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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge
Case No. 2013-000638

THE STATE,

Respondent,

vs.

GEORGE WHITE,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant White was indicted for lewd act on a minor and criminal sexual conduct with a minor in the second degree. White was tried by jury before the Honorable Thomas L. Hughston, Jr., on March 18-21, 2013.

The jury deliberated for thirty minutes to find White guilty as charged. Judge Hughston sentenced White to concurrent sentences of twelve years imprisonment for criminal sexual conduct and ten years imprisonment for lewd act on a minor.

STATEMENT OF FACTS

The relationship between Appellant George White and Victim began when he came to Victim's house to fix the bathroom. Victim lived with her grandmother, great-grandmother, aunt, cousin, and sister. ROA. p. 47. Grandmother testified White was sent by the landlord to fix the bathroom. ROA. p. 76. As it turned out, Grandmother knew White's wife. ROA. p. 77. Grandmother testified she thought, at the time, White was okay – he seemed like a real religious person. After the bathroom was fixed, he started working on a playroom for Grandmother. He offered to do the work for free and Grandmother only needed to pay for the materials. White started taking Victim to church. Grandmother testified White and his wife might take Victim to church together, but sometimes White took Victim to church unaccompanied. White would also take Victim to see a "wolf" that lived at a house in downtown Charleston. ROA. pp. 77-80.

Grandmother testified White gave Victim a lot of gifts and took a lot of pictures of Victim at Victim's birthday party. ROA. p. 80. She also testified that Victim disclosed to her that Victim was sexually assaulted at a house White was working on. ROA. pp. 83-84. On cross-examination, Grandmother testified she asked Victim if anything was put inside her and Victim said no. ROA. p. 87. But on redirect, Grandmother testified that Victim told her White sat Victim down, made her take her clothes off, and he was "[j]ust rocking her back and forth and up and down." ROA. p. 88, lines 17-23

Kristin Kulpepper was a past neighbor and close friend of Victim's family. She worked for the Department of Health and Human Services. She described Victim as quiet, sweet, and obedient. She testified she started often seeing White at Victim's house.

Kulpepper testified that at Victim's birthday party, White gave Victim a lot of birthday gifts, as many as twenty presents. To Kulpepper, it seemed elaborate and over the top. Kulpepper noted: "And he was fussing even at other children to get out of the way, he couldn't see [Victim]. And I thought that seemed a bit odd and obsessive." ROA. pp. 28-30 (direct quote, p. 30, lines 7-10).

Kulpepper testified that one day she came over to Victim's house and saw Victim and White in the front room of the house. White was supposedly tutoring Victim. Victim was sitting in a recliner chair and White was on the floor by Victim. White was laying his head on Victim's lap, even though Victim was sort of sitting on her feet and had her homework spread across her lap. Kulpepper testified it seemed inappropriate and she thought something was up, so she told the family about it. ROA. pp. 30-32. She admitted on cross-examination that White gave her the creeps. ROA. p. 36.

Kulpepper testified during cross-examination that she returned around 8 p.m. that same night, and everyone was upset, including Victim. Kulpepper questioned Victim herself about whether something happened. ROA. pp. 38-39. Kulpepper was questioned about her statement to law enforcement, as follows:

> Q: . . . [D]id you ask [Victim]: Did he, George White, put his wiener up inside you? Did you ask her that question?
>
> A: Yes.
>
> Q: And on this statement, if you could help me, it says: she said, and it had "no," but then no is crossed out and then it has "yes" and all initials around it. Do you see where I'm talking about?
>
> A: Yes.

ROA. p. 41, lines 17-25. Kulpepper volunteered: "It was determined that she wasn't really sure. She was only 10 or 11 years old." ROA. p. 42, line 25 - p. 43, line 1. Kulpepper was allowed to review the statement to refresh her memory. ROA. pp. 43-44. Kulpepper then testified as follows:

> Q: . . . And so did you tell [Victim] that there was a hole down there where babies come out, and if he had put his wiener up inside there, it would probably hurt?
>
> A: Yes.
>
> Q: And at first, she said she wasn't sure, because she thought she was sliding around on top of him?
>
> A: Yes.
>
> Q: Later I heard her say that it did hurt?
>
> A: Yes.

ROA. p. 44, lines 9-18.

Victim testified she met White when he fixed their bathroom. White came back to finish the bathroom and later build a playhouse. Victim testified White would take her to church and to see a wolf that lived downtown. ROA. pp. 46-51.

Victim identified a photograph of White's white van. She also identified a picture of a bed that White had in the back of the van. ROA. pp. 52-54. Victim testified that one time White went to the back of the van and then called her to follow him. ROA. pp. 54-55. Victim testified: "He just told me to come. I was so young, so I just did what I was told." ROA. p. 55, lines 3-4. White pulled Victim's pants down and sat her on his lap. His pants were off also. They were sitting face to face. ROA. pp. 55-56. With his hands on her back,

White pushed Victim back and forth. This happened multiple times, every time she would go off with him. ROA. p. 57, lines 2-15.

Victim testified it also happened in the house across the street from where the wolf was located. Both of them had their pants off and she was sitting on his lap while he was sitting on the toilet. White moved her back and forth. She testified she did not remember whether any part of him was inside her, but she testified that it hurt ROA. pp. 58-60. Victim further testified: "It would hurt for a little bit, but then it would stop." ROA. p. 60, lines 17-18. Victim testified this assault occurred on a Sunday, which she was able to recall because White and Victim were supposed to go to church that day. ROA. p. 62, lines 11-16.

Victim testified as follows:

> Q: When you were sitting on his lap, can you describe how his body felt, any part of his body?
>
> A: No.
>
> Q: Did you feel any part of his body?
>
> A: Yes.
>
> Q: And describe what that felt like.
>
> A: I don't really know what it felt like. I just know that I felt – I can't really describe it.
>
> Q: Well, can you just give whatever description you can of what it felt like?
>
> A: I guess wet. I don't know.
>
> Court: I couldn't understand that. I couldn't understand you.
>
> Witness: Wet.

ROA. p. 63, lines 3-17.

Victim testified that when this was happening, she did not tell anyone because she was scared. Victim explained she was scared of "[b]eing taken" from her aunt and grandma. ROA. p. 60, line 24 – p. 61, line 4. There was a basis for this fear. As Grandma later explained to the jury, Victim's mother lost custody of Victim for child neglect several years beforehand. This, Grandmother confirmed on cross-examination, was what Victim was talking about when she said she was afraid of being taken from Grandmother and Victim's Aunt Teresa (Aunt). ROA. pp. 83-84.

Victim testified Grandmother and Aunt asked Victim about whether she was abused and Victim denied it, because she was still scared. However, when they asked her again, Victim admitted being sexually abused. Victim begged them not to call the police, because she was still scared of being taken from the household. ROA. pp. 61-62.

Victim testified that in addition to going to church and the house downtown to see the wolf, White also took her out for breakfast on Sunday mornings. White took Victim to the park once. White would let Victim steer his van sometimes. ROA. p. 62.

Victim's Aunt Teresa (Aunt) testified that White started coming over to the house and fixed things. White started getting close to Victim. White took Victim to church, to see the wolf (which Aunt said was really a dog), to buy supplies, and to different jobs. After speaking with Kulpepper, Aunt and Grandma asked Victim if she was being abused. At first Victim denied it, but then started crying and shaking. She cried and said "Yes he did." ROA. p. 100. Victim disclosed the abuse occurred at the house downtown and in White's van. ROA. p. 100. Aunt testified Victim was upset; she was crying and shaking. She was

scared she was going to be taken away and asked them not to call the police. ROA. p. 100, lines 3-6.

Tammy Tanner testified that White worked on the vacant house for Tanner's father. The house was across the street from the house where the wolf lived. Tanner explained the house was being renovated at the time and had no furniture in it. Tanner lived near this house. Tanner testified that on a Sunday morning, she saw White's van parked in front of the house and saw White and a little girl come out of the house. This was unusual because White normally only worked at the house on week days. White explained to Tanner that they were making a box. ROA. pp. 204-207.

Some bedding was removed from the van; the bedding tested presumptive for seminal fluid. ROA. pp 158-160. However, DNA results were inconclusive. ROA. pp. 214-215. White's wife, Christine, testified she never had sex in the van with White, but explained he did take a sleeping bag with him on a trip in the van to Arizona once. ROA. p. 197; p. 200. She also claimed the multiple gifts were just small things, trinkets from a dollar store. ROA. p. 302.

White testified on his own behalf. Cross-examination was not his problem so much as his direct examination. White was asked if he had a son, he said he had a grown son. When asked how old he was, White said he was not sure, and then proceeded to explain why: "The reason why I don't know is because I gave him up because at the time I was not married and at the time I was in jail." ROA. p. 315, lines 23-25. When asked whether Christine White was his first or second wife, White replied "Yes, at least second wife." ROA. p. 316, line 18.

White would explain he grew up in an orphanage and was later in the military, getting in trouble and going to the jail when he got out of the military. ROA. pp. 316-318. White explained:

> But there was one thing that I had that I had gotten from the orphanage I was in, I found that one of my gifts, if you want to accept the fact that we all have gifts, one was working with my hands, and the other one was I had a love for children because I was in the orphanage. Never had any, so to speak, but everybody I met seemed to have children whether it was in church or jobs, home, wherever I went, there was always children.
>
> Sometimes the children were neglected in their families, and sometimes they clung to me. Sometimes they were all around me, particularly in this case.

ROA. p. 318, lines 8-19. White admitted offering to help tutor Victim. ROA. p. 329. He explained that he and Victim were at the house downtown to work on a box as a surprise for Aunt. He verified there really was a wolf across from this house. ROA. pp. 329-332. White verified taking Victim to church, to breakfast, and to see the wolf, and verified that at times it was just him and Victim. ROA. p. 339.

White's counsel asked him. "Did you ever have any sex with [Victim] take her clothes off of her or do anything like that?" ROA. p. 339, lines 21-22. He replied: "I'm sorry, I can honestly tell you no, I did not. Why would she say it? I don't know. But as far as me personally having – I pled not guilty at the beginning of this and I still stand by that." ROA. p. 339, line 23 – p. 340, line 1.

ARGUMENT

I.

The video recording of the forensic interview met the statutory requirements for admission; the trial court did not err in allowing the use of a transcript of the forensic interview; and the interview contained sufficient guarantees of trustworthiness to be admitted into evidence.

White complains that the trial court erred in admitting the video interview of Victim because of problems with the sound quality and because the interview did not contain sufficient guarantees of trustworthiness. Further, White complains the trial court should not have allowed a transcript of the interview to be admitted into evidence. The trial court did not err, as the video had sound, the applicable statute allows for a child victim's out of court statement to be admitted in mediums other than a video recording, and the interview was conducted by a well-qualified social worker, and the interview contained particularized guarantees of trustworthiness as required by statute.

Section 17-23-175 of the South Carolina Code provides for the admission of the videotaped forensic interview of a child victim of a sex crime when certain criteria are met. Specifically, the statute reads:

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

> (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
>
> (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.
>
> (B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, but is not limited to, the following factors:
>
> (1) whether the statement was elicited by leading questions;
>
> (2) whether the interviewer has been trained in conducting investigative interviews of children;
>
> (3) whether the statement represents a detailed account of the alleged offense;
>
> (4) whether the statement has internal coherence; and
>
> (5) sworn testimony of any participant which may be determined as necessary by the court.

S.C. Code Ann. § 17-23-175(A)(B).

The trial court made the following ruling when it found the video recording admissible:

> Well, I have considered this and thought about it a great deal since we started this case and been thinking about it since we've gone along. And done particularized thinking about it over the time that we've been involved. I think it does comply with the statute as far as its admissibility. I think that it is admissible under this statute, having considered everything that I'm told to consider. I have considered it all, and I think that it does comply with the statute and is admissible.
>
> I think it is, given in response to questioning and

conducted by an investigative interview by somebody that's trained and authorized to do it under the statute. It was – it is basically recording, however poorly it may be, and bothers me the way – if the jury sees it the way we have to see it, I don't think that's very good. But anyway, that's the way it goes.

. . . [B]ut anyway I've conducted this hearing outside the presence of the jury and the totality of the circumstances. There's that language surrounding making the statement. Does provide me with some particularized guarantees of its trustworthiness

And in regard to that, I would say as far as leading questions sometimes, but not enough to make in my opinion the statements made by the person, the child, untrustworthy. There were some leading statements, but not such enough and in such quality as to lead me to feel that the interview and the contents of basic stuff as far as the interview was concerned was untrustworthy, her responses were untrustworthy. Again, she's been trained, interviewer has been trained properly.

I would say that when it said the detail account of the alleged offense, I wouldn't call it a detailed account, but it's enough of an account, bare essentials of the account of what happened, and it does conform with what she testified to in court. You know, that's what it does to me. That's the most important part to me, is – I wouldn't call it a detailed account, but it's the same account that she's given here in court. So that's the way – that's what I would say in regard to three and all that.

When you say internal coherence, I interpret that to mean that it makes sense, that I can understand what she's saying, it is coherent, and that it's not off the wall or anything of that sort. I can understand her both in her testimony she made in court in person and also this testimony here. It is coherent and it goes together. That's what I would say about that.

. . . So after considering all of this and all of the other things that I have been instructed by this statute to consider, I find that it is admissible and I will allow it into evidence.

ROA. p. 252, line 4 – p. 254, line 14.

White complains that the video recording should not have been admitted because of (1) limitations in volume of sound in the recording and (2) the interview did not possess

particularized guarantees of trustworthiness. As to his first complaint, White also argues the jury should not have been provided with the transcript of the interview, as the statute does not provide for the jury being supplied with transcripts.

Sound was adequate, transcripts are allowed

The recording does have sound, and while it is necessary to raise the volume above normal levels on a computer, the interview is audible. The sound issues seemed to have been generally resolved according to the trial transcript. The trial court noted when the video recording was introduced into evidence that there had been technical difficulties, but told the jury, "we think we've got it to the point now where you can watch it and hear it." ROA. pp. 261-262 (direct quote, ROA. p. 262, lines 8-9). Therefore, the recording meets the plain language requirements of the statute. It is an audio and visual recording, even if there was room for improvement.

Further, under paragraph (F):

> Out-of-court statements made by a child in response to questioning during an investigative interview that is visually and auditorily recorded will always be given preference. If however, an electronically unrecorded statement is made to a professional in his professional capacity by a child victim or witness regarding an act of sexual assault or physical abuse, the court may consider the statement in a hearing outside the presence of the jury to determine:
>
> (1) The necessary visual and audio recording equipment was unavailable;
>
> (2) The circumstances surrounding the making of the statement;
>
> (3) The relationship of the professional and the child; and

> (4) If the statement possesses particularized guarantees of trustworthiness.
>
> After considering these factors and additional factors the court deems important, the court will make a determination as to whether the statement is admissible pursuant to the provisions of this section.

S.C. Code Ann. § 17-23-175 (F).

The statute does state a marked preference for a visual and audio recording, but also provides the means to admit out-of-court statements by the victim in other mediums, most likely testimony. The statute clearly contemplates that evidence of the out-of-court statement might come from a source other than a visual and audio recording, and in the instant case, the replication of the audio recording by transcript does not violate the statute, given the provisions of paragraph (F). In the instant case, a reasonably accurate transcript was provided to enhance perceived deficiencies in volume. It was not an abuse of discretion for the trial court to do so, given that paragraph (F) provides for admission of out-of-court statements in mediums other than a visual and audio recording.

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)). In the instant case, the interview was preserved in an audio and visual recording. The transcript was a reliable reproduction of the interview and was

provided to the jury for use in conjunction with the video recording made available to the jury. Accordingly, the trial court did not abuse its discretion in allowing the transcript to be used or in admitting the video and audio recording.

Given the lack of inaccuracy in the transcript, any error would be harmless. The improper admission of evidence is reversible error only when the admission causes prejudice. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Defects in evidence or procedure generally do not affect admissibility. See, e.g., State v. Odom, 382 S C. 144, 676 S.E.2d 124 (2009) (citing State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002)). "Exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the defendant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures." Huntley, 349 S.C. at 6, 562 S.E.2d at 474.

The transcript was provided to aid the jury with any possible defects in sound quality. Note the trial court asked whether counsel objected to any particular part of the transcript as opposed to the use of the transcript. Counsel did not have any objections and noted "[t]here were a couple of terms that weren't perfect, but I didn't see anything that was damaging." ROA. p. 257, lines 17-25. The trial court did not err in allowing the video recording and the transcript into evidence.

Guarantees of trustworthiness

White further complains that the trial court should not have admitted the recording of the interview because it did not possess sufficient guarantees of trustworthiness. White makes two arguments in this regard (1) Kulpepper's questioning tainted the subsequent interview by Dadin, rendering Dadin's professionally conducted interview inadmissible; and

(2) Victim's answers were inconsistent with the trial testimony.

The latter issue should not be reviewed. White's trial counsel conceded to the trial court that the threshold requirements of the statute were met. When asked by the trial court, White's trial counsel advised the trial court: "Narrowly, I agree it probably meets what the statute requires. I've got some constitutionality problems, but I will save that." ROA. p. 246, lines 9-16.

However, when asked for his arguments against admission at the conclusion of the State's in camera presentation, trial counsel argued that the video recording should not be admissible because of the suggestive questioning by Kulpepper, a family friend. Trial counsel also argued the statement did not have internal coherence because the nurse examiner asked Victim if anybody hurt her down there and she said no. ROA. p. 250, line 10 – p. 251, line 6. White never complained at trial that the interview was inconsistent with Victim's trial testimony.

An objection should be sufficiently specific to bring the exact error to the trial court's attention. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). An issue conceded in trial court is not preserved for review State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000); see Lindsay v. Lindsay, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997) (holding an appellate court will affirm a ruling by a trial judge if offended party does not challenge that ruling; failure to challenge ruling is abandonment of the issue and precludes consideration on appeal; unchallenged ruling is law of the case and requires affirmance). The ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial. State v. Smith, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999).

In the instant case, White's appellate argument about the perceived inconsistency between Victim's trial testimony and her interview is not preserved for review because trial counsel conceded the statutory requirements were met, although he did make a totality of the circumstances argument based on Kulpepper's discussions with Victim. White's trial counsel also objected to utilizing the transcripts. However, White's trial counsel never argued that the Victim's interview lacked coherence because it was inconsistent with trial testimony.

Further, the trial court did not abuse its discretion in determining the recording met the threshold requirements for admission. A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). In the instant case, the interview was conducted by Dadin, a skilled interviewer who completed roughly five hundred interviews, received basic and advanced training in Finding Words and RATAC, and attended state and national conferences in forensic interviewing. Tr. pp. 345-346. Dadin limited the amount of direct questioning and the substance of the allegations was not elicited by direct questioning. State's Exhbit No. 17. Contrary to White's argument, Victim's statements had internal coherence – White is essentially arguing whether the interview is **externally** consistent with trial testimony. Further, the interview statement represents a detailed account of the sexual abuse. For instance, Victim testified and demonstrated how the conduct occurred. She recounted that she and White travelled across the new bridge in Charleston to arrive at the hotel parking lot when she was abused on one occasion in the van. She discussed the bedding in the back of the van. She explained about the house that White

was fixing and the wolf they used to see and feed. She testified, as she did at trial, about the abuse occurring at the renovated house, in the bathroom, on the toilet. State's Exhibit No. 17.

Additionally, Dadin tested and determined that Victim was not swayed by suggestiveness. Dadin testified in camera on this point, as follows.

> Prosecution: What tools did you use to determine whether or not [Victim] was suggestible?
>
> A: So I gave her the opportunity several times to correct me, and sort of in a benign way to see if she would. She did correct me. She did clarify information and she did resist suggestion. Also, if I didn't understand something, you see several times in the video she is sort of helping me understand in her own way. So it was my opinion at the time that she was not actually suggestible.

ROA. p. 243, line 22 – p. 244, line 6.

White complains that "during the interview, she testified that Appellant allegedly assaulted her in the back of his van one time only, in a hotel parking lot." Br. of Appellant, p. 11. Victim actually said it occurred one time in a van, clarifying it was parked by a hotel across the bridge. (State's Exhibit No. 17, 9:30). However, during the interview, consistent with trial testimony, Victim explained the abuse happened every time White and Victim went off somewhere and she was not expected back at a particular time. (State's Exhibit No. 17, 10:40-10:55). What slight discrepancy might exist hardly defeats the admissibility of the interview. Further, White later complains the interview is bolstering, which is opposite to the remonstration made on this issue that the statement was inconsistent with trial testimony. However, the interview is consistent with Victim's trial testimony and the trial court did not

abuse its discretion in this regard. Accordingly, the trial court did not abuse its discretion in admitting the forensic interview into evidence as it contained sufficient guarantees of trustworthiness.

II.

Section 17-23-175 does not violate due process and is not unconstitutional; and Appellant's argument is conclusory.

White argues that section 17-23-175 violates due process as applied to his case because the victim was under twelve years old at the time of the interview, but was sixteen years of age at the time of trial The argument is conclusory save for the very generic proposition that "[a] denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice." State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) (cited in Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010)). While White complains Victim was no longer under twelve at the time of trial, White fails to explain why that is fundamentally unfair. It is not: the Victim was subject to cross-examination, as was Dadin, the interviewer. "Statutes are to be construed in favor of constitutionality, and this Court will presume a legislative act is constitutionally valid unless a clear showing to the contrary is made." State v. Curtis, 356 S.C. 622, 629, 591 S.E.2d 600, 603 (2004).

The State is unclear on the theory underlying White's assertion that his due process rights were violated. "Procedural due process requires adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review." State v. Dukes, 404 S.C. 553, 558, 745 S.E.2d 137, 140 (Ct. App. 2013) (citation and internal quotation marks omitted). "It does not, however, require any particular form of procedure." Id. White has been or is being provided all these components of procedural due process.

As noted by White, this Court has already determined section 17-23-175 does not violate the confrontation clause found in the Sixth Amendment as long as the minor is available and subject to cross-examination. State v. Hill, 394 S.C. 280, 293, 715 S.E.2d 368, 375 (Ct. App 2011).

On the other hand, "[t]he substantive due process guarantee requires a rational basis for legislation depriving a person of life, liberty, or property." In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311 (2003). "When an act is challenged under the due process clause, this Court only requires the act to be reasonably designed to accomplish its purposes, unless some fundamental right or suspect class is implicated." In re Luckabaugh, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002). The statute does not implicate a fundamental right or suspect class. "Legislation that does not infringe on fundamental rights is subject only to a rational basis test." Id.

As White notes, the statute makes admissible evidence not previously admissible. "Generally, a prior consistent statement is not admissible unless the witness is charged with recent fabrication or improper motive or influence." State v. Russell, 383 S.C. 447, 450, 679 S.E.2d 542, 543-44 (Ct. App. 2009) (citing Rule 801(d)(1)(B), SCRE). "However, in this case, the legislature has made a specific allowance for these out-of-court statements by child victims provided certain elements are met." Id. at 451, 679 S.E.2d at 544.

The general rule against admitting hearsay statements is based on the long-established belief that cross-examination is the best vehicle to discover the truth and statements from the witness stand are the most reliable. California v. Green, 399 U.S. 149 (1970). "Despite the importance of cross-examination, exceptions to the hearsay rule have long existed in

evidentiary law. Two principles – trustworthiness (or reliability) and necessity – serve as the underlying rationale for exceptions to the hearsay rule." State v. Myatt, 697 P.2d 836, 841 (Kan. 1985).

White's counsel noted the perceived trustworthiness of a forensic interview during pre-trial discussions about the mechanics of the statute:

> Mr. Howe: The way I interpret it, Judge, in all honesty, is that the videotape comes in basically as an exception to the hearsay rule because of the indicia of reliability outlined in the statute. Does that make sense? That's the way I see it –

ROA. p. 16, lines 1-5.

The Kansas Supreme Court concluded that a statute creating a hearsay exception for testimony from child victims did not violate the confrontation clause. Myatt. In so doing, the Kansas Supreme Court contemplated what it deemed the necessity for the exception and the policy reasons for the statutory hearsay exception:

> Often the child victim's out-of-court statements constitute the only proof of the crime of sexual abuse. Witnesses other than the victim and perpetrator are rare as people simply do not molest children in front of others. . . . Most often the offender is a relative or close acquaintance who has the opportunity to be alone with the child. . . . Depending on the type of sexual contact, corroborating physical evidence may be absent or inconclusive. . . . The child may be unable to testify at trial due to fading memory, retraction of earlier statements due to guilt or fear, tender age, or inability to appreciate the proceedings in which he or she is a participant. Therefore, these hearsay statements are usually necessary to the proceedings as the only probative evidence available.

Myatt, 697 P.2d at 841.

In the instant case, the forensic interview provides an environment that is less

intimidating than a courtroom setting and typically is conducted close in time to an initial disclosure of abuse. Providing a video recording of the interview provides a benefit to the defendant too, as the defendant can determine if the interview was conducted in a potentially suggestive manner and may formulate a defense to the charges based on observations of that interview.[1]

A maximum age for when the trial occurs makes little sense. For one thing, it could encourage the defense to delay trial to avoid evidence being admitted at trial and gain a windfall, contrary to concepts of judicial economy. Further, as a trial is delayed and time passes, the preservation of a contemporaneous account of the crime increases, rather than decreases, the probative value of the statement provided under this statute. Certainly, White fails to show he was prejudiced by the video being admitted now that Victim is sixteen years of age as opposed to if she was still under twelve years of age.

White received due process and his conviction is constitutionally just. The conviction and sentence should be affirmed. Any error is harmless, because White's own testimony is far more prejudicial than any possible unfair prejudice from admitting the forensic interview despite the child victim reaching a pre-adult age. Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990).

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[1] See State v Michaels, 642 A 2d 1372, 1379 (N J 1994) (a sufficient consensus exists within the academic, professional, and law enforcement communities, confirmed in varying degrees by courts, to warrant the conclusion that the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events ")

III.

It was not error to qualify a social worker as an expert in child abuse dynamics to testify about delayed disclosure and grooming; the testimony did not improperly bolster victim's testimony; and the social worker did not testify to any out of court statements by victim so the time/place limitation on hearsay statements by a victim of a sexual assault was not implicated.

White's third issue is confusing and jumbles several concepts of law At the heart of the issue appears to be an objection to allowing Dadin, a social worker who interviewed victim, to be qualified as an expert in child abuse dynamics and to also provide general expert testimony about delayed disclosure and grooming. White, however, confuses a limitation on the outcry exception found in Rule 801(d)(1(D), and the rules that pertain directly to the admissibility of expert testimony, chiefly Rules 702 and 703, SCRE. The testimony is simply behavioral testimony that has been admissible here in South Carolina and most other jurisdictions.

In South Carolina, "[t]he admission or exclusion of expert testimony is a matter within the sound discretion of the trial court." Burroughs v. Worsham, 352 S.C. 382, 390, 574 S.E.2d 215, 219 (Ct. App. 2002). "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). A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

Expert testimony on common behavior by victims of sexual abuse is allowed in South Carolina. State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999); see

State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993) (finding "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"). "Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." Weaverling, at 474, 523 S.E.2d at 794. "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); see also People v. Carroll, 740 N.E.2d 1084, 1090 (N.Y. 2000) ("We have long held that expert testimony regarding rape trauma syndrome, abused child syndrome or similar conditions may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand[.]"). "Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior." State v. White, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004) (finding testimony is admissible in prosecutions where the victim of sexual abuse is an adult).

Rule 702, SCRE states the following:

> 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.

Testimony on the behavioral characteristics of sexually abused children has been accepted by courts for approximately a quarter of a century. 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, 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 Batangan court further observed:

> Child victims of sexual abuse have exhibited some patterns of behavior which are seemingly inconsistent with behavioral norms of other victims of assault. Two such types of behavior are delayed reporting of the offenses and recantation of allegations of abuse. Normally, such behavior would be attributed to inaccuracy or prevarication. . . . In these situations it is helpful for the jury to know that many child victims of sexual abuse behave in the same manner. Expert testimony exposing jurors to the unique interpersonal dynamics involved in prosecutions for intrafamily child sexual abuse . . . may play a particularly useful role by

> disabusing the jury of some widely held misconceptions . . . so that it may evaluate the evidence free of the constraints of popular myths.

Batangan, at 51-52 (citations and internal quotation marks omitted). 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).

Delayed disclosure

White complains about Dadin's testimony on delayed disclosure, a well-known phenomenon in our courts, but still considered beyond the ken of laymen. White makes inaccurate statements in his brief. He claims the prosecution offered Dadin to render an opinion as to why the minor disclosed when she did. Br. of Appellant, p. 15. This is false. Dadin never offered an opinion about why or how Victim disclosed; she did not reference Victim at all when she offered her expert testimony. The prosecution did not make this argument for admission or attempt to have Dadin render an opinion on the facts of the case.

Instead, Dadin discussed delayed disclosure in general terms without reference to Victim or the facts of the case. Dadin testified: "Delayed disclosure is a common occurrence in children who have been sexually abused. Typically what happens is they may not tell right away for a variety of reasons." ROA. p. 276, lines 17-20. She explained the reasons for delayed disclosure, without reference to Victim, as follows: "There could be many reasons. Some of the more common ones are relationship to the offender, if there's a close relationship to the offender; fear of getting in trouble; concerns of the impact on the family;

concerns of the offender getting in trouble sometimes; and then often just general embarrassment talking about something that's uncomfortable and that kids don't always have the language to talk about." ROA. p. 276, line 22 – p. 277, line 4. Dadin discussed grooming of children and children's families, without mentioning Victim or the facts of the case, and noted that grooming of the child can impact a child's willingness to tell. Dadin also testified that grooming of a child's family can impact disclosure by the child "because they see this close relationship with the family. And generally, what it implies to a child is that the impact on the family is going to be substantial and pretty uncomfortable for everyone." ROA. pp. 277-278 (direct quote ROA. p. 278, lines 12-16).

This general background expert testimony is admissible both here and nationally. For instance, the Alabama Criminal Court of Appeals found that an expert's testimony on delayed disclosure based on her specialized knowledge was admissible and "clearly assisted the jury to understand the evidence presented" regarding the victim's ten year delay in disclosing abuse. W.R.C. v. State, 69 So.3d 933, 939 (Ala. Crim. App. 2010) (noting "other jurisdictions have held similar testimony to be admissible in child-sexual-abuse cases").

A law review article discusses the soundness of the expert testimony on delayed disclosure, as follows:

> 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); see Westbrooks v. State, 710 S.E.2d 594, 597-98 (Ga. Ct. App. 2011) (finding forensic interviewer's testimony regarding things such as partial disclosure and delayed disclosure was relevant and did not directly address the victim's credibility or express a direct opinion that the victim had been sexually abused; the fact that such testimony may also indirectly, though necessarily, involve the child's credibility does not mean that it improperly bolsters the victim).

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, "[D]isclosure in child abuse cases is generally delayed because of coercion, guilt, or some other reason, [and thus] 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").

"Indeed, the majority of states permit expert testimony to explain delayed reporting, recantation, and inconsistency . . . ." People v. Spicola, 947 N.E 2d 620, 635 (N.Y. 2011).

This testimony is readily admissible; contrary to White's arguments in the instant case, the trial court did not abuse its discretion in allowing this testimony.

Grooming

Grooming is "the process of eroding a victim's boundaries to physical touch and desensitizing them to sexual issues." State v. Berosik, 214 P.3d 776, 782 (Mont. 2009) (finding generalized testimony about grooming by expert witness was proper and not prejudicial profiling evidence). Other states have recognized the importance of testimony on the practice of grooming and held that it is admissible. See Morris v. State, 361 S.W.3d 649 (Tex. Crim. App. 2011); State v. Norlander, 701 N.W.2d 652 (Wis. Ct. App. Table Op. 2005); People v. Diaz, 988 N.E.2d 473 (N.Y. 2013) (finding expert testimony about grooming proper as it is "beyond the ken of the typical juror" and favorably noting that the expert testified she was not aware of the facts of the particular case). "[T]he D.C. Circuit, among other courts, has upheld the admission of [the expert's] testimony on the grooming techniques of child molesters precisely because the average layperson lacks knowledge regarding the manner in which preferential sex offenders operate." Jones v. United States, 990 A.2d 970, 978 (D.C. Ct. App. 2010). "The testimony [helps] to explain not only how a child molester could accomplish his crimes without violence, but also why a child victim would acquiesce and be reluctant to turn against her abuser." Id.

This Court, in finding prior bad acts evidence admissible, noted that "[t]he six to seven year pattern of escalating abuse of Victim by [appellant] is the **essence of grooming** and continuous illicit activity." State v. Kirton, 381 S.C. 7, 36, 671 S.E.2d 107, 121 (Ct. App. 2008) (emphasis added).

Like expert testimony on delayed disclosure, general expert testimony on how grooming affects a child's disclosure of sexual abuse is acceptable behavioral testimony. See Weaverling. Accordingly, the trial court did not abuse its discretion in allowing this testimony.

Expert's qualifications

White makes a conclusory claim under this issue that Dadin was not qualified in the area of child abuse dynamics or to provide expert testimony on delayed disclosure or grooming. Cole v. South Carolina Electric and Gas, Inc., 355 S.C. 183, 196, 584 S.E.2d 405, 412 (Ct. App. 2003) (declining to review argument because it was "not supported with citations of authority, and it [was] so conclusory as to be an abandonment of this issue on appeal"). It should not be reviewed. White makes the same claim under Issue IV and Respondent discusses the issue more thoroughly in its brief under Issue IV.

Note that White's trial counsel only objected to the scope of expert testimony, not to the qualification of Dadin as an expert. White's counsel advised the trial court, "I do not object to her being an expert in applying of this RATAC method." ROA. p. 265, lines 10-11. White's counsel never took issue with the designation of expertise in child abuse dynamics. He only took issue with the scope of expert testimony.[2]

Dadin testified she is a licensed independent social worker with a clinical practice. Dadin testified her area of specialty is trauma in child abuse. ROA. p. 275. Dadin has an

[2] Accordingly, to the extent White now argues that Dadin should not have been qualified as an expert at all, the issue is not properly before this court An issue conceded in trial court is not preserved for review State v Benton, 338 S C 151, 526 S E 2d 228 (2000), see Lindsay v Lindsay, 328 S C 329, 491 S E 2d 583 (Ct App 1997) (holding an appellate court will affirm a ruling by a trial judge if offended party does not challenge that ruling, failure to challenge ruling is abandonment of the issue and precludes consideration on appeal,

undergraduate degree in psychology and a master's degree in social work. Dadin testified she received basic and advanced training in Finding Words and RATAC, and attended state and national conferences in forensic interviewing She estimated she has conducted five hundred forensic interviews of children. Part of her practice includes both therapeutic interviews and forensic interviews. ROA. pp. 259-260. Dadin testified ". . . what I specifically look at now in treatment is the impact of child abuse on children and families, and often address any sort of things leading up to the child abuse and the impact that might have on children moving forward." ROA. p. 276, lines 9-13.

Dadin testified the concept of delayed disclosure is documented in literature and has been studied. ROA. p. 267. Likewise, Dadin testified grooming has been studied and there are many publications about grooming. Dadin testified she has experienced the effects of grooming in her clinical practice. ROA. p. 269.

"The qualification of a witness as an expert is a matter within the discretion of the trial court." State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997). "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 beyond the scope of the jury's good judgment and common knowledge." Id. A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

In Honea v. Prior, 295 S.C. 526, 389 S.E.2d 846 (Ct. App. 1988), this Court

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unchallenged ruling is law of the case and requires affirmance)

considered whether the circuit court erred in qualifying two social workers as experts to testify on a victim's mental condition. This Court 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. This Court concluded the trial court properly found each social worker was qualified based on their education, post-graduate training, and clinical experience with victims of sexual assault, as well as their opportunities to observe the victim. Id. at 531, 369 S.E.2d at 849. In the instant case, Dadin had education, training, and professional experience making her well-qualified to provide generalized expert testimony about delayed disclosure and grooming as part of her qualifications in the field of child abuse dynamics. Accordingly, the trial court did not err in allowing this testimony.

Hearsay exception

White's briefing is confusing because he conflates concepts of hearsay with background expert testimony that is allowable, pursuant to Weaverling and Schumpert, on the behavioral characteristics of victims of child abuse. Clearly irrelevant to the issue is the contention that Dadin exceeded the time/place limitation on the hearsay exception for victims of child abuse.

One must back up and start with basics to unscramble White's arguments. The time and place limitation is a limitation on the admissibility of out of court statements by a victim of child abuse. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801, SCRE. Hearsay is inadmissible except as provided by statute, the Rules of

Evidence, or other court rules. Rule 802, SCRE; State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001), *cert dismissed* 353 S.C. 538, 579 S.E.2d 318 (2003).

Although not cited by White, the hearsay exception White references is found in Rule 801(d)(1)(D), SCRE, which provides, in relevant part, the following:

> [T]he declarant testifies at the trial . . and is subject to cross-examination concerning the statement, and the statement is . . . (D) consistent with the declarant's testimony in a criminal sexual conduct case or an attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident.

Appellate courts have found it error to admit out of court statements by a victim as to the identity of the perpetrator or the details of the sexual assault. State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989) (error to allow social worker to testify to details of victim's dislclosure); Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994) (counsel ineffective for failing to object to testimony by relative that Jolly sexually abused victim); Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001) (counsel ineffective for failing to object to testimony by four different witnesses that victim told them Dawkins was the perpetrator of sexual assaults on victim – "[t]estimony from other witnesses regarding the victim's identification of the perpetrator does not fall within this hearsay exception."); Watson v. State, 370 S.C. 68, 634 S.E.2d 642 (2006).

However, the complaint is not that Dadin testified as to what victim told her, but that Dadin testified about the phenomena of delayed disclosure and grooming – behavioral testimony. Reference to this hearsay exception and associated case law merely clouds the issue.

Bolstering by interviewers

Further clouding the issue is reference to recent cases where an individual is admitted as an expert in forensic interviewing and then gives opinion testimony that vouches for the credibility of a victim. Those cases are not implicated in the present case. Dadin did not opine on Victim's credibility. The Supreme Court recently explained: "[I]t is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." State v. Kromah, 401 S.C. 340, 358-59, 737 S.E.2d 490, 500 (2013). In this case Dadin did not opine on Victim's veracity. Accordingly, this case is readily distinguishable from Kromah and other cases where the expert testimony was found to be unfairly prejudicial to the defendant. See State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding the admission of the forensic interviewer's written report into testimony to be error because the reports stated that each child "provided a compelling disclosure of abuse by appellant."); State v. McKerley, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding the forensic interviewer's "opinion as to whether she thinks something happened [was] nothing other than her inadmissible opinion as to whether the victim was telling the truth").

White's assertion in his statement of this issue, that Dadin gave an opinion about Victim's credibility, is simply false. Dadin gave background information about abused children generally without reference to Victim or her testimony. The trial court did not err in allowing Dadin to testify about grooming and delayed disclosure. Further, White never objected to Dadin giving an opinion on Victim's credibility, which makes sense since it simply never occurred. An issue must be raised to and ruled upon by the circuit court in

order to be considered on appeal. State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 213 (Ct. App. 2002).

Suggestible

Confusing matters even more is a loaded statement that does not fairly characterize the record. White argues the following: "Ms Dadin also testified that, despite the minor having first denied any abuse but later changing her mind, and despite using Ms. Kulpepper's words when disclosing that 'it hurt,' Ms. Dadin did not think the minor's testimony was influenced by Ms. Kulpepper's questioning because, in her opinion, the minor was not 'suggestible.'" White cites to pages 298-299 of the record for this proposition.

This statement is false because Dadin did not give an opinion on whether Victim's testimony was influenced by Kulpepper's questioning. The relevant portion of testimony is as follows:

> Q: Mr. Howe was asking you questions about the leading questions, and what he was really getting at is the term suggestibility. Can you tell the jury what that means in terms of child abuse, dynamics of child abuse?
>
> A: Uh-huh. So there's a concern that children are more suggestible than adults, meaning that if they are provided information, they may sort of take on that information and parrot it back.
>
> Q: Did you do anything in your interview to determine whether or not [Victim] was suggestible?
>
> A: I did.
>
> Q: And what was that and what were the results?
>
> A: So some of the concrete examples are, I asked her about favorite things and then offer my favorite to see if she will

> change what she says. A lot of younger kids typically, you know, between three and probably as old as eight, when I had [said] my favorite is chocolate might have said, my favorite is chocolate too. She resisted suggestions several times though.

ROA. p. 298, lines 4-22. Dadin testified further:

> Q: And is it ever necessary when interviewing a child to ask more than: Just tell me what happened?
>
> A: Yes.
>
> Q: Why is that?
>
> A: A lot of times kids don't necessarily have the language to share what they are trying to say. Typically, the semi-structured protocol suggests that you start with very open-ended questions. And then you get to more direct information trying to clarify things. So, for example, you would not ask a direct question of a child who, A, was suggestible; or, B, had not made a disclosure already.

ROA. p. 299, lines 2-13.

This testimony was properly elicited on redirect examination as White's counsel opened the door to this testimony. A party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991).

On cross-examination, White's counsel questioned Dadin about the RATAC method and about Finding Words. ROA. pp. 288-289. White's counsel further questioned Dadin about the importance of projecting a calm and neutral demeanor to a child during an interview. ROA. pp. 290-292. White's counsel then pursued the following cross-examination:

> Q: And the reason [you want to be as general as you can] is,

you want to be eliciting the details from the child not providing the details?

A: Right.

Q: Simply said, you don't want to be putting words in their mouth or in their head?

A: Right.

Q: And so you never want to ask leading questions?

A: Correct.

Q: Kind of questions I'm asking you now, right; you want to stay away from those, correct?

A: Correct, yes.

ROA. p. 293, lines 3-14. White's counsel pursued cross-examination further:

Q: Exactly. Exactly. So if you are a parent, you are not armed with that, you might ask the kinds of questions, you might start off with the leading question?

A: You could sure.

Q: Which is the same question you are trained not to ask?

A: Right.

ROA. p. 294, lines 17-24.

This is consistent with the trial strategy White's counsel employed to try and show that Victim's accusations were the result of suggestive questioning by Culpepper. White's counsel previously cross-examined Culpepper as follows:

Q: And then did you ask her – and this is in line with what you said, . . . you asked her if she saw any white gooey stuff coming out of his penis?

A: Yes. We were trying to get details.

* * *

Q: These are fairly accurate of the words and the kinds of questions that you used?

A: Yes, sir.

* * *

Q: And the scene generally was one of what I would call, and I think you would agree, to be very emotionally charged?

A: Yes.

Q: She was crying profusely?

A: Yes.

Q: And that was kind of the time when you were asking these questions?

A: That's correct.

ROA p. 44, line 19 – p. 46, line 1.

White's counsel also elicited testimony from Victim that when Kulpepper came back that evening, Victim, Grandmother, Aunt, and Kulpepper were all upset, and that Kulpepper spoke with her about the things that had happened. ROA. p. 67. In contrast, White's counsel elicited testimony from Victim that when she was interviewed by the forensic interviewer, people were not upset and the interviewer was calm and made Victim "feel relatively comfortable and unthreatened." ROA. pp. 68-69.

White's counsel also cross-examined Aunt about Kulpepper's questions, eliciting testimony that Kulpepper "got pretty into details asking her how he did this." ROA. p. 104,

lines 21-24.

Accordingly, the door was opened to the redirect testimony, as White's counsel sought to show that Victim's interview with Dadin was fatally tainted by Culpepper's earlier questioning. When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003). A party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991). "Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge." State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2009) (citations omitted). The State properly elicited testimony from Dadin that she ensured her interview with Victim was not tainted by her own questioning and that she considered whether or not Victim was suggestible.

Further, there was no objection to any of the redirect examination testimony now complained about on appeal. The failure to object when evidence is offered constitutes a waiver of the right to raise the issue on appeal. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). An issue must be raised to and ruled upon by the circuit court in order to be considered on appeal. State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 213 (Ct. App. 2002). 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. I'On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); see also Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App.2004) ("Without an initial

ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.").

Accordingly, the trial court did not err in regards to any of the multiple errors alleged under Appellant's Issue III. Any possible error was harmless beyond a reasonable doubt; White did more to prejudice his case than any conceivable error raised. 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).

IV.

Expert testimony about grooming was not impermissible character evidence but basic background information on the phenomenon of grooming. Contrary to Appellant's statement of issues, the prosecution's expert never gave an opinion as to whether Appellant groomed the victim. The expert, a private licensed social worker, was qualified to testify about the phenomenon of grooming.

White argues Dadin's testimony on grooming was impermissible character evidence and Dadin was not qualified to provide expert testimony about grooming. Dadin did not testify to White's character, contrary to White's factually erroneous statement of this issue, and Dadin was qualified to testify about grooming by victims of child abuse through her education and experience.

Dadin provided only general expert testimony on grooming

White makes a highly inaccurate claim in his statement of this issue. He claims Dadin was allowed to render an opinion that White groomed his Victim. This did not occur. The **whole** direct examination pertaining to grooming follows:

> Q: What does grooming mean?
>
> A: Grooming is another term commonly used in the area of child sexual abuse, meaning that someone attempts to establish a close relationship with the child and essentially gain their trust, thereby gaining access to the child. It can be –
>
> Q: Go ahead.
>
> A: Can be sometimes in the form of having special rituals, offering gifts, flattery, sometimes pornography is shown to children, sometimes flattering comments about bodies or personality or things like that are often used.

> Q: How does grooming have an effect on a child's willingness to tell?
>
> A: It can certainly impact their willingness to tell in a negative manner for the reasons I stated.
>
> Q: And what is – is there ever grooming of adults or grooming of the child's family?
>
> A: Yes.
>
> Q: And what is that?
>
> A: So sometimes if someone is attempting consciously or unconsciously to gain access to a child, they sort of establish a level of trust with the family in order to see the child more often.
>
> Q: And how does that affect a child's willingness to tell?
>
> A: It can inhibit the child's willingness to tell because they see this close relationship with the family. And generally, what it implies to a child is that the impact on the family is going to be substantial and pretty uncomfortable for everyone.

ROA. p. 277, line 12 – p. 278, line 16.

As shown above, all the testimony was general background information – none of Dadin's testimony on grooming referenced specific facts of this case or commented on Victim's testimony. White's statement of this issue is misleading. Dadin's expert testimony on grooming is 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 Texas prison classification system and prison violence admissible despite claim the testimony did not relate to appellant personally; testimony was relevant as rebuttal "educator-expert" evidence). Dadin did not relate her testimony to Victim personally.

Another glaring inaccuracy in White's brief is the assertion that "the State offered Ms. Dadin to testify as an expert in the 'dynamics of child abuse' so that she could offer her opinion that the minor delayed disclosing the alleged abuse because she was being 'groomed' by the defendant. (ROA, pp. 266-268)." Br. of Appellant pp. 20-21.[3] The reality is Dadin never testified or gave an opinion as to why Victim delayed disclosing the abuse, to whether Victim was groomed, or to whether Victim was even abused. The portion cited by White above is in camera testimony which offers background information on grooming and delayed disclosure similar to the trial testimony before the jury. The testimony does not reference the facts of the case and does not, as White falsely claims, come to a conclusion as to whether Victim delayed disclosure or was groomed by White.

Not improper character evidence

White claims the expert testimony was inadmissible under Rule 404(a), SCRE. Under Rule 404(a): "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except (1) **Character of Accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; . . . ."

Contrary to White's argument, Dadin did not testify about White's character or about White at all. Dadin also did not testify or offer an opinion on whether Victim was groomed by White. Dadin only offered general background expert testimony about the phenomenon of grooming. This does not even implicate Rule 404(a).

White's reliance on State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998), is misplaced.

[3] Also false is the assertion that Dadin informed the jury "Appellant was behaving like a child molester"

In Nelson, an expert on sexual trauma and abuse of children was allowed to testify about the general characteristics of pedophiles, that pedophiles sometimes fantasize about taking children away from other adults, that pedophiles will have a "stash" of childlike items, and that pedophile means "love of children." Id. at 5, 501 S.E.2d at 718.

In the instant case, Dadin did not testify about pedophiles or their preferences. Dadin's testimony was focused on the effects of grooming on a child's potential disclosure of sexual abuse. In other words, Dadin's testimony was acceptable behavioral testimony about child victims of sexual abuse. State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999); State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993); see also State v. Sena, 192 P.3d 1198, 1203 (N.M. 2008) (finding evidence of grooming admissible as it was offered for a legitimate, non-character purpose).

Because Dadin did not testify as to whether or not White was a pedophile, did not testify as to the facts of the case when she discussed grooming, and did not testify about White at all, the trial court did not err in admitting this testimony.

Qualifications

White complains Dadin was not qualified to be an expert and provide expert testimony on grooming. Dadin testified she is a licensed independent social worker with a clinical practice. Dadin testified her area of specialty is trauma in child abuse. ROA. p. 275. Dadin has an undergraduate degree in psychology and a master's degree in social work. Dadin received basic and advanced training in Finding Words and RATAC, and attended state and national conferences in forensic interviewing. She estimated she has conducted

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(Br of App p. 22) Dadin never testified or commented about how White behaved

five hundred forensic interviews of children. Part of her practice includes therapeutic interviews in addition to forensic interviews. ROA. pp. 259-260. Dadin testified "... what I specifically look at now in treatment is the impact of child abuse on children and families, and often address any sort of things leading up to the child abuse and the impact that might have on children moving forward." ROA. p 276, lines 9-13.

Dadin testified the concept of delayed disclosure is documented in literature and has been studied. ROA. p. 267. Likewise, Dadin testified grooming has been studied and there are many publications about grooming. Dadin testified she has experienced the effects of grooming in her clinical practice. ROA. p. 269.

In South Carolina, "[t]he admission or exclusion of expert testimony is a matter within the sound discretion of the trial court." Burroughs v. Worsham, 352 S.C. 382, 390, 574 S.E.2d 215, 219 (Ct. App. 2002). "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).

Rule 702, SCRE states the following:

> 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.

"The qualification of a witness as an expert is a matter within the discretion of the trial court." State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997). "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 beyond the scope of the jury's good judgment and common knowledge." Id. A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

In Henry, the appellant objected to the qualifications of a psychotherapist to testify about trauma and delayed disclosure of sexual abuse of children. The psychotherapist had an undergraduate degree in sociology and a master's degree in social work. She practiced as a psychotherapist for both adult and child sexual abuse for eleven years. She had previously been qualified to testify as an expert fifteen times. The expert in Henry had some additional qualifications beyond Dadin's: she was on a board of directors for a professional organization concerning child abuse and conducted some workshops oriented towards sexual abuse, in addition to having a specialty in post-traumatic stress disorder. Id. at 276-77, 495 S.E.2d at 468. This Court affirmed and commented, ". . . Henry blithely ignores the recognized principle of law that a witness is competent as an expert provided the witness has acquired by reason of study or experience or both such knowledge and skill in a business, profession, or science that she is better qualified than the jury to form an opinion on the particular subject of testimony " Id. at 278, 495 S.E.2d at 468-69.

In Honea v. Prior, 295 S.C. 526, 389 S.E.2d 846 (Ct. App. 1988), this Court considered whether the circuit court erred in qualifying two social workers as experts to testify on a victim's mental condition. This Court 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.

This Court concluded the trial court properly found each social worker was qualified based on their education, post-graduate training, and clinical experience with victims of sexual assault, as well as their opportunities to observe the victim. Id. at 531, 369 S.E.2d at 849. In the instant case, Dadin had education, training, and professional experience making her well-qualified to provide generalized expert testimony about grooming.

A Texas court, after an extensive survey of federal and state cases, observed expert testimony on grooming has been admitted in courts from a range of professionals, including psychiatrists, psychologists, therapists, social workers, and law enforcement. Morris v. State, 361 S.W.3d 649, 666 (Tx. Crim. App. 2011) ("A person can, through his experience with child-sex-abuse cases gain superior knowledge regarding the grooming phenomenon.").

In Jones v. United States, 900 A.2d 970 (D.C. Ct. App. 2010), the appellant complained that the government's expert, a former special agent with the Behavioral Science Unit of the Federal Bureau of Investigation, was not qualified to provide expert testimony on grooming because he did not have training as a psychologist or psychiatrist and had not interviewed victims of child abuse. Jones held that the witness was qualified as an expert, noting "[e]xpertise may be predicated on experience rather than academic training. Scholarship is not a prerequisite for eligibility to testify as an expert witness; the relevant knowledge may be derived from professional experience, including, in particular, experience as a police officer." Id. at 979 (citation and internal quotation marks omitted).

In the instant case, White makes the conclusory assertion that Dadin's experience as a forensic interviewer did not qualify her to testify as an expert in the dynamics of child abuse. Br. of App. p. 22. However, White fails to provide any authority or explain how Dadin's

education and experience is lacking to provide fundamental information on delayed disclosure and grooming. The argument, unsupported by citation and conclusory in nature, should not be reviewed, but instead considered abandoned on appeal. Cole v. South Carolina Electric and Gas, Inc., 355 S.C. 183, 196, 584 S.E.2d 405 (Ct. App. 2003) (declining to review argument because it was "not supported with citations of authority, and it [was] so conclusory as to be an abandonment of this issue on appeal"). Likewise, White's trial counsel failed to explain how Dadin's expertise was deficient in his objection at trial. Tr pp. 358-359.

Nonetheless, the trial court's finding that Dadin was qualified to provide expert testimony is supported by evidence in the record and does not constitute an abuse of discretion. Price.

V.

The trial court did not err in denying the motion for directed verdict on the charge of criminal sexual conduct with a minor as there was sufficient evidence to support the element of an intrusion of Victim's genital openings.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury. State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001).

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)).

The United States Supreme Court noted the following:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, **and to draw reasonable inferences from basic facts to ultimate facts.**

Jackson, at 319 (second emphasis added).

Our Supreme Court recently articulated the following concerning the standard of review:

> The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty as suspicion implies a belief or opinion as to the guilt based upon facts or circumstances which do not amount to proof. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402, 409 (2013) (quoting State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004) (citations and internal quotations omitted)). This is consistent with the United States Supreme Court's observation concerning circumstantial evidence:

> Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt we can require no more.

Holland v. United States, 348 U.S. 121, 137-38 (1955) *cited with approval in* Jackson, at 317 n.9.

A person is guilty of criminal sexual conduct on a minor in the second degree if the person "engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age." S.C. Code § 16-3-655(B)(1). Sexual battery is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight,

of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code § 16-3-651(h). "Penetration of the vagina is not necessary or required." State v. Morgan, 352 S.C. 359, 373, 574 S.E.2d 203, 210 (Ct. App. 2002) (emphasis removed)

In the instant case, testimony from the victim and other witnesses provided sufficient evidence of an intrusion of Victim's body. Victim testified she was rocked back and forth and that it hurt. During the interview (approximately 11:45 into the DVD) Victim demonstrated with dolls what occurred, which suggested contact between private areas. Victim testified that when she was sitting on top of White, his body felt "wet." Further, Grandmother testified that Victim told her he sat Victim down and with her clothes off and he was "[j]ust rocking her back and forth **and up and down**." ROA. p. 88, lines 17-23 (emphasis added).

In State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986), the South Carolina Supreme Court found the six year-old victim's testimony that the defendant touched her with his penis, but could not remember whether he put it inside her body, sufficient to survive directed verdict where she also testified it hurt. Mathis found that this was sufficient evidence of an intrusion.

In State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), the Supreme Court similarly found evidence of an intrusion sufficient to survive directed verdict on the issue of intrusion as to the victim named Betty where Betty testified that Johnson touched Betty and it hurt, and the physical examination revealed an injury inside Betty's vagina. Johnson, at 85-86, 512

S.E.2d at 799.

Like Mathis and Johnson, evidence was sufficient in the instant case to submit the case to the jury. Victim was rocked back and forth, and up and down, on White's lap while both were unclothed. A reasonable juror could use the juror's life experiences and knowledge to believe these repeated actions – where evidence indicates White was grinding Victim in his lap – constituted contact of genital areas between White and Victim sufficient to establish an intrusion under statute. Additionally, Victim testified when this occurred, White felt wet. She testified it hurt. Victim's demonstration during the forensic interview simulated intercourse. Evidence was sufficient for the trial court to submit the case to the jury. The jury was reasonable, as rational triers of fact, to find White guilty of criminal sexual conduct. Jackson.

CONCLUSION

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

Respectfully submitted,

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October 31, 2014

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
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v.

GEORGE WHITE, Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR

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PROOF OF SERVICE

I, Norma Bigbee, 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: Rachel Atkin Hedley, Esquire, 1320 Main St., 17th Floor, Columbia, SC 29201 and Robert M. Dudek, Esquire, Chief Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

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