

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Honorable Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2011-196447

THE STATE,

Respondent,

vs.

CESAR ORLANDO PORTILLO,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Initially, any issue regarding whether the expert witness' testimony constituted improper of evidence of bolstering or vouching was not properly preserved for appellate review because such an issue or argument was not raised to the trial judge during trial. However, regardless of any issue preservation concerns, the trial judge did not abuse her discretion in qualifying a witness as an expert or in admitting the expert's testimony regarding the victim's use of hand gestures and age-appropriate language during the forensic interview and exhibition of behavioral changes consistent with post-traumatic stress disorder following the incident with Appellant because that testimony was proper behavioral science evidence, fell within the scope of the expert's area of expertise, and did not improperly bolster the victim's testimony or vouch for the victim's veracity or credibility.

STATEMENT OF THE CASE

Appellant Cesar Orlando Portillo was arrested following an investigation into allegations that he sexually abused his nine-year-old niece. In March of 2010, the Dorchester County grand jury indicted Appellant for one count of first-degree criminal sexual conduct with a minor. On July 19, 2011, a jury trial was commenced in the Dorchester County court of general sessions with the Honorable Diane Schafer Goodstein, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to a term of imprisonment of twenty-five years. Subsequently, Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

On Saturday, January 16, 2010, the nine-year-old victim (“Victim”) visited the home of her aunt, Jessica Portillo (“Aunt”), her uncle, Appellant Cesar Orlando Portillo, and her nine-year-old cousin (“Cousin”) in Summerville, South Carolina. (R. pp. 85-87; pp. 130-131; pp. 149-150; p. 158). During the visit, Victim and Cousin played together throughout the course of the day, watched a movie together that evening, and fell asleep together in Cousin’s bed. (R. pp. 86-87; pp. 93-94; p. 132).

Later that night, Victim awoke to discover that Appellant had gotten into bed with her and Cousin while they were sleeping. (R. pp. 96-97; p. 120). Startled and frightened, Victim pretended to be asleep as Appellant placed her hand onto his penis and moved it back and forth. (R. pp. 96-99). After several minutes, Appellant got up from the bed, touched his penis until he ejaculated, and zipped up and buckled his pants. (R. p. 100; pp. 102-103). Appellant then pulled Victim’s pajama pants and underwear down to her ankles and performed oral sex on her for approximately five to eight minutes. (R. pp. 100-102; p. 115). Once he was finished, Appellant wiped his saliva off of Victim’s body with a towel, threw the bedcovers over her, left the bedroom, and went to the bathroom. (R. p. 102).

After Appellant left the bedroom, Victim was able to pull up her pajama pants and underwear before Appellant returned from the bathroom only a minute later. (R. p. 105). When Appellant re-entered the bedroom, Victim pretended to wake up and asked him what was happening. (R. pp. 105-106). In response, Appellant told Victim that he was just getting a towel from the closet in Cousin’s bedroom and instructed her to go back to sleep. (R. p. 106). Appellant then exited the bedroom, went back to the bathroom, and started taking a shower. (R. p. 108; p. 134).

Once Appellant began showering, Victim jumped out of bed, went to Appellant and Aunt's bedroom, and revealed the sexual abuse to Aunt. (R. pp. 108-109; p. 135). Shortly thereafter, Appellant finished his shower and came into the bedroom, Aunt confronted him about what Victim told her, and Appellant denied the allegations. (R. pp. 109-110; pp. 134-135). Nonetheless, Aunt decided to leave the home and began preparing the children to go. (R. p. 137). As she did so, she observed Appellant attempt to give Victim a hug and instructed him to leave Victim alone. (R. pp. 136-137). Aunt, Cousin, and Victim then left, and, as they were leaving, Appellant blew cigarette smoke into Victim's face. (R. pp. 110-111; p. 137).

Thereafter, at approximately 2:00 a.m. on Sunday morning, Lesley Hitchens ("Mother"), Victim's mother and Aunt's sister, was awakened by a call from Aunt. (R. p. 147; pp. 151-152). Aunt was highly upset and advised Mother to meet them at the home of their mother and Victim's grandmother ("Grandmother") in Walterboro, South Carolina. (R. p. 130; pp. 152-153). Mother then immediately left for Walterboro and met Aunt and Victim at Grandmother's home a short time later. (R. pp. 153-154). Upon arriving, Mother spoke with Victim, who seemed confused and scared and appeared to have been crying, and Victim disclosed that she had been sexually abused. (R. p. 155). Mother, a registered nurse, then examined Victim to make sure she was not bleeding or injured and indicated to Victim that she was going to take her to the hospital. (R. pp. 155-156). However, Victim pleaded with her not to be taken to the hospital, so Mother took her back to their home instead. (R. pp. 156-157).

Later that day, Mother called Dr. Lucinda DeMarco, a family friend and pediatrician with expertise in sexual assault cases, to discuss the incident involving Victim. (R. p. 157; p. 169; pp. 173-174). Following the discussion, Dr. DeMarco visited

Victim's home the next day to examine Victim, and Victim reported to Dr. DeMarco that she had been sexually assaulted by Appellant. (R. pp. 159-160; pp. 175-177). Dr. DeMarco then conducted a medical examination of Victim and discovered redness and irritation around Victim's vagina and urethra. (R. p. 177). Based on the examination, Dr. DeMarco recommended Victim be taken to the Dee Norton Lowcountry Children's Center ("the Center") in Charleston, South Carolina, and Mother scheduled an appointment for Victim at the Center. (R. pp. 160-161; p. 210; p. 225).

On January 22, 2010, Mother brought Victim to the Center for the scheduled appointment, and Dr. Donald Elsey, the director of clinical services at the Center and a licensed professional counselor, conducted a forensic interview of Victim. (R. pp. 9-10; p. 27; p. 115; p. 162; p. 190; p. 210; p. 225). During the interview, Victim disclosed that she had been sexually abused by Appellant and provided the details of the incident.¹ (R. pp. 27-30; pp. 34-35; p. 115; p. 227; State's Ex. # 2 – Forensic Interview D.V.D.). Thereafter, the disclosed sexual abuse was reported to law enforcement, Appellant was arrested and indicted for first-degree criminal sexual conduct with a minor, and he proceeded to trial. (R. pp. 5-6; pp. 163-164; pp. 334-335).

At the outset of trial, the trial judge conducted a pre-trial hearing in regard to the admissibility of the recording of Victim's forensic interview. (R. pp. 7-8). During the hearing, Dr. Elsey testified about his interview of Victim and his training, experience, and background in psychology, counseling, childhood development, and forensic interviewing, and he was qualified as an expert in the fields of child sexual abuse and

¹ In addition to the forensic interview, Dr. Elsey met with Victim and her family on February 1, 2010, to conduct a follow-up interview. (R. p. 239). During the follow-up interview, Victim and her parents reported that Victim was having trouble sleeping, was experiencing nightmares, and was have difficulty in school following the incident with Appellant. (R. pp. 239-240). At the conclusion of the interview, Dr. Elsey referred Victim for trauma-based cognitive behavioral therapy because Victim's reported symptoms were potential indicators of post-traumatic stress disorder. (R. pp. 240-241).

child sexual abuse forensic interviews without objection. (R. pp. 9-10; p. 12; pp. 17-18; pp. 23-24; pp. 27-30). At the conclusion of Dr. Elsey's testimony, the trial judge found the forensic interview recording was admissible pursuant to S.C. Code Ann. § 17-23-175. (R. pp. 42-44). However, the trial judge found portions of the forensic interview during which the Victim discussed an unindicted incident were not admissible and required the parties to redact those portions of the recording when it was played for the jury during trial. (R. pp. 44-46; pp. 74-75).

Subsequently, Appellant objected to Dr. Elsey being qualified as an expert in regard to his interview of Victim, arguing it was unnecessary for a forensic interviewer to be qualified as an expert. (R. p. 77). In response, the solicitor acknowledged it would be inappropriate for Dr. Elsey to be qualified as an expert to offer his opinion that Victim was telling the truth but asserted Dr. Elsey might testify in other areas that would require expert qualification. (R. pp. 77-78). Following the arguments of counsel, the trial judge indicated the determination regarding Dr. Elsey's qualification as an expert would be made prior to his testimony. (R. p. 78).

Thereafter, during trial, Victim detailed the sexual abuse she suffered at the hands of Appellant, and she identified Appellant in court as the individual who sexually abused her. (R. pp. 96-104; p. 115). Additionally, Aunt, Mother, and Dr. DeMarco testified about Victim's disclosure of the sexual abuse and the actions they took following that disclosure.² (R. pp. 133-137; pp. 151-162; pp. 174-177).

Following Dr. DeMarco's testimony, the trial judge conducted an in camera hearing, and Dr. Elsey testified about the forensic interview process and the specifics of

² During her testimony, Mother noted Victim had a difficult time sleeping, began having nightmares, and became quieter and more emotional after the incident with Appellant. (R. pp. 158-159).

his forensic interview of Victim. (R. p. 190). During his testimony, Dr. Elsey stated he typically used the R.A.T.A.C. method when conducting the interviews and had personally conducted approximately 4,500 forensic interviews. (R. pp. 187-188). He noted the interviewing process involved asking open-ended questions as opposed to leading questions to allow for the child to respond in a narrative fashion. (R. pp. 189-190). He further indicated interviews formerly used to begin by asking the child to explain the difference between the truth and a lie but the practice was typically no longer used because children could still provide untruthful responses even if they understood the difference between the two concepts. (R. pp. 192-193). Regarding the interview of Victim, Dr. Elsey testified Victim used age-appropriate language when describing Appellant's actions while noting children sometimes use language "that seems like maybe an adult had used those words for them." (R. pp. 193-194; pp. 203-204). He further noted Victim's hand gestures were significant because they were another way through which Victim tried to help him understand what she was trying to explain. (R. p. 194). Furthermore, Dr. Elsey testified about his follow-up interview of Victim and stated she revealed symptoms potentially consistent with post-traumatic stress disorder. (R. pp. 194-196). However, he indicated he did not make any diagnosis in regard to Victim. (R. p. 204).

Following Dr. Elsey's in camera testimony, defense counsel asserted Dr. Elsey's testimony regarding the interview process and his specific interactions with Victim was factual, did not involve an opinion, and was appropriate without expert qualification. (R. p. 205). However, defense counsel argued Dr. Elsey's testimony regarding Victim's use of age-appropriate language and hand gestures should not be admitted because he contended "that line of questioning [was] outside the scope of the areas in which he has

been qualified as an expert.” (R. p. 205). In support of that contention, defense counsel maintained Dr. Elsey had not been qualified “in an area of language interpretation or child development or anything of that nature that would render that type of an opinion appropriate.” (R. p. 205). After considering defense counsel’s argument, the trial judge determined the testimony was admissible, ruling:

With regards to that testimony, I notice that Dr. Elsey was quite careful not to interpret what that meant. But what he was saying was that that was this child’s language and that sometimes you can tell where adults have given the language to a child. But he talked about the fact that this was her language. It’s just the way she was describing something that she very well had no – no basis to know what she was describing. And – and I notice that he was very careful to describe – to describe what the alleged victim was doing.

And I thought he was very careful to do that. He didn’t say – he didn’t opine what she was describing but talked about – I thought – I – I actually thought it was very helpful to the jury, as any expert testimony ought to be, to talk about the fact that this is – that – that he believed that what he was hearing was a child describing something that the child didn’t know what it was, what was happening, and yet was trying to use her language to describe what she was seeing.

And – and I think that insofar as that portion is concerned, that his expertise as someone – his bachelor’s child psychology, has a licensed clinical counselor, and has his Ph.D. in child development with his other expertise in the area of forensic interviewing and counsel with children who were both sexually as well as physically abused – I think that he – his expertise would encompass that and would allow him to testify as an expert which regards to that portion of the testimony.

(R. pp. 206-207).

Following the trial judge’s ruling, defense counsel next challenged the admissibility of Dr. Elsey’s testimony regarding Victim’s disclosure of symptoms potentially consistent with post-traumatic stress disorder, arguing the testimony was not proper because Dr. Elsey did not actually make a diagnosis in regard to Victim. (R. p. 207). However, the trial judge found the testimony to be admissible and noted defense

counsel's contentions went to the weight of the evidence as opposed to its admissibility and could be brought out on cross-examination. (R. p. 207).

Thereafter, the jury returned to the courtroom, and the solicitor called Dr. Elsey to testify about Victim's forensic interview. (R. p. 210). During his testimony, Dr. Elsey indicated he was the clinical director of the Center and a licensed professional counselor and detailed his educational background, which included a bachelor's degree in psychology and sociology, a graduate degree in clinical counseling, and a doctorate in childhood development, for the jury. (R. pp. 210-211). Dr. Elsey was then qualified as an expert in child sexual assault and child sexual assault forensic interviewing subject to defense counsel's earlier objection. (R. pp. 214-215). As his testimony continued, Dr. Elsey stated he had performed approximately 4,500 forensic interviews typically on children between the ages of 2 and 18 and discussed the R.A.T.A.C. interview method, which he indicated was widely used in South Carolina and nationally. (R. p. 216; pp. 219-221). During forensic interviews, he indicated he typically looked to see if a child's responses were appropriate for the child's age and if the child was able to provide context to those responses. (R. p. 224). Regarding the forensic interview of Victim, Dr. Elsey testified the language used by Victim appeared to be age-appropriate based on his expertise in child sexual assault cases and noted Victim appeared to be "just describing what she said she was seeing" and was not using language it seemed somebody else had provided to her.³ (R. pp. 236-238). He further noted Victim's use of childlike language was not unusual for a nine-year-old child. (R. p. 237). Additionally, he noted Victim frequently used hand gestures to try to help him understand what she was telling him. (R.

³ During Dr. Elsey's testimony, the video recording of Victim's forensic interview was admitted into evidence and played for the jury. (R. pp. 233-234).

pp. 237-238). Regarding his follow-up interview of Victim, Dr. Elsey testified Victim and her family reported Victim was experiencing difficulty sleeping and was having nightmares and trouble focusing during school following the incident with Appellant, and he indicated he referred her for trauma-focused cognitive behavioral therapy due to the fact those reported symptoms could be potentially indicative of post-traumatic stress disorder. (R. pp. 239-240). However, Dr. Elsey emphasized he did not make any diagnosis in regard to Victim, including a diagnosis of post-traumatic stress disorder, and he explained it would have been inappropriate to do so at that time. (R. p. 240; p. 245). Finally, Dr. Elsey confirmed he could not say what happened during the incident and had made no determinations in regard to the information reported to him in Appellant's case. (R. p. 247).

Following Dr. Elsey's testimony, both the State and the defense rested their cases. (R. p. 248; p. 257). Subsequently, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 258-316). As part of her jury charge, the trial judge thoroughly instructed the jury in regard to the credibility of witnesses in general, including the credibility of juvenile witnesses. (R. pp. 305-308). Additionally, the trial judge specifically instructed the jury in regard to the credibility of expert witnesses, explaining:

[I]n this trial you have also heard from witnesses who were declared to be expert witnesses. Our rules of evidence ordinarily do not permit witnesses to testify regarding their opinions or conclusions. An exception to this rule exists for witnesses deemed to be expert witnesses. A witness who, by virtue of their education and experience, has become an expert in some art or science, profession or calling. And those witnesses may state an opinion as to relevant and material matter in which the witness claims to be an expert, and may also state the reasons for the opinion.

You should consider any expert testimony received in evidence in this case, and like any other evidence, you give it the weight you think it

deserves. If you decide that the opinion of an expert witness is not based on sufficient education and experience; or if you conclude that the reasons given in support of the opinion are not sound; or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

And expert witness's testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert. Further, you are not required to accept an opinion – an expert's opinion even though it is not contradicted. Expert opinion, ladies and gentlemen – testimony – expert opinion testimony is given for the purpose of helping you understand the evidence, and not for the purpose of controlling your judgment.

(R. pp. 308-309). Thereafter, at the conclusion of trial, the jury convicted Appellant as indicted. (R. pp. 320-321). Following the verdict, the trial judge sentenced Appellant to a twenty-five-year term of imprisonment. (R. p. 333).

ARGUMENT

Initially, any issue regarding whether the expert witness' testimony constituted improper of evidence of bolstering or vouching was not properly preserved for appellate review because such an issue or argument was not raised to the trial judge during trial. However, regardless of any issue preservation concerns, the trial judge did not abuse her discretion in qualifying a witness as an expert or in admitting the expert's testimony regarding the victim's use of hand gestures and age-appropriate language during the forensic interview and exhibition of behavioral changes consistent with post-traumatic stress disorder following the incident with Appellant because that testimony was proper behavioral science evidence, fell within the scope of the expert's area of expertise, and did not improperly bolster the victim's testimony or vouch for the victim's veracity or credibility.

Appellant contends the trial judge erred in qualifying Dr. Elsey as an expert.

Appellant further contends the trial judge erred in admitting Dr. Elsey's expert testimony on the significance of Victim's use of hand gestures and age-appropriate language during the forensic interview and on Victim's exhibition of symptoms consistent with post-traumatic stress disorder following the incident with Appellant. In support of those contentions, Appellant maintains Dr. Elsey was allegedly improperly and unnecessarily qualified as an expert, Dr. Elsey's testimony allegedly constituted an improper comment on Victim's veracity and credibility, Dr. Elsey allegedly exceeded the scope of his expertise during his testimony, and Dr. Elsey allegedly should not have been permitted to testify in regard to the existence of Victim's symptoms of post-traumatic stress disorder due to the fact that he testified he could not make a diagnosis of post-traumatic stress disorder at the time he met with Victim. Initially, to the extent that Appellant is contending Dr. Elsey's testimony was inadmissible or improper because it bolstered Victim's testimony or vouched for Victim's credibility, that issue was not properly preserved for appellate review and should not be considered on appeal because no such issue or argument was raised to the trial judge. However, regardless of any issue preservation concerns, the trial judge committed no error in qualifying Dr. Elsey as an

expert in child sexual abuse, which was an area of expertise outside of the realm of ordinary common knowledge, and Dr. Elsey's expert testimony regarding Victim's use of hand gestures and age-appropriate language during the forensic interview and exhibition of behavioral changes and characteristics consistent with post-traumatic stress disorder following the incident with Appellant was properly admitted because it could be helpful to the jury in resolving the issues raised in Appellant's case, it fell within the scope of Dr. Elsey's area of expertise, and it did not improperly bolster Victim's testimony or vouch for Victim's credibility. Accordingly, the trial judge did not abuse her discretion in either qualifying Dr. Elsey as an expert or admitting Dr. Elsey's expert testimony. Appellant's conviction 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." (emphasis added)); 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, the 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).

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. 1998). An expert's testimony is admissible where "it is relevant and based on some factual predicate in the record." State v. Irick, 344 S.C. 460, 465, 545 S.E.2d 282, 285 (2001). In determining whether a witness' knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Henry, 329 S.C. at 274, 495 S.E.2d at 467. Instead, an expert can become sufficiently skilled or knowledgeable to be able to provide an opinion helpful to the trier of fact in a multitude of ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). "[D]ifferences in the amounts and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility." Henry, 329 S.C. at 274, 495 S.E.2d at 467.

In cases involving allegations of child 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), overruled on other grounds by State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). “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.” Id. at 475, 523 S.E.2d at 794; see 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.”). 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; 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.”). Accordingly, “both expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect.” State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993).

In the case sub judice, the trial judge did not abuse her discretion in qualifying Dr. Elsey as an expert and in permitting him to testify during Appellant’s trial because Dr.

Elsy possessed substantial knowledge, training, and experience in the area of child sexual abuse through his participation in approximately 4,500 forensic interviews of children, his experience as a licensed professional counselor, and his educational background in psychology, sociology, clinical counseling, and childhood development. Based on his specialized knowledge, training, and expertise, Dr. Elsey was able to offer testimony on child sexual abuse that was outside of the common knowledge and experience of a typical juror and that the jury could have found to be helpful in resolving the factual issues raised in Appellant's case. See Henry, 329 S.C. at 278, 495 S.E.2d at 469 (“[T]he relevant inquiry concerning qualification of the proffered expert is whether the witness possesses the necessary skill, learning, education, training, knowledge, or experience to enable the witness to give opinion testimony.”).

Specifically, based on his educational background and the experience he acquired through conducting thousands of forensic interviews of children, Dr. Elsey was able to offer an opinion to the jury in regard to the age-appropriate nature of Victim's statements during the forensic interview and the fact that Victim's use of childlike language was not unusual. Such an opinion was highly relevant and instructive because it enabled the jurors to properly consider and evaluate the statements and testimony of Victim, who was nine years old at the time of the incident, by providing important information to the jury regarding the vocabulary possessed by a normal nine-year-old child, which was beyond the common knowledge of an ordinary juror. See United States v. Lukashov, 694 F.3d 1107, 1117 (9th Cir. 2012) (“[The expert witness'] 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.”); see, e.g., United States v. Betcher, 534 F.3d 820, 826 (8th

Cir. 2008) (finding the testimony of an expert qualified in the area of child abuse was properly admitted where the expert's testimony on age-appropriate sexual knowledge and conduct assisted the jury in evaluating the evidence and the victims' testimony). Furthermore, Dr. Elsey was able to offer an opinion to the jury on the behavioral characteristics associated with post-traumatic stress disorder, which was helpful to the jury in evaluating the behavioral characteristics and symptoms that Victim reported and was outside of the common knowledge of a typical juror. See Weaverling, 337 S.C. at 474, 523 S.E.2d at 794 ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible."). Thus, although it was likely unnecessary for Dr. Elsey to be qualified as an expert in the field of forensic interviewing, the trial judge properly qualified Dr. Elsey as an expert in the area of child sexual abuse and permitted him to offer helpful testimony to the jury on matters outside of the jurors' own common knowledge and experience. See Henry, 329 S.C. at 273, 495 S.E.2d at 466 ("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."); see also Schumpert, 312 S.C. at 506, 435 S.E.2d at 862 (holding the testimony of an expert qualified in the field of sexual abuse was properly admitted during trial).

In arguing that the trial judge abused her discretion in admitting Dr. Elsey's expert testimony, Appellant first contends Dr. Elsey was improperly and unnecessarily qualified an expert. However, contrary to Appellant's contentions, the trial judge properly qualified Dr. Elsey in the area of child sexual abuse because Dr. Elsey's

testimony in that area involved specialized expertise outside of the realm of common knowledge and experience and, thus, necessitated his qualification as an expert before he could properly testify in that area. See Rule 701, SCRE (“If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) **do not require special knowledge, skill, experience or training.**” (emphasis added)). Significantly, although courts in South Carolina have found it to be unnecessary for an expert to be qualified as an expert forensic interviewer, South Carolina courts have consistently found expert qualification to be appropriate in the area of child sexual abuse. Compare State v. Kromah, 401 S.C. 340, 357, n. 5, 737 S.E.2d 490, 499 (2013) (noting it is unnecessary for a forensic interviewer to be qualified as an expert); and State v. Douglas, 380 S.C. 499, 502-503, 671 S.E.2d 606, 608-609 (2009) (finding it was unnecessary for a witness to be qualified as an expert in forensic interviewing where the witness testified only as to her own personal observations and discussions with the victim); with Schumpert, 312 S.C. at 506, 435 S.E.2d at 862 (holding the testimony of an expert qualified in the field of sexual abuse was properly admitted during trial); Weaverling, 337 S.C. at 475-476, 523 S.E.2d at 795 (concluding the trial judge did not err in admitting the testimony of an expert qualified in the field of “victims of sexual abuse”); and Henry, 329 S.C. at 278, 495 S.E.2d at 469 (finding a witness was properly qualified as an expert psychotherapist “with a specialty in child sexual abuse”). In the case at bar, Dr. Elsey testified in the area of child sexual abuse, which was a subject beyond the common knowledge of an ordinary juror, and his expert testimony was based on his substantial educational background,

which included a bachelor's degree in psychology and sociology, a graduate degree in clinical counseling, and a doctorate in childhood development, and his extensive training and experience in regard to juvenile victims of sexual abuse. See 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].”). As a result, the trial judge did not abuse her discretion in qualifying Dr. Elsey as an expert in Appellant’s case. However, even assuming the trial judge did err in qualifying Dr. Elsey as an expert, any potential for prejudice was greatly reduced by the trial judge’s instructions to the jury indicating the testimony of Dr. Elsey was **not** entitled to be afforded greater weight based on the witness’ qualification as an expert. See Douglas, 380 S.C. at 503, 671 S.E.2d at 609 (finding Douglas suffered no prejudice from a witness’ unnecessary qualification as an expert because “[t]he fact that [the witness] was qualified as an expert did not require the jury to accord her testimony any greater weight than that given to any other witness”); see also Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) (“A jury is presumed to follow instructions.”).

In challenging the admission of the expert testimony, Appellant next contends that Dr. Elsey was allegedly permitted to render his expert opinion that Victim was telling the truth by testifying in regard to Victim’s use of age-appropriate language and hand gestures during the forensic interview. (App. Br. p. 10; pp. 13-14). Initially, to the extent that Appellant is challenging the propriety of Dr. Elsey’s testimony on the basis that it constituted improper testimony regarding Victim’s credibility or truthfulness, that issue and argument was not properly preserved for appellate review because Appellant failed to

raise such an issue or argument to the trial judge. See State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) (“The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal.”); see also State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (“[A] party may not argue one ground at trial and an alternate ground on appeal.”).

Critically, in challenging the admission of Dr. Elsey’s expert testimony during trial, defense counsel argued to the trial judge:

With regard to the forensic interview itself – the portion of Dr. Elsey’s testimony where he explains the process, explains his contact with [Victim], goes over what happened on that date and how he – he did what he did – I – I think that that’s very factual, very straightforward. It’s not something that he rendered opinion about or was required to render opinion about. And I think that that testimony is – is appropriate not as expert testimony. And I know I’m probably not articulating myself very well, but it’s not necessary for it to be expert testimony.

With regard to the other proposed questions that [the solicitor] asked regarding the descriptive language and the significance of hand gestures, I – I believe that that line of questioning is outside the scope of the areas in which he has been qualified as an expert. He’s been qualified as an expert in forensic interviewing and child abuse, but not in – in an area of language interpretation or child development or anything of that nature **that would render that type of opinion appropriate**. And we would ask that that not be allowed in, in terms of examination of Dr. Elsey.

(R. pp. 205-206). Thus, in objecting to the testimony during trial, defense counsel did **not** object to the propriety of the testimony or contend that the testimony constituted improper bolstering of Victim’s testimony or vouching for Victim’s credibility as Appellant now contends on appeal. Instead, defense counsel acknowledged the matters testified to by Dr. Elsey were the proper subject of expert testimony while simply asserting that Dr. Elsey had not been qualified in an allegedly appropriate field to give the testimony he provided. Accordingly, because Appellant did not challenge the propriety of Dr. Elsey’s testimony on the basis that it constituted improper testimony regarding

Victim's credibility or truthfulness during trial; Appellant is precluded from doing so for the first time on appeal. See State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) (“[A] party cannot argue one theory at trial and a different theory on appeal.”); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) (“[A] defendant may not argue one ground below and another on appeal.”); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial.”); West v. Morehead, 396 S.C. 1, 14, 720 S.E.2d 495, 502 (Ct. App. 2011) (“Appellants make arguments and cite authorities in their briefs that were not presented to the trial court. These arguments are not preserved.”); see, e.g., I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) (“Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and **arguments.**” (emphasis added)).

Regardless, even assuming Appellant's challenge to the substance of Dr. Elsey's testimony was preserved for appellate review, Dr. Elsey's testimony did **not** constitute improper bolstering or vouching for Victim's veracity or credibility. Critically, “[i]mproper 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.” State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), rev'd in part on other grounds, 380 S.C. 499, 671 S.E.2d 606 (2009). In Appellant's case, Dr. Elsey did **not** testify that he believed Victim's statements regarding the abuse or that Victim's revelations were compelling indicators of abuse. Cf. 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); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (Ct. App. 2011) (finding a forensic interviewer's testimony constituted improper vouching where the interviewer testified the victims provided compelling disclosures of abuse by Jennings and provided details consistent with the background information provided by the victims' mother, the police report, and other children). Instead, Dr. Elsey simply explained to the jury that Victim used language appropriate for her age in describing the abuse, which he indicated was not unusual, and used hand gestures to aid in describing what she reported to him. Significantly, in offering that limited testimony, Dr. Elsey emphasized that the language and gestures Victim used related to what "[Victim] said she saw" and not what definitively occurred. (R. p. 236). Thus, through his testimony, Dr. Elsey offered relevant and helpful information for the jurors to consider in evaluating Victim's statements and testimony without commenting on whether he believed or disbelieved Victim's statements or testimony. See Lukashov, 694 F.3d at 1117 ("[The expert witness'] 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."); see also State v. Kennedy, 320 N.C. 20, 32, 357 S.E.2d 359, 367 (N.C. 1987) ("The fact that this evidence may support the credibility of the victim does not alone render it inadmissible. Most testimony, expert or otherwise, tends to support the credibility of some witness."). However, assuming that testimony somehow could be misconstrued as an assurance by the expert that he believed Victim, Dr. Elsey specifically dispelled such a conclusion by unequivocally stating to the jury that he could not personally state what actually occurred and had not made a determination in regard to the information reported to him. (R. p.

247). Accordingly, Dr. Elsey's testimony did not constitute improper vouching for Victim's truthfulness or believability. See State v. Hill, 394 S.C. 280, 295, 715 S.E.2d 368, 376-377 (Ct. App. 2011) ("[T]he forensic interviewer never addressed the veracity of Victim. He testified only that he saw the types of details in Victim's interview that he would look for to determine whether a child had been coached. He gave no opinion on whether Victim was being truthful, or even that Victim had not, in fact, been coached. Accordingly, we find no reversible error in the admission of this testimony." (footnote omitted)).

Next, in challenging the admission of Dr. Elsey's testimony, Appellant asserts the trial judge erred in allowing Dr. Elsey to exceed the scope of his expertise by discussing Victim's use of age-appropriate language and hand gestures during the forensic interview. To the contrary, Dr. Elsey's testimony regarding Victim's use of age-appropriate language and hand gestures fell directly within the area of Dr. Elsey's expertise as an expert in the field of child sexual abuse. Critically, Dr. Elsey was qualified as an expert in child sexual abuse based on his participation in approximately 4,500 forensic interviews, his work as a licensed clinical counselor, his training and experience in regard to juvenile victims of sexual abuse, his educational background in psychology, sociology, and clinical counseling, and his doctorate in childhood development. That substantial knowledge, training, and experience enabled Dr. Elsey to testify in regard to normal and expected behavior for juvenile victims of sexual abuse, which included testimony in regard to the appropriateness of Victim's use of childlike language and hand gestures during the forensic interview. 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 that those characteristics were typical for victims of sexual abuse). Thus, Dr. Elsey's testimony did not exceed his area of expertise, and the trial judge did not abuse her discretion in permitting Dr. Elsey to testify as an expert in regard to Victim's use of appropriate and expected language and behavior. See Weaverling, 337 S.C. at 474, 523 S.E.2d at 794 ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible.").

Finally, Appellant contends the trial judge erred in permitting Dr. Elsey to testify about the potential symptoms of post-traumatic stress disorder that Victim reported she was experiencing after the incident with Appellant. However, Appellant failed to cite to any relevant case law or other authority in support of that argument either during trial or on appeal.⁴ As a result, the issue has been waived and was not properly preserved for appellate review. See State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); State v. Crocker, 366 S.C. 394, 399, n. 1, 621 S.E.2d 890, 893 (Ct. App. 2005) ("[C]onclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review."); see also State v. Attardo, 263 S.C. 546, 551, n. 1, 211 S.E.2d 868, 869 (1975) ("The burden of proof is on the appellant to convince this Court that the lower court was in error." (citation omitted)); State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) (holding a conclusory, unsupported argument was

⁴ In raising the objection during trial, defense counsel asserted: "With regard to his opinion regarding posttraumatic stress disorder, I believe he said that he said he saw symptoms of that. He did not provide any diagnosis for this child at any point along the way. I think, since he did not diagnose her with that particular affliction or any other affliction, it wouldn't be proper for him to testify as to her showing signs of such a thing. I think it would, in essence mislead, the jury in terms of dealing with that particular set of issues." (R. p. 207).

abandoned on appeal). Regardless, even assuming the issue was properly preserved for review, Dr. Elsey's testimony regarding the behavioral changes and characteristics that Victim and her parents reported to him after the incident constituted proper behavioral science evidence and could have been helpful to the jury in understanding and evaluating the issues raised in Appellant's case.⁵ See Weaverling, 337 S.C. at 474, 523 S.E.2d at 794 ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible."); see also Henry, 329 S.C. at 278, 495 S.E.2d at 469 (finding a witness was sufficiently qualified to render an expert opinion in regard to post-traumatic stress disorder). For those reasons, the testimony was properly admitted during trial, and, just as the trial judge indicated, any issue regarding the degree of certainty of Dr. Elsey's testimony merely went to the weight as opposed to the admissibility of the evidence and was an issue Appellant was fully able to address and explore on cross-examination.⁶ See Melton v. Williams, 281 S.C. 182, 186, 314 S.E.2d 612, 614-615 (Ct. App. 1984) ("Assessment of the credibility of witnesses is a question for the jury, not the court, and it is the jury that decides the weight to be afforded the testimony." (emphasis added)); see also Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1983) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the

⁵ Significantly, Mother also testified about the behavioral changes and characteristics that Victim exhibited after the incident, and no objection was raised to her testimony. (R. pp. 158-159). As a result, Dr. Elsey's testimony regarding Victim's reported behavioral changes and characteristics was merely cumulative to other properly-admitted testimony. See State v. Oglesby, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) ("[T]he admission of improper evidence is deemed harmless if it is merely cumulative to other evidence."); see also State v. Jarrell, 350 S.C. 90, 101, 564 S.E.2d 362, 368 (Ct. App. 2002) ("[B]ecause we find Gillespy's statement cumulative and substantially identical to other properly admitted evidence, any error caused by the admission of the prior consistent statement is harmless.").

⁶ Notably, Dr. Elsey's testimony could not have misled the jury to believe a diagnosis had been made in regard to Victim because Dr. Elsey specifically and unequivocally testified that he had **not** diagnosed Victim with post-traumatic stress disorder during his testimony on both direct examination and cross-examination. (R. p. 240; p. 245).

burden of proof are the traditional and-appropriate means of attacking shaky but admissible evidence.”); see, e.g., 31A Am. Jur. 2d Expert and Opinion Evidence § 90 (“Such matters as defects in an expert’s education or experience, the lack of an expert’s specialization or lack of specialized training, **the degree of an expert’s certainty as to his or her opinion, or the quality of the expert’s conclusions go to the weight to be given expert opinion testimony.** Furthermore, the mere fact that controversy, or even substantial controversy, surrounds an expert’s conclusion or opinion goes to the weight to be given such testimony.” (emphasis added and footnotes omitted)). Accordingly, the trial judge did not abuse her discretion in admitting Dr. Elsey’s testimony regarding the behavioral changes and characteristics that Victim reported experiencing after the incident.

In conclusion, the trial judge committed no error in either qualifying Dr. Elsey as an expert or permitting him to testify during Appellant’s trial because Dr. Elsey possessed all the requirements necessary to present relevant expert testimony to the jury in the area of child sexual abuse. Critically, Dr. Elsey possessed specialized knowledge, training, and experience in that area through his work as a licensed professional counselor and forensic interviewer and through his educational background in psychology, sociology, clinical counseling, and childhood development, and that specialized knowledge, training, and experienced enabled him to offer helpful testimony during trial that was outside of the realm of the common knowledge of an ordinary juror. See Henry, 329 S.C. at 278, 495 S.E.2d at 469 (“[T]he relevant inquiry concerning qualification of the proffered expert is whether the witness possesses the necessary skill, learning, education, training, knowledge, or experience to enable the witness to give opinion testimony.”). Furthermore, Dr. Elsey did **not** improperly bolster Victim’s testimony or

vouch for Victim's veracity or credibility, and his testimony did not exceed the scope of his expertise. Accordingly, the trial judge did not abuse her broad discretion in qualifying Dr. Elsey as an expert or in admitting his expert testimony. See White, 382 S.C. at 269, 676 S.E.2d at 686 ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion."); Myer, 301 S.C. at 255, 391 S.E.2d at 554 ("The qualification of a witness as an expert falls largely within the discretion of the trial judge."); see also Henry, 329 S.C. at 273, 495 S.E.2d at 466 ("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."). Appellant's conviction should be affirmed.

CONCLUSION

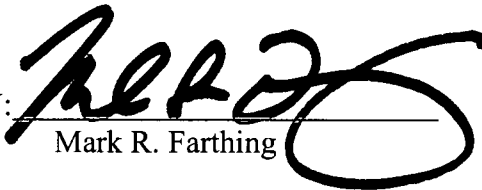
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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July 11, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Honorable Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2011-196447

THE STATE,

Respondent,

vs.

CESAR ORLANDO PORTILLO,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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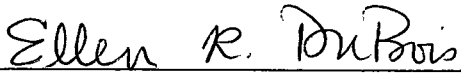
Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 11th day of July, 2013.


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