a prior allegation of sexual abuse.

Betancourt claims the trial court erred by not allowing evidence Victim accused her biological father of sexually assaulting her. At trial and on appeal, Betancourt stops short of asserting the allegation was false. A showing of falsity is required for the evidence to be admitted. Further, the trial court found the incident too remote and dissimilar to be admissible. The trial court did not abuse its discretion to find the evidence irrelevant.

During the forensic interview, the interviewer asked Victim if anyone other than Betancourt abused her, and she responded that her biological father touched her when she was approximately one year old. State's Exhibit 3 (unredacted interview, 53:00). After leaving the room momentarily and returning to ask follow up questions, the interviewer asked Victim if that was something she knew or something she heard, and Victim replied it was something she knew, that she remembered her father touching her in the bathtub, but she also said her mother told her about the abuse. (1:01:00 - 1:02:00). In addressing the admissibility of the video statement, defense counsel suggested that the statement did not fit under State v. Boiter, 302 S.C. 381, 396 S.E.2d 364 (1990), but instead was admissible to challenge Victim's ability to recall and her capacity to understand what happened to her at the age of one. R. p. 18, lines 7-13. This argument is a tacit admission that the accusation was irrelevant to the present case: Betancourt was on trial for assaulting Victim between the ages of five and ten years old, and her ability to recall or understand prior victimization by another person when she was one year old is irrelevant to the instant case.

In Boiter, the Supreme Court found evidence of prior false accusations by the victim may be probative on the issue of credibility, but noted other jurisdictions require a threshold determination the prior accusation was false. Id. at 383, 396 S.E.2d at 365. The Supreme Court held in "deciding the admissibility of evidence of a victim's prior accusation, the trial judge should first determine whether such accusation was false." Id. If finding the accusation was false, the trial court should consider the remoteness in time and consider the factual similarity between the prior and present allegations to determine relevancy. Id.

Boiter's victim, his seventeen-year old stepdaughter, testified in camera she told her mother and a social worker she was fondled by her biological father at age eight. No investigation or further inquiry was conducted as a result of her complaint. Applying the facts in Boiter to the Supreme Court's announced standard, the Supreme Court held, "Based upon the record in this case, the previous accusation was not investigated. **The defense presented no evidence to establish its falsity.**" Id. at 384, 396 S.E.2d at 365 (emphasis added).

Accordingly, Boiter requires the defendant to show: (1) the prior accusation was false, (2) the prior accusation was not too remote; and (3) the factual similarity between the prior and present allegation is sufficient to be relevant. Boiter. In the instant case, the trial court determined that while the accusation may be false, the allegation of abuse from when Victim was one year old was too remote and not sufficiently similar to the facts of the instant case to be allowed into evidence. R. p. 21. Note the trial court did not rule that the rape shield statute applied. The trial court acted within its discretion to find the accusation inadmissible.

First, no evidence was presented showing that Victim's allegation against was false.

Victim's accusation made during the forensic interview was based in part on information her mother provided to her. The record does not indicate that any charge was ever brought against the biological father. Like Boiter, because no evidence was presented that the accusation was false, the trial court did not err in declining to allow evidence of the false accusation.

Further, the trial court correctly found the accusation was too remote because it related to when Victim was only one year old. It also is irrelevant to the present case due to the different circumstances surrounding the accusation. The accusation pertains to an isolated incident while Betancourt's abuse of Victim was chronic, over an extended period of time.

In Hughes v. Raines, 641 F.2d 790 (9th Cir. 1981), the defendant kidnapped and raped the victim under the pretext of taking her to his employer to help her find a job. At trial, he sought to admit evidence she accused another man of rape on another occasion and the charge was false. The Ninth Circuit noted it was doubtful a reasonable juror would find the accusation was false, but also concluded the relevance to the case was slight. The Ninth Circuit noted, "The fact that the two incidents were quite different further attenuates the inference to be drawn [that the accusation in this case was false]." Id. at 793. The court concluded, "Exploring the factual situation of the prior incident would have added extraneous issues that had little, if any, probative value. The limitation of the cross-examination was a reasonable exercise of discretion by the trial judge." Id.

In Commonwealth v. Haynes, 696 N.E.2d 555 (Mass. App. Ct. 1998), the defendant attempted to introduce evidence the victim made a false accusation against her grandfather to a DSS social worker. The victim testified that at the time she believed it because her mother and the defendant told her she woke in the middle of the night and wrote it down, and that it was her writing

what was in her subconscious. Id. at 560. The victim testified at trial that she did not have an independent memory of the event and no longer believed her mother or the defendant, or that the act occurred. Id. at 561. The Appeals Court found the victim's statement was not a false accusation in the true sense and further found the excluded statement would not have any significant impact on a central issue of the trial. Id.

In State v. LeClair, 730 P.2d 609 (Ore. Ct. App. 1986), the Oregon Court of Appeals skeptically noted some evidence prior accusations made by the victim of incidents occurring in 1981 and 1984 could be false. Nonetheless, the Oregon court noted the trial court determined that the probative value of the 1981 incident was diminished by remoteness because the victim was only four years old at the time. The incident report indicated the mother made the accusation and the victim was unwilling to talk. Mother and daughter both denied making the accusation. Id. at 615-16.

As to the 1984 incident, the Oregon court referenced the trial judge's observation "that the trauma of an actual incident of sexual abuse can precipitate a child's false accusations of subsequent abuse" and noted, "The determination, therefore, of whether the 1984 incident occurred or whether the victim had fabricated that charge would depend in part on whether the events for which defendant was charged had occurred, rather than vice versa, thereby causing further confusion." Id. at 616. The Oregon court concluded the trial judge's determination was not in error. Id.

In the instant case, the trial court correctly declined to allow evidence that was both confusing and irrelevant to the charges against Betancourt. First, no evidence was presented that the accusation was false and it certainly could have occurred even if there is a question about the accuracy of victim's age when it occurred. Further, Victim told the interviewer she remembered being molested

by her biological father, but also told the interviewer her mother told her it happened. Therefore, her memory was consistent with what her mother suggested to her. However, Victim's accusations as to Betancourt were made without suggestion by her mother, and she recounted chronic abuse by Betancourt over a five-year period from when she was five years old up until the time of disclosure. Her disclosure of Betancourt's abuse was not predicated on remote memory or a suggestion by her mother that Betancourt abused her – instead the abuse was still ongoing and Mother was caught off guard and unaware of the abuse until Victim disclosed at school. R. p. 262, lines 10-19.

"The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003); Rule 403 SCRE ("evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, . . ."). A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App.2004). Because Victim's accusation related to a remote period of time, arose under different circumstances, did not represent an accusation of chronic abuse, and was wholly disconnected from the veracity of Victim's accusations against Betancourt, the trial court did not abuse its discretion in declining to allow evidence of the prior accusation at trial.

Further, any conceivable error was harmless beyond a reasonable doubt. Despite not being allowed to introduce evidence that Victim made a prior accusation against her biological father, Betancourt was allowed to elicit testimony from Mother that she was sexually abused as a child and disclosed that to Victim. R. pp. 262-63. She told Victim "you have to watch out for people." R. p.

312, lines 19-21. She also told Victim she did not like the way her biological father changed her diaper and did not think it was right. She did not want something to happen. R. p. 264, lines 10-17.

The "materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). Errors are considered to be harmless when they could not reasonably have affected the result of the trial. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003); State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). In the instant case, Betancourt was allowed to elicit testimony from Mother tending to show she might have suggested prior sexual abuse by her biological father and suggesting hypervigilance on her part. Because any further testimony on any potential abuse by the biological father could not reasonably be expected to change the outcome of the trial, any possible error was harmless beyond a reasonable doubt.

IV.

> **Because defense counsel did not object to the law clerk remaining in the jury room while the jury viewed the forensic interview on a laptop, the issue is not preserved for review. Further, the trial court did not abuse its discretion, and Appellant fails to show he was prejudiced by the procedure.**

Betancourt complains the trial court's law clerk remained with the jury while it viewed the forensic interview. The issue should not be reviewed because Betancourt's defense counsel did not object to the procedure.

During deliberations, the jury sent a note to the trial court requesting to watch the forensic interview again. The trial court later explained for the record the following:

> All right. Let's put this on the record, just kind of bring us up to date.
>
> The jury had sent out a question indicating they wanted to watch the forensic interview. So per agreement with the State's investigator, a laptop, along with my law clerk, the laptop and my law clerk went back to the jury room for purposes of playing the video. And, of course, my law clerk being back there just to make sure that the jury didn't try to go to any part of the laptop, even though that may not have been possible. Because she was back there just to kind of safeguard that. And they've – and that's been for about an hour. We've learned that during the course of that, in my law clerk's presence, they were discussing/deliberating while they're watching the video. And only got about twenty minutes into it.
>
> * * *
>
> **So per agreement as well,** we're going to bring the jury out and instruct them that my law clerk is not going to remain back there. . . . [T]hey are instructed not to try to gain access or do anything else with the computer, other than to use it to watch and listen to the forensic video.

R. p. 620, line 15 – p. 621, line 25. The prosecutor agreed with the trial court's statements and when

the trial court asked for defense counsel's acknowledgement, defense counsel merely added his understanding that other materials on the computer were password protected. R. p. 621, line 25 – p. 622, line 7. The trial court proceeded to instruct the jury consistent with what the trial court discussed beforehand with the attorneys. R. pp. 622-23. Afterwards, the trial court asked if the attorneys were satisfied with the instructions the trial court provided to the jury. Defense counsel indicated he was satisfied. R. p. 624, lines 6-13.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). "An appellate court may not address an issue that is not preserved." Abba Equip., Inc. v. Thomason, 335 S.C. 477, 486, 517 S.E.2d 235, 240 (Ct. App. 1999).

In the instant case, Betancourt's counsel failed to offer any objection to the trial court's decision to send the law clerk into the jury room and did not object when the trial court changed course and decided to provide the jury a cautionary instruction to ensure the jury did not use the laptop for any purpose except viewing the video recording of the forensic interview. State v. Sosebee, 284 S.C. 411, 413, 326 S.E.2d 654, 655 (1985) (finding "[n]o objection was made to either of these alleged errors nor was a motion for a new trial made such that the judge might have an opportunity to correct a mistake if there be such."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724-25 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. . . It prevents a party from keeping an ace card up his sleeve – intentionally **or by chance**

– in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.") (Emphasis added, citations omitted).

The trial court's comments indicate that the initial procedure to send the law clerk in with the lap top was by agreement, but further, defense counsel was provided an opportunity twice to indicate defense counsel's objection to the procedure followed during trial. State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998) (stating a defendant cannot acquiesce in an issue at trial and then complain about it on appeal); State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (holding defense counsel waived his objection when he specifically stated that he had no objection). Because defense counsel never objected to the law clerk's presence in the jury room while the jury viewed the forensic interview and never made any motions even after being advised the jury was deliberating in the law clerk's presence, the issue is not preserved for this Court's review.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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May 4, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

Appeal from Greenville County
The Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

Respondent,

vs.

GABRIEL BETANCOURT, JR.,

Appellant.

Appellate Case No. 2017-001016

CERTIFICATE OF COUNSEL

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

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