ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
J.C. "Buddy" Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2013-000694

THE STATE, ...RESPONDENT

v.

ERICK ARROYO,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly admitted testimony from psychologist Maria Steenkamp regarding her diagnosis of post-traumatic stress disorder (PTSD), where that testimony was relevant to help the jury in understanding the victim's behavior, did not improperly bolster the victim's credibility, and was not unfairly prejudicial to Appellant.

2. Whether the trial court properly admitted into evidence a heavily redacted copy of the written report of forensic interviewer Elsey where: (1) Appellant opened the door to the complete report by asking extensive questions about Dr. Don Elsey's forensic interview during cross-examination; (2) the complete un-redacted report was initially admitted into evidence without objection from Appellant but was subsequently redacted by the trial court in an effort to remove any comments on the victim's veracity; (3) any remaining un-redacted comments are sufficiently vague so as not to constitute prohibited comments on the victim's veracity; and (4) any remaining un-redacted comments were harmless error.

3. Whether the trial court properly placed no limits on Appellant's cross-examination of his estranged wife, and properly ruled that any such cross-examination which focused upon communications she made to Appellant about their pending divorce would open the door to the witness being able to explain all of her reasons for seeking a divorce, including evidence of an alleged sexual assault committed against her daughter, which the trial court had previously ruled was an inadmissible "prior bad act" under Rule 404(b), SCRE.

4. Whether the trial court properly declined Appellant's requested jury instruction on evidence of good character and good reputation where: (1) the requested charge would violate South Carolina's constitutional prohibition against charging juries "in respect to matters of fact"; (2) Appellant failed to call character witnesses or otherwise adequately present evidence of his good character during trial to warrant the charge; and (3) the charge taken as a whole properly charged the law to be applied. Additionally, to the extent the trial court's decision was error, whether the error was harmless because the evidence presented at trial conclusively established Appellant's guilt beyond a reasonable doubt.

5. Whether Appellant's claim that the trial court erred in tolling his probation until he completes a sexual abuse program is unpreserved for appeal, and even if preserved, whether the trial court acted within its discretion in determining the start date of Appellant's term of probation.

STATEMENT OF THE CASE

Erick A. Arroyo (Appellant) was indicted at the January, 2010 term of the grand jury for Charleston County for one count of criminal sexual conduct (CSC) with a minor – 2nd degree (2010-GS-10-522) and one count of lewd act upon a child (2010-GS-10-529). He was subsequently indicted at the July, 2011 term of the grand jury for a second count of CSC with a minor – 2nd degree (2011-GS-10-4790). He was represented by Andrew J. Savage, Esquire, of the Charleston County Bar. The State was represented by Assistant Solicitor Elizabeth Gordon of the Ninth Circuit Solicitor's Office. (Tr.p.1). On July 9-13, 2012, Appellant proceeded to trial by jury before the Honorable J.C. "Buddy" Nicholson, Jr., pursuant to which he was found guilty as indicted. Following the verdict, the trial judge deferred sentencing until Appellant could be given an evaluation by a forensic psychiatrist. (R.p.835, line 18). On February 26, 2013, Appellant filed a motion for a new trial. (R.p.875-890). On March 4, 2013, the trial court reconvened for a sentencing hearing but again deferred imposing sentence until further review of the psychiatrist's report. (R.p.841-p.874). On March 12, 2013, the trial court sentenced Appellant to fifteen (15) years' concurrent imprisonment on the two counts of CSC with a minor in the second degree, and fifteen (15) years' consecutive imprisonment suspended upon the service of five (5) years' probation on the lewd act charge. The court ordered to "toll probation until the defendant can complete a sexual abuse program." (R.p.946-948). On March 22, 2013, the trial court issued an order denying Appellant's motion for a new trial. (R.p.891). Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent (the State) follows.

STATEMENT OF FACTS

Appellant sexually abused his twelve to thirteen-year-old niece (the victim) over approximately a year spanning 2008 and 2009, while she and her mother were living in his house in Charleston County. Appellant digitally penetrated the victim's vagina and made her touch his penis and eventually escalated the abuse by putting his penis in the victim's vagina and using his tongue and mouth to perform oral sex on her on multiple occasions. Appellant told the victim he loved her and was doing these things so she would not experiment with other boys. (R.p.67, line 23-p.81, line 23). The victim knew Appellant's penis was actually inside her during the abuse because she could feel it moving. She said it hurt physically the first time and hurt emotionally every time she was raped. (R.p.88, lines 6-20).

The sexual abuse was first reported to law enforcement on September 20, 2009, by the victim's mother, Melina Arroyo. She had fallen asleep in Appellant's living room and awoke to discover Appellant leaning over the victim with his face on her breasts. Melina drove directly to the Mount Pleasant Police Department to report the incident. (R.p.154, line 1-p.163, line 7). Appellant was subsequently arrested and indicted for two counts of CSC with a minor in the second degree and one count of lewd act upon a minor. On July 9-13, 2012, he proceeded to trial pursuant to which he was found guilty as indicted. Additional procedural history and facts are included in each of the arguments below and are herein incorporated by reference.

ARGUMENT

I.

The trial court properly admitted testimony from psychologist Maria Steenkamp regarding her diagnosis of post-traumatic stress disorder (PTSD), where that testimony was relevant to help the jury in understanding the victim's behavior, did not improperly bolster the victim's credibility, and was not unfairly prejudicial to Appellant.

Appellant argues the trial court erred in admitting testimony from psychologist Maria Steenkamp, who testified the victim suffered from PTSD, because her testimony was "irrelevant" and "only served to improperly bolster" the victim's credibility. He contends: "It is impossible to construe Dr. Steenkamp's diagnosis as anything other than she believed the child's testimony regarding the abuse and believed it caused PTSD." Appellant argues that as such, his case is indistinguishable from the current line of cases from our appellate courts which find such testimony inadmissible, culminating in our supreme court's 2013 decision in State v. Kromah.[1] (Brief of Appellant p.14). The State disagrees and submits Appellant's argument is without merit.

Initially, the State submits the trial court acted well within its broad discretion in qualifying Dr. Steenkamp as an expert in "trauma-related psychology" based on her education, training, and experience.[2] Furthermore, the trial court properly admitted Dr. Steenkamp's expert testimony pursuant to Rule 702, SCRE, because she possessed scientific, technical or other specialized knowledge which could assist the jury to understand the evidence or to determine a fact in issue. Her diagnosis and opinion of

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[1] 401 S.C. 340, 737 S.E.2d 490 (2013). In Kromah, the Supreme Court held a forensic interviewer should not have been allowed to testify about a "compelling finding" of child abuse, as that was the equivalent of stating the child was telling the truth. Id. at 359, 737 S.E.2d at 500.

[2] Although Appellant bemoans Dr. Steenkamp's alleged "lack of experience with children" (Brief of Appellant p.12), his appeal does not challenge the trial court's decision to qualify her as an expert.

PTSD was based on the history received from the victim, her personal observations of the victim, the victim's demeanor, and symptoms exhibited by the victim. Dr. Steenkamp's expert testimony could help explain the victim's avoidance behavior, a hallmark symptom of PTSD. This behavior manifested itself in the victim's initial denial that abuse occurred, her subsequent tentative disclosure of abuse, and ultimately her delayed disclosure of the details of the abuse. The victim's detailed testimony was the strongest evidence of the sexual abuse committed by Appellant; thus, her credibility was central to the jury's determination of the facts in issue. To the extent that credibility could be challenged or attacked by Appellant because of the manner in which the victim disclosed the abuse, Dr. Steenkamp's evaluation of the victim's psychological symptoms, diagnosis of PTSD, and therapy could assist the trier of fact. Thus, her testimony was clearly relevant. In addition, despite Appellant's claims to the contrary, Dr. Steenkamp's testimony can be construed as serving the precise purpose for which it was offered, as a professional explanation for what a layperson may believe to be the victim's unusual course of disclosure. As such, Appellant's case is absolutely distinguishable from Kromah and other cases which involved testimony of a non-scientific "forensic interviewer" who offered either: (1) a "direct opinion as to the child's veracity," (2) a statement that "indirectly vouches for the child's believability," (3) a statement "to indicate to a jury that the interviewer believes the child's allegations in the current manner," or (4) "an opinion that the child's behavior indicated the child was telling the truth." Kromah, 401 S.C. at 360, 737 S.E.2d at 500. The testimony was properly admitted and did not improperly bolster the victim's credibility; therefore, Appellant's convictions should be affirmed.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The conduct of a criminal trial is left largely to the sound discretion of the presiding judge and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Commander, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982)). Thus, the admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 494-95 (2013); State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012); State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006); State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007). Indeed, the qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion. Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of that discretion. State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009); State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. Kromah, 401 S.C. at 349, 737 S.E.2d at 495; Douglas, 369 S.C. at 429-30, 632 S.E.2d at 848; Gooding, 326 S.C. at 252, 487 S.E.2d at 598; Lee v. Suess, 318 S.C. 283, 457 S.E.2d 344 (1995).

Procedural History & Facts

Prior to trial, Appellant filed a motion in limine to exclude the testimony of Dr. Maria Steenkamp on grounds it would not meet a threshold level of reliability under Rule 702, that it was not relevant under Rule 401, and that even if relevant it should be excluded because its probative value was substantially outweighed by the danger of unfair prejudice under Rule 403. (R.p.892). During opening statements, the solicitor outlined the sexual abuse that would be described by the twelve to thirteen-year-old victim, how it affected the victim, and the events which led her to finally disclose the sexual abuse. She said at first "[the victim] was too afraid to tell" and noted "it didn't leave physical scars on [the victim], but the emotional damage is real." The solicitor then discussed the victim's reaction to two specific incidents where witnesses "caught" Appellant with her. First, she described an incident in Appellant's garage and commented: "[The victim] thinks it's her fault, that she's been caught doing something wrong. When her aunt asked her, no, nothing happened. Nothing happened. Nothing happened." Next she described an incident on Appellant's couch and said: "[Melina] says to her daughter, I know something happened. You've got to tell me. [The victim's] still like, Mama, nothing happened. Nothing happened." The solicitor explained: "That's how this case comes to the light of law enforcement. [The victim] finally tells everything that's been happening for over almost fifteen months. It took two people to catch him in the act because no one could believe that there really was this wolf in sheep's clothing. But they exist." (R.p.57, line 9-p.62, line 18).

During trial, the victim gave detailed testimony about the sexual abuse committed by Appellant when she was twelve and thirteen years old. She explained how he started

by rubbing her back and slowly progressed to rubbing her front through her clothes, including the front of her pants near her zipper. Appellant later started touching the victim inside her underwear and putting his hands inside her "privacies." Eventually, Appellant progressed to putting his penis in the victim's vagina and using his tongue and mouth to perform oral sex on her on multiple occasions. Appellant told the victim he was doing these things so she would not experiment with other boys and he said that he loved her. (R.p.67, line 23-p.81, line 23).

In regard to the emotional impact and how it affected her disclosure, the victim testified the sexual abuse made her feel like she was "a nothing" and that she avoided telling anybody because she thought people were going to judge her and not believe her. (R.p.79, lines 1-13). She testified that during the sexual abuse she felt like something was "wrong" with her and that she "just froze." (R.p.79, lines 24-25; p.81, lines 14-18). The victim testified that even after her Aunt Joyce "caught" Appellant trying to do things to her in the garage, she did not tell what happened because she was afraid her aunt would not believe her and would not say anything to help. (R.p.81, line 24-p.84, line 6). The victim admitted that sometimes the sexual contact felt good but testified she thought she was "disgusting for feeling that way" and that she was "sinning." She said it caused her to stop praying and going to church. She became mean and bitter, but she did not show it to people. The victim acted nice and smiled all the time, but her mother still noticed something was wrong. (R.p.86, line 14-p.87, line 9). The victim testified she knew Appellant's penis was inside her vagina during the abuse because she could feel it moving as he started slowly and then would start going faster. She said it hurt physically

the first time his penis was inside her, and that it hurt emotionally every time she was raped. (R.p.88, lines 6-20).

The solicitor asked the victim how Appellant's actions made her feel about herself and she responded: "To me, I felt like I was nothing. I felt like nobody cared about me and that I was disgusting and that I wasn't - - that I did something bad, that this was all my fault, that I made him do this to me." (R.p.90, lines 18-23). She said she "broke down" because she "couldn't deal with all this stuff" and that she eventually went to a therapist as a result of the abuse. The victim testified that with the exception of her friend Lori, she never told anyone besides the therapist all the details of the sexual abuse because she did not want to remember what happened. (R.p.91, line 9-p.92, line 20). On cross-examination the victim testified she hid her feelings because she did not want her younger brother and sister seeing her crying every other weekend, and she repeated how it made her feel disgusting. (R.p.104, lines 4-21; p.111, lines 19-22). On re-direct she testified she went to therapy to talk about getting raped so she would know how to deal with it and confront the abuse instead of hiding and leaving it in her head. (R.p.122, lines 2-10).

Next, the State called Melina Arroyo (Melina) to the stand. She explained the victim is her daughter and Appellant is her older brother. Melina described her relationship with Appellant, her relationship with Appellant's estranged wife Joyce Arroyo (Joyce), and the events that led her to report the sexual abuse of the victim to the Mount Pleasant Police Department. (R.p.148, line 3-p.153, line 25). In particular she described an incident when Appellant called her at work to tell her Joyce had "left him" and was accusing him of molesting the victim. Melina testified that when she called the

victim to ask if Appellant had touched her, the victim was "very jumpy" but denied anything inappropriate happened. (R.p.154, line 1-p.156, line 8). Next, she described an incident on September 20, 2009, where she had fallen asleep in the Appellant's living room while watching football on TV. She awoke to discover Appellant leaning over the victim with his face on her chest and breasts. She gathered up the victim and her younger siblings and drove directly to the Mount Pleasant Police Department. (R.p.157, line 8-p.163, line 7). Melina testified the victim was "in shock" during the car ride, but insisted "nothing happened." She begged the victim to tell her the truth and although the victim was "scared," "crying," and "frozen," she eventually acknowledged Appellant had been touching her breasts. After arriving at the police department, Melina told the victim to tell her more or she would ask the police to put her through a lie detector test. Melina reminded the victim she was her mother, and if the victim thought her own mother could not help and protect her she would not get through this. The victim then started telling Melina "a bunch of stuff," which Melina relayed to the police. (R.p.163, line 8-p.166, line 1). Melina testified her relationship with the victim suffered as a result of the sexual abuse and that it had been a hard road because the victim was no longer a sweet, innocent child. (R.p.168, lines 20-24). She testified that when she woke up and saw Appellant molesting the victim, the victim was "panicked," had "big eyes," and looked "very frightened." (R.p.169, lines 15-21).

On cross-examination Appellant focused on Melina's questions to the victim and how the victim first denied anything had happened. (R.p.214, line 23-p.215, line 25). On re-direct Melina again described how the victim looked scared when Appellant's face was on her breasts, (R.p.218, line 24-p.219, line 20), and on re-cross-examination she

described taking the victim to therapy after reporting the sexual assaults to the police. (R.p.255, lines 16-23).

The State later called psychologist Maria Steenkamp to the stand. The trial judge excused the jury and explained Appellant was questioning Dr. Steenkamp's qualifications and wanted to cross-examine her before he made a ruling on whether she would be qualified as an expert. The solicitor said the State was seeking to offer Dr. Steenkamp as an expert in "trauma-related psychology" to explain how trauma affects individuals. Appellant noted that in addition to questioning Dr. Steenkamp regarding her qualifications to testify, he had a legal argument regarding the parameters of that testimony if she was so qualified by the court. (R.p.295, line 6-p.298, line 1). After listening to voir dire and hearing arguments from the parties, the trial judge found Dr. Steenkamp qualified to testify as an expert in trauma-related injuries and found the diagnosis of PTSD is the same whether it is made in children or in adults. (R.p.335, lines 5-20).

The trial judge asked the solicitor to describe what evidence the State intended to offer from Dr. Steenkamp. The solicitor said Dr. Steenkamp was the victim's treating psychologist and would testify about her diagnosis of the victim, the specific symptoms the victim presented that led to her diagnosis, the victim's treatment, and whether the treatment was helpful; however, she would not go into "grooming" or other aspects of child sexual abuse. The trial judge then granted Appellant's request to have the State proffer Dr. Steenkamp's substantive testimony. (R.p.335, line 21-p.339, line 9).

Dr. Steenkamp testified she met and treated the victim during her rotation at the Crime Victims' Center at the Medical University of South Carolina. She said the victim

was referred to the clinic due to an allegation of child sexual abuse because she was having psychological symptoms that might benefit from treatment. Dr. Steenkamp made a diagnosis of PTSD and explained this was an anxiety disorder that sometimes happens after an individual has experienced a trauma. She explained the three general clusters of symptoms including the "re-experiencing" cluster, the "avoidance and numbing" cluster, and the "hyper-arousal" cluster. Dr. Steenkamp testified the victim met diagnostic criteria for all three clusters and noted the victim's "avoidance" was very prominent. She recommended trauma-focused therapy and began treating the victim using a technique in which the psychologist asks the patient to write about what happened. Dr. Steenkamp explained that one part of therapy is called "habituation or extension" and is used to reduce the emotional response to the trauma so the person can actually think about and talk about what happened. At some point in the therapy the victim disclosed additional details about the abuse she had previously reported. Dr. Steenkamp testified this was not unusual for sufferers of PTSD. She further testified that a common thinking pattern of someone who has suffered a child sexual abuse is one of self-blame and negative emotions and that she observed these symptoms in the victim. (R.p.339, line 11-p.350, line 20).

Appellant argued the proffered testimony "could not be construed in any other way than to bolster . . . the testimony of [the victim]." (R.p.350, line 23-p.351, line 3). He claimed:

> It's sort of a back door way of doing it, not commenting directly on the verbal statements, but commenting on the inference that the treatment continued, that she found post-traumatic stress syndrome and other areas that she testified consistent with the truthful statement by the child. So we believe Judge Few, earlier this year in the McCurley [sic] case prohibits this type of testimony.

(R.p.351, lines 2-10).[3] Appellant moved to disqualify Dr. Steenkamp because the testimony sought is "strictly bolstering the testimony of the victim." (R.p.351, lines 16-18). The solicitor responded by noting that the offending testimony in McKerley consisted of the forensic interviewer's explanation that she was trying to determine whether or not to believe the child and her conclusion that the child's story was compelling, neither of which the State was asking Dr. Steenkamp to do in this case. The solicitor argued that Dr. Steenkamp's area of expertise was not common knowledge for a lay jury and that her testimony would be helpful for them in understanding "avoidance" and why the victim might not have initially disclosed all the details of the sexual assaults. She contended the information would be helpful for the jury to evaluate the testimony they had heard during trial. Appellant maintained Dr. Steenkamp's testimony was sufficiently similar to what was prohibited by McKerley because she was evaluating the victim's behavior and the way the victim expressed herself in an interview, in order to help form an opinion as to whether something happened. He argued it was an impermissible "end-run" around the prohibition against bolstering. The trial judge disagreed and denied Appellant's motion based on the holding in McKerley. (R.p.352, line 1-p.354, line 22).

The jury returned and the trial court qualified Dr. Steenkamp as an expert in "trauma-related psychology." She testified the victim was referred for an assessment for trauma-related symptoms given alleged child sexual abuse, which revealed a diagnosis of PTSD and a recommendation of treatment. Dr. Steenkamp told the jury PTSD is an anxiety disorder that sometimes develops after someone has experienced a traumatic

[3] State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).

event. She gave several examples including being in a bad car crash, being in combat, being raped, and being in a hurricane. Dr. Steenkamp testified there are seventeen overall symptoms of PTSD which are grouped into three broad clusters, including the "numbing and avoidance" cluster. She noted the victim had symptoms in each of the three clusters and that despite learning of other possible traumas in the victim's past, she was able to relate the alleged sexual abuse to the current diagnosis of PTSD. (R.p.360, line 17-p.368, line 4). Dr. Steenkamp testified she recommended trauma-focused therapy, which is the "gold standard treatment for PTSD" and involves asking the individual to talk and think about the trauma. She explained how this therapy could be helpful in two ways: by allowing the patient to shift away from maladaptive and harmful thoughts like "self-blame," and by allowing the patient to process the event without it causing such strong emotions through a process called "habituation." (R.p.368, line 5-p.369, line 23).

Dr. Steenkamp described her specific work with the victim and how through therapy the victim was able to talk about the sexual abuse and disclose additional details she had not previously shared. She said this was not unusual and that patients often reveal more details once they establish trust in their relationship with the therapist. Dr. Steenkamp also described a reference to "human freezing response" in regard to the victim. She explained it is an evolutionary mechanism which can cause a person who feels physically trapped in a traumatic situation to freeze or go limp. She called it a state of "tonic immobility" where the person cannot really respond and often goes mute. (R.p.369, line 24-p.372, line 13).

On cross-examination, Dr. Steenkamp confirmed she was in court testifying as a result of the minor victim's allegations of a sexual assault. (R.p.377, lines 1-22). Appellant asked Dr. Steenkamp whether she believed it was important when treating a child to get third-party verification of the patient's factual report. She testified: "No. Only in situations where I had reason to believe an individual was malingering. In other words, lying." Appellant said he had a matter of law which the trial judge allowed him to argue after Dr. Steenkamp completed her testimony. Appellant argued that by testifying third-party verification was only important where she believed a patient was "lying," Dr. Steenkamp was simply bolstering the testimony of the victim. He asked that her testimony be stricken and for a curative instruction. After listening to a recording of the testimony and noting it was given in response to Appellant's repeated questions, the trial judge ruled he would not strike it but would give a curative charge to the jury. Ultimately, the trial judge charged the jury as follows:

> I would also like to tell you that you just heard the testimony from Dr. Steenkamp. Now, her testimony is for the purpose of medical diagnosis and treatment of post-traumatic stress syndrome, not as to the victim's truthfulness.

(R.p.411, line 18-p.425, line 13; p.436, lines 7-11) (emphasis added).

Later, during cross-examination of Detective Michelle Bacon of the Mount Pleasant Police Department, Appellant specifically referenced Dr. Steenkamp's testimony that "children don't always tell the first go around the details, the extensive details, of the abuse." Bacon testified she heard the doctor's testimony and acknowledged the theory that children do not report sexual abuse right away, which is why as soon as a child discloses abuse it raises a red flag and the police try to conduct an intensive examination. (R.p.526, line 25-p.527, line 3; p.529, lines 12-18).

The State then called Dr. Don Elsey to the stand. He was admitted as an expert in child abuse and forensic interviewing, without objection. Dr. Elsey interviewed the victim on September 22, 2009, two days after the abuse was reported to the police. During that interview she told him she had been sexually abused more than one time during the past year, and the abuse occurred in her uncle's house. Dr. Elsey gave detailed testimony about delayed disclosure, tentative disclosure, accidental disclosure, and grooming. He also noted that a primary attribute of PTSD is avoidance, which can contribute to a child not wanting to talk about abuse. (R.p.623, line 8-p.629, line 21). On cross-examination, Appellant asked Dr. Elsey about "Munchausen syndrome by proxy" being a psychological diagnosis in cases where a child is injured by a caregiver because the caregiver wants sympathy and support. Appellant acknowledged the validity of PTSD being a valid diagnosis by asking: "And that's real. I mean, that's not make-believe. That's the same as post-traumatic stress syndrome. That's the same as all these other psychological definitions of behavior?" (R.p.642, line 22-p.645, line 2).

After the State rested, Appellant moved to strike the testimony of Dr. Steenkamp on grounds that she was not qualified as an expert and that it was irrelevant. The motion was denied. (R.p.664, line 18-p.666, line 3). During his closing argument, Appellant focused on the State's burden of proof and why he believed it had not been met. He argued the jury should have reasonable doubts about the victim's allegations because of the lack of a thorough investigation, the lack of physical evidence to support the allegations, and inconsistencies between the victim's version of certain events and the versions provided by the two eyewitnesses to those events. Appellant directly challenged the victim's credibility by suggesting she may have made the allegations up based on

anger or jealousy. (R.p.770, line 6-p.793, line 22). In response, the State focused on the direct testimony from the victim describing the sexual abuse, arguing "the most important testimony you heard was [the victim's]." The solicitor described the victim's avoidance behavior and how she had spent years trying not to talk about the abuse. The solicitor also noted that once the victim was in therapy, she was able to disclose additional details about the sexual abuse she did not disclose at the forensic interview. (R.p.794, line 13-p.804, line 13).

The trial court then charged the jury on the State's burden of proof, the presumption of innocence, the roles of the judge and jury, reasonable doubt, credibility of witnesses, direct evidence, and circumstantial evidence. (R.p.804, line 14-p.818, line 18). In regard to expert witnesses, the trial judge specifically charged the jury as follows:

> Now, the rules of evidence ordinarily do not permit witnesses to testify to opinions or conclusions. An exception to this rule exists for witnesses called expert witnesses. A witness who, by education and experience have [sic] become an expert in some art, science or profession are permitted to give their opinion in certain areas if the Court qualifies them as an expert witness.
>
> An expert witness may also give the reasons for their opinion. An expert opinion is evidence for you to use in any way you see fit. You should give the evidence the weight and credibility you believe is appropriate. If you decide an expert witness' opinion is not based on sufficient evidence or experience or you decide 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 altogether.

(R.p.811, line 19-p.812, line 9). At the conclusion of trial, the jury convicted Appellant as indicted. (R.p.835, line 18).

Analysis / Relevance

As a general rule, all relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); Rule 402, SCRE. Evidence that assists the jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent. State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004). Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In the Matter of Care and Treament of Corley, 353 S.C. 451, 577 S.E.2d 451 (2003); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002); Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). It is not required that the inference sought should necessarily follow from the fact proved. See Sweat, 362 S.C. at 127, 606 S.E.2d at 513. Indeed, evidence is relevant if "logically relevant" to establish a material fact or element of the crime; it need not be "necessary" to the State's case in order to be admitted. Id. (citing State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990)).

The State submits evidence of the victim's PTSD was of consequence to the jury's determination of Appellant's guilt or innocence at trial. The State was entitled to introduce evidence to help explain the victim's avoidance behavior. The victim's initial failure to disclose details of the sexual abuse, and her delayed disclosure of the details were certainly relevant to her credibility and to Appellant's guilt or innocence of the charges. The diagnosis of PTSD and the behavioral characteristics associated with that diagnosis were likewise relevant to the jury's assessment of the facts that were relayed by both the victim and the people to whom she disclosed the sexual abuse.

Finally, the testimony about PTSD was relevant for anticipating and responding to Appellant's strategy of attacking the victim's credibility. Appellant focused on how the victim hid her feelings, (R.p.104, lines 4-21; p.111, lines 19-22), and her initial denial that anything had happened. (R.p.214, line 23-p.215, line 25). He attacked Dr. Steenkamp's failure to get third-party verification of the victim's factual report, (R.p.411, line 18-p.425, line 13), and then argued to the jurors they should have reasonable doubts about the victim's allegations because of inconsistencies in the victim's version of certain events. Appellant also directly challenged the victim's credibility by suggesting she may have made the allegations up based on anger or jealousy. (R.p.770, line 6-p.793, line 22). Aware of Appellant's strategy of undermining the victim's credibility and understanding this issue was a critical one to be decided by the jury, the State sought to provide the jury with all evidence having a tendency to make the existence of the consequential facts more probable than not. Testimony describing PTSD had a tendency to make a determination the victim was credible more probable than it would be without such testimony; therefore, the expert testimony was relevant. Rule 401, SCRE.

Analysis / Bolstering

As to the specific testimony about PTSD, the State submits the trial court exercised appropriate discretion in allowing such testimony, and that it was not unfairly prejudicial because it did not constitute improper bolstering of the victim's credibility. "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."); 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[.]"). Indeed, this kind of testimony has been accepted by courts in many jurisdictions precisely because it provides relevant insight into the often puzzling aspects of a child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility. Weaverling, 337 S.C. at 475, 523 S.E.2d at 794; State v. Batangan, 799 P.2d 48, 51-52 (Haw. 1990); State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984); State v. J.Q., 617 A.2d 1196, 1206 (N.J. 1993). 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).

Here, the victim was suffering from various psychological problems after disclosing Appellant's sexual abuse. Before this disclosure the victim actively denied the sexual abuse and later she gave more details to her treating psychologist. Dr. Steenkamp's testimony focused primarily on the occurrence and reasons for avoidance behavior in victims suffering from PTSD, information typically beyond the common knowledge of a typical juror. Dr. Steenkamp was able to offer an opinion on the behavioral characteristics associated with PTSD, which was helpful to the jury in

evaluating the actual behavioral characteristics and symptoms displayed by the victim. Thus, the trial judge properly qualified Dr. Steenkamp as an expert in the area of trauma-related psychology and permitted her 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).

Appellant argues Dr. Steenkamp's testimony nevertheless should have been excluded as unfairly prejudicial because the effect of this testimony on the jury was to bolster the victim's credibility by implying Dr. Steenkamp believed the victim's allegations of abuse. The State disagrees. In order for evidence to be excluded as prejudicial, the probative value of the evidence must be substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence." State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest a decision on an improper basis." Id. at 529, 732 S.E.2d at 229. A trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed

only in exceptional circumstances. State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003).

In the instant case, for the reasons discussed above, the testimony had tremendous probative value. Dr. Steenkamp gave a diagnosis and opinion of PTSD based on the history received from the victim, her personal observations of the victim, the victim's demeanor, and symptoms exhibited by the victim. Through her testimony, Dr. Steenkamp offered relevant and helpful information for the jurors to consider in evaluating the victim's testimony without commenting on whether she believed or disbelieved victim's statements or testimony. See 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."). As is obvious to those involved in the criminal justice system and those in the field of psychology, PTSD, avoidance behavior, and delayed disclosure by sexually abused children really does exist. Appellant fails to show otherwise. However, this information is not within the knowledge of laymen and is proper general information to provide in the form of expert testimony.

On the other hand, Dr. Steenkamp's testimony cannot be found to have been unfairly prejudicial to Appellant's case. As explained above, Dr. Steenkamp was treating the victim for psychological problems and diagnosed her with PTSD. "Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror." 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). Dr. Steenkamp never gave an opinion about the credibility of the victim except in response to a direct question from Appellant, and that comment was cured. Indeed, the curative instruction given by the trial court in this case was so broad that it covered all of Dr. Steenkamp's testimony. 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 Dr. Steenkamp did not opine on the victim's veracity. Furthermore, she was not admitted as an expert "forensic interviewer." 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").

Dr. Steenkamp's expert testimony was proper in this case because it aided the trier of fact in understanding the victim's behavior. The testimony also was not unfairly prejudicial to Appellant because the testimony was presented for the purpose of diagnosis and treatment. Dr. Steenkamp did not vouch for or otherwise bolster the victim's truthfulness. Further, given the victim's clear trial testimony, the testimony from two eyewitnesses who "caught" Appellant involved in inappropriate behavior with the victim, the corroborating testimony regarding the time and place of the sexual abuse, the trial

court's curative charge in regard to Dr. Steenkamp, and the trial court's general charge to the jury to give no greater weight to the testimony of the expert, any error from admission of Dr. Steenkamp's testimony was harmless. See 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); 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 n.1 (1999) ("A jury is presumed to follow instructions."). For these reasons, Appellant's convictions should be affirmed.

II.

The trial court properly admitted into evidence a heavily redacted copy of the written report of forensic interviewer Don Elsey where: (1) Appellant opened the door to the complete report by asking extensive questions about Dr. Elsey's forensic interview during cross-examination; (2) the complete un-redacted report was initially admitted into evidence without objection from Appellant but was subsequently redacted by the trial court in an effort to remove any comments on the victim's veracity; (3) any remaining un-redacted comments are sufficiently vague so as not to constitute prohibited comments on the victim's veracity; and (4) any remaining un-redacted comments were harmless error.

Appellant argues the trial court erred in admitting the written report of forensic interviewer Dr. Don Elsey even though the report was partially redacted, because the un-redacted portions constituted an improper bolstering of the victim's credibility. The State disagrees and submits Appellant's argument is entirely without merit for several reasons. First, Appellant opened the door to introduction of the entire report by asking extensive

questions about Dr. Elsey's forensic interview during cross-examination. Second, Appellant cannot now complain where the entire un-redacted report was first admitted into evidence without objection and was subsequently redacted by the trial court in an effort to remove any comments on the victim's veracity. Third, the remaining un-redacted comments do not constitute direct opinions on the victim's veracity and are sufficiently vague so as not to constitute indirect vouching for the victim's believability. Fourth, any error in the admission of the remaining un-redacted comments was harmless beyond a reasonable doubt. Appellant's convictions should be affirmed.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Jennings, 394 S.C. 473, 477, 716 S.E.2d 91, 93 (2011). An abuse of discretion occurs when the trial court's ruling is based on an error of law or when grounded in factual conclusions, is without evidentiary support. Id. at 477-78, 716 S.E.2d at 93. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." State v. Singleton, 395 S.C. 6, 13-14, 716 S.E.2d 332, 335-36 (Ct. App. 2011) (quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

Procedural History & Facts

During pretrial arguments on Appellant's motion to sever the indictments, Appellant advised the court he would be objecting during trial to any analysis by any forensic interviewer which would bolster the credibility of the victim. He argued that: "Any opinion of a so-called expert as to truthfulness, believability, symptoms of post-traumatic stress syndrome, symptoms of child abuse, it's all impermissible under the current case law in South Carolina." (R.p.51, line 24-p.52, line 25).

During trial, the State announced it planned to call Dr. Don Elsey to the stand. The jury was sent out and the trial court heard arguments regarding Appellant's motion to restrict Dr. Elsey's testimony. Appellant said he had no issue with Dr. Elsey's expertise and that his challenge was solely to the nature of the testimony being offered. The solicitor explained Dr. Elsey is a licensed professional counselor and conducted a forensic interview of the victim after the sexual abuse was reported to the police. She said the State intended to elicit testimony about the time and place of the sexual assaults as disclosed by the victim, and expert testimony about delayed disclosure, grooming, and why children do not tell about the abuse. The solicitor said Dr. Elsey would not give any opinion on whether he believed the victim was telling the truth. Appellant continued to object on two grounds. First, he argued the testimony would be cumulative to testimony already elicited from Dr. Steenkamp and Dr. Amaya about PTSD and the effects of child abuse and delayed disclosure. Second, he argued the testimony sought would be improper vouching and equivalent to Dr. Elsey saying he believed the victim. The trial court deferred ruling on whether the testimony was cumulative until the witness took the stand but held Dr. Elsey would not be allowed to testify he reached a conclusion that the

victim was telling the truth. The judge agreed with Appellant that any such conclusion, as well as any testimony that the disclosure was compelling, detailed, or consistent with sexual abuse was improper and would not be allowed. (R.p.611, line 5-p.620, line 23).

The State then called Dr. Elsey to the stand. He was admitted as an expert in child abuse and forensic interviewing, without objection. Dr. Elsey interviewed the victim on September 22, 2009, two days after the police were contacted by the victim's mother. During that interview she told him she had been sexually abused more than one time over the past year, and the abuse happened in her uncle's house. Over Appellant's continuing objections, Dr. Elsey gave detailed testimony about delayed disclosure, tentative disclosure, accidental disclosure, and grooming. He also noted that a primary attribute of PTSD is avoidance, which can contribute to a child not wanting to talk about abuse. (R.p.623, line 8-p.629, line 21).

On cross-examination, Appellant asked Dr. Elsey if he ever wrote a report concerning the observations he made and the information he gathered from the victim and her mother. Dr. Elsey produced a copy of his written report and showed it to Appellant's counsel. (R.p.634, lines 4-23). Appellant then questioned Dr. Elsey extensively about the interviews and the written report, asking whether the process he used during the interviews was "to identify whether or not this child had experienced abuse." Appellant asked Dr. Elsey whether "the role of the Lowcountry Children's Center was to assist the police in identifying criminal conduct." He also asked: "But part of that is also to have your resources used to engage in scientific hardcore evidence to verify the credibility and believability of the child?" Dr. Elsey answered: "Well, the credibility and believability is usually left up to the court to decide. We certainly do ask

questions. Can the child really know what tell the truth means? Can they give us accurate information about things we do know? Where they go to school, who lives in their house, those type of things." (R.p.634, line 24-p.636, line 12). Appellant then specifically asked Dr. Elsey to refer to the written report before answering whether the victim and her mother denied the victim had been exposed to pornography from someone other than Appellant. (R.p.638, line 9-p.639, line 22).

On re-direct examination, the solicitor had the written report marked for identification as State's Exhibit Number 9. Dr. Elsey identified the report as one he prepared regarding his interview with the victim and testified it was a fair and accurate representation of the interview. The State moved to place the report into evidence and, after Appellant asked for conformation it was the same report Dr. Elsey testified about on cross-examination, Appellant stated: "I don't have any objection." The entire written report was then admitted into evidence. (R.p.645, line 6-p.646, line 10).

During a subsequent discussion regarding whether the videotape of the interview should be admissible, Appellant acknowledged he had questioned Dr. Elsey about the report, but he never mentioned the video. The solicitor argued the video should be admitted as the "complete statement" because the report was merely a summary of the interview. She however noted the report contained information about the "prior bad act" the court had previously ruled inadmissible. Appellant asked that the prior bad act information be redacted and the trial judge agreed to the request. (R.p.651, line 23-p.659, line 18).

After the State rested, Appellant moved to strike the entire testimony of Dr. Elsey on grounds that it violated Rule 403 and that it improperly inferred the victim was telling

the truth. The motion was denied. (R.p.664, line 18-p.666, line 3). Before breaking for the day, the trial judge reminded the solicitor to take State's Exhibit Number 9 and redact the information referencing the prior bad act. (R.p.674, lines 2-25). The following morning, counsel for Appellant went on record to note he had failed to object to Dr. Elsey's report when it was offered by the State. He said he could not give an explanation for this because he had consistently objected to that type of evidence throughout the trial. Counsel argued his "non-objection" was clearly erroneous and would be reversed if challenged in a post-conviction hearing. Despite the earlier failure to object, the trial judge allowed Appellant to make any objections he had to the report because the jury had not yet seen it. The judge also suggested redacting any objectionable material rather than excluding the entire report, and asked the parties to see if they could reach an agreement before the end of the trial. (R.p.678, line 14-p.681, line 20).

After Appellant presented a defense and the State presented evidence in reply, Appellant renewed his motion to exclude Dr. Elsey's written report in its entirety. He argued it was not possible to redact the report sufficiently to exclude the things that would be in violation of Jennings, and argued it was inevitable the case would be reversed on appeal or post-conviction relief if he was not allowed to remedy his earlier failure to object. The court repeated the decision to allow Appellant to ask that the report be excluded despite the fact it had already been admitted without objection. The State argued the complete report (minus the redaction of any reference to the prior bad act) was admissible under Rule 106, SCRE, and as a prior consistent statement under Rule 801, SCRE. Appellant responded that even if Rule 106 applied, it would not trump Jennings and the supreme court's decision that hearsay statements from the victim are

inadmissible.[4] The trial judge denied Appellant's request to remove the report from evidence and instead elected to redact the questions from the interview that concerned the interviewer's opinion regarding the truthfulness of the victim. The court then asked Appellant if he believed any additional portions should be redacted. Appellant requested a host of additional redactions, most of which were granted by the trial court. The solicitor argued Appellant had opened the door to introduction of the report, including the portions touching on credibility, because he asked questions about it during his cross-examination of Dr. Elsey. The court acknowledged the solicitor's argument, but nevertheless decided to redact the portions of the report the judge determined might constitute vouching. The trial judge also agreed to redact additional portions of the report at Appellant's request, but eventually denied any further redactions and held the heavily redacted version would be substituted as State's Exhibit number 9. (R.p.743, line 25-p.758, line 25). Appellant said he was still concerned about the redactions. (R.p.761, lines 8-24).

After presentation of all evidence, closing arguments and the jury charge, the trial court asked the parties to review the exhibits that would be sent to the jury, including State's Exhibit Number 9, the redacted copy of Dr. Elsey's written report. The original exhibit was replaced with a redacted copy, marked, and admitted into evidence. Appellant continued to object to the type of redaction the Court had proposed. The trial judge noted he had redacted everything Appellant requested, except the things he previously refused to redact as described in the record. (R.p.825, line 5-p.827, line 3).

[4] This was the first time Appellant made an argument that any portion of Dr. Elsey's report was inadmissible on grounds that it included hearsay. His pretrial argument and the argument articulated throughout the trial was that portions of the report would constitute improper vouching for the victim's credibility.

At the conclusion of trial, the jury convicted Appellant as indicted. On February 26, 2013, Appellant filed a motion for a new trial. He argued the admission into evidence of Dr. Elsey's report constituted error because it contained inadmissible hearsay bolstering the trial testimony of the victim and improperly gave the forensic interviewer's expert opinion on the veracity of the child. (R.p.875-890). On March 22, 2013, the trial court issued an order denying Appellant's motion for a new trial. (R.p.891).

Analysis

First, the State submits the trial court properly admitted Dr. Elsey's written report because Appellant opened the door to that report by asking extensive questions about the forensic interview and the report itself during cross-examination. State v. White, 361 S.C. 407, 415-16, 605 S.E.2d 540, 544 (2004) (ruling expert in post-traumatic stress disorder and assessment and treatment of sexual abuse could testify that she believed the victim in this case because defendant opened the door by cross-examining expert about other cases in which she did not believe victim); State v. Taylor, 333 S.C. 159, 175, 508 S.E.2d 870, 878 (1998) ("[B]ecause appellant opened the door about his relationship with his wife, the solicitor was entitled to cross-examine him regarding the relationship, even if the responses brought out appellant's prior criminal domestic violence conviction."); State v. Page, 378 S.C. 476, 482-83, 663 S.E.2d 357, 360 (Ct. App. 2008) ("It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence.").

Second, the State submits the trial court committed no error in admitting a heavily redacted copy of the written report where the entire un-redacted report was first admitted into evidence without objection from Appellant. It was subsequently redacted by the trial

court solely as an effort to help remedy Appellant's initial failure to object by attempting to remove all potentially prejudicial parts which would arguably vouch for the victim's veracity. Even if the trial court's efforts fell short in some regard, Appellant should be precluded from now claiming error where the circumstances leading to that alleged error were a product of Appellant's own actions. He should not benefit from his own wrongdoing. See, e.g., Delahoussaye v. State, 369 S.C. 522, 633 S.E.2d 158 (2006) (holding that an escapee should not be given credit against his South Carolina sentence for time served in another jurisdiction on a subsequent crime); State v. Hackett, 363 S.C. 177, 609 S.E.2d 553 (Ct. App. 2005) (holding that where a probationer absconds from supervision, the probationary period is tolled until he is once more placed under probationary supervision).

Third, the State submits the trial court properly admitted the heavily redacted copy of Dr. Elsey's written report where the remaining un-redacted comments do not constitute direct opinions on the victim's veracity and are sufficiently vague so as not to constitute indirect vouching for the victim's believability. Appellant complains that a box on the report is marked "Yes" in response to the question: "Did the child present as an accurate reporter regarding verifiable information?" This question does not suggest the sexual abuse itself was "verifiable information." Indeed, it gives no indication of what "verifiable information" was used to find the victim presented as "an accurate reporter." As a consequence, it says nothing to the jury about Dr. Elsey's opinion of the victim's credibility in regard to the sexual abuse allegations themselves. At most the question and answer merely imply the child was telling the truth about something, but

they imply nothing about whether Dr. Elsey believed the victim was telling the truth about the abuse.

Next, Appellant complains that a second box on the report is marked "Yes" in response to the question: "Was the child able to respond to trauma specific questions?" Again, this question and answer do not in any way, shape, or form constitute an opinion from Dr. Elsey that he believes the child is telling the truth about the abuse. Knowing the victim was able to respond to trauma specific questions does not tell the jury what questions were asked or what responses were given, and it certainly does not tell the jury whether Dr. Elsey believed the allegations of abuse.

Finally, Appellant complains that a third box on the report is marked "Yes" in response to the question: "Did the child present as being impacted by external factors?" He particularly complains because the sub-boxes for "Family response" and "Injunctions not to tell" are checked while the sub-box for "Coaching" is not checked. As with the other boxes, the question and answer do not constitute a direct or indirect opinion as to a child's veracity or tendency to tell the truth. Also, because no testimony was offered at trial about coaching, it is pure speculation on Appellant's part to attach any significance to the absence of a check mark in the "Coaching" sub-box. Even if the three portions of the report identified by Appellant do somehow suggest Dr. Elsey believed the victim was telling the truth about the sexual abuse, any such suggestion was disabused by Dr. Elsey himself when he testified that credibility and believability are matters left up to the court to decide, not the forensic interviewer. (R.p.634, line 24-p.636, line 12). Thus, the trial court committed no error in refusing to redact any remaining portions of the written report.

Fourth, the State submits any error in the admission of the remaining un-redacted portions of Dr. Elsey's written report was harmless beyond a reasonable doubt given the overwhelming evidence of Appellant's guilt. See 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). Appellant's convictions should be affirmed.

III.

The trial court placed no limits on Appellant's cross-examination of his estranged wife, and properly ruled that any such cross-examination that focused upon communications she made to Appellant about their pending divorce would open the door to the witness being able to explain all of her reasons for seeking a divorce, including evidence of an alleged sexual assault committed against her daughter, which the trial court had previously ruled was an inadmissible "prior bad act" under Rule 404(b), SCRE.

Appellant argues the trial court erred in limiting his cross-examination of State's witness Joyce Arroyo. Specifically, he contends that by ruling any cross-examination about allegedly threatening communications she made to Appellant for challenging jurisdiction in their pending divorce would open the door to Rule 404(b) "Lyle" evidence previously ruled inadmissible, the trial court improperly limited his ability to cross-examine her in regard to bias. Appellant argues the trial court erred in finding the evidence of bias could open the door to the Lyle evidence. The State disagrees and submits Appellant's argument is without merit. The trial court appropriately exercised its discretion by choosing not to impose limits on Appellant's cross-examination of Joyce. Indeed, the trial judge repeatedly told Appellant there were no limits. Furthermore, the trial court properly recognized the undeniable nexus between the allegedly threatening communications and Appellant's prior bad act. Finally, any error in the court's ruling

was harmless in light of: (1) the existence of direct evidence from the victim corroborating Joyce's testimony on material points, (2) the extent of the cross-examination Appellant was permitted to conduct, and (3) the overall strength of the State's case.

Standard of Review

The admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Jennings, 394 S.C. 473, 477, 716 S.E.2d 91, 93 (2011). As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed on appeal absent a manifest abuse of discretion. State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012); State v. Quattlebaum, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000). Pursuant to the Sixth Amendment of the United States Constitution, every criminal defendant has a right to "to be confronted with the witnesses against him" during trial. U.S. Const. amend. VI. Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses. State v. Aleksey, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). This right guarantees to a criminal defendant the opportunity to cross-examine the witnesses against him concerning bias. State v. Gillian, 360 S.C. 433, 450, 602 S.E.2d 62, 71 (Ct. App. 2004), aff'd as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007); see also Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.").

"This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination." Aleksey, 343 S.C. at 33-34, 538 S.E.2d at 255; see also State v. Whitner, 380 S.C. 513, 519, 670 S.E.2d 655, 659 (Ct. App. 2008) (finding the scope of cross-examination rests in the trial judge's sound discretion). "On the contrary, 'trial [courts] retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant.'" Aleksey, 343 S.C. at 34, 538 S.E.2d at 255 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)). "The limitation of cross-examination is reversible error if the defendant establishes he was unfairly prejudiced." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). A criminal defendant may show a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness. State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002) (quoting Van Arsdall, 475 U.S. at 680).

Procedural History & Facts

During a break in testimony in the State's case, the judge asked to hear arguments on the State's request to introduce Rule 404(b) "prior bad act" evidence against Appellant in an attempt to show the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C.

406, 118 S.E. 803 (1923). Specifically, the State wanted to introduce evidence of sexual assaults Appellant allegedly committed against his step-daughter Jennifer twenty years before the sexual assaults he was charged with committing against the victim. After hearing from both parties, the trial court ruled it would not allow the State to go into the prior bad acts, but warned Appellant the evidence might be admissible on reply if he presented a defense that opened the door. (R.p.425, line 14-p.434, line 1).

When trial resumed the following day, the solicitor went "on record" to explain the State would be calling Joyce Arroyo, Appellant's estranged wife and the mother of the Rule 404(b) victim, to the stand. She advised that even though much of the information regarding the still-pending divorce, which Appellant addressed in his opening statement, related to both the current sexual assault as well as the prior bad act involving Jennifer, she was not going to ask Joyce about the prior bad act on direct. The solicitor however warned that if Appellant chose to cross-examine Joyce about their marital problems and why she believed what she witnessed between Appellant and the victim in the garage was inappropriate, Appellant may open the door to the solicitor asking Joyce about the prior bad act. Appellant responded that that decision would be up to him and that he would do his best not to open the door. The trial judge emphasized that if Appellant were to "get in it on cross" about the divorce, he would need to be careful not to open the door. Appellant advised he intended to ask about the divorce, but to restrict his questions within the pleadings from the divorce case. (R.p.486, line 18-p.490, line 19).

Later, Appellant cross-examined Detective Michelle Bacon of the Mount Pleasant Police Department in regard to why a gynecological examination was performed on the victim's younger sister despite the police having no evidence or complaints that the sister had been sexually abused. (R.p.511, line 19-p.522, line 11). After the testimony, the State argued that by asking these questions Appellant had opened the door to the Rule 404(b) "prior bad act" evidence. The trial court deferred ruling while it addressed a separate issue. (R.p.542, line 19-p.543, line 11).

The State then called Joyce to the stand. She explained she was married to Appellant and they have three biological daughters together. Joyce testified the victim is the daughter of Appellant's stepsister, Melina Arroyo. She explained how Melina and her children moved in with Appellant and the unusually close relationship Appellant developed with the victim. Joyce described an occasion when she was looking for a television remote control when she discovered a bottle of massage oil in the couch. She asked Appellant why it was there and he turned pale and said not to tell the victim. Joyce also described a particular incident when she got up late at night and found Appellant and the victim standing face-to-face together in the dark garage. They quickly moved apart and she saw the victim zipping up her pants. When Joyce asked Appellant why the victim's pants were unzipped, he said he didn't know. She also asked what they were doing together in the garage so late at night and he said nothing was going on and that he was tutoring the victim. Joyce testified: "I told him that this wasn't the first time that I had caught him in the middle of the night with a child and that it doesn't look good and that I'm not going to put up with it and that I wanted him to leave." She said he started crying and said he shouldn't have put himself in that

position, but maintained she has a dirty mind and that nothing was going on. Appellant did not object to this testimony. (R.p.554, line 13-p.562, line 7). Joyce then answered questions about her plans to leave Appellant. She said Appellant insisted they work on the marriage and told her not to tell anybody about the incident. He told her if she did no one would believe her because of "who he was." Joyce said the thought of working on their marriage "was very hard for me because of his past record with me." (R.p.562, line 21-p.564, line 4).

The solicitor stopped her questions and asked to approach the bench. The trial judge had the jury step out and reminded the parties of the court's prior Rule 404(b) ruling. He cautioned Joyce not to testify about the prior alleged abuse against Jennifer. Appellant moved for a mistrial, arguing Joyce had already improperly referenced the "prior bad act" after being instructed not to do so, and that her testimony was highly prejudicial. The judge denied the motion and pointed out that Appellant made no objection to Joyce's comment at the time it was made. The court nevertheless cautioned Joyce to avoid any further reference to the prior incident despite the fact that it was part of the reason she decided to leave Appellant and seek a divorce. (R.p.564, line 5-p.572, line 1).

Next, the trial court asked Appellant to explain how he intended to use documents from the pending divorce during his cross-examination of Joyce. Appellant said he wanted to ask Joyce about the grounds for divorce as alleged in the pleadings, as well as a series of emails between Appellant and Joyce in an effort to test her credibility. The solicitor objected to use of the documents, arguing they were not relevant because Joyce's statement to the police regarding the current allegations was

made a year before the alleged threatening communications with Appellant. (R.p.572, line 11-p.577, line 11). The trial court ruled as follows:

> All right. Look, let me say this. I have previously ruled out, on the Defendant's motion under Lyle, prior bad acts, i.e. allegations of sexual abuse by another child that was in the home that occurred some twenty years prior to this. The Court has ruled that that's not admissible.
>
> Now, Mr. Savage, the Court also has an obligation under the rules not to allow misleading evidence to be submitted to the jury. My difficulty in allowing you to go into the divorce is I have pretty much put the hammer on this lady and told her I was going to put her in jail if she testifies to it. So I control that. It's not fair to her, and it's not fair to the jury to allow you to insinuate things about the divorce and not give a full picture.
>
> Now, let me make myself very clear. It's up to you. If you want to go into that divorce concerning her veracity and those affidavits, then I'm going to let her testify to what she found twenty years ago and let the fur fly. That's your decision. I'm telling you now what the Court is going to allow. I'm going to allow it to come in in the fairness to this lady and the jury so they can get a complete picture as to why this marriage separated, and ultimately the parties are going through a divorce. Because you just want to put partial in. And the Court's making her sit on another portion, and that's not fair and that's giving misleading information to this jury. Do you understand? It's your decision.

(R.p.577, line 12-p.578, line 14) (emphasis added). Appellant argued that since there was no specific mention to the prior bad acts in the documents, he did not think cross-examination on those pleadings and communications should open the door. The following morning the trial court restated its ruling.

> My instruction to you was this. If you want to go into it, that's fine. I'm not prohibiting you from going into it. But if you do go into it, I'm going to let this lady fully explain why she separated. And that will include the prior allegations of sexual abuse by the daughter or half-daughter. That's what my instructions are to you, and it's up to you. I'm not prohibiting you from going into the divorce.

(R.p.582, lines 14-21) (emphasis added). The judge said Appellant could explore the fact that a divorce was pending to suggest bias, but warned if Appellant questioned Joyce

about the divorce pleadings and communications and why she sought a divorce, she would be allowed to fully explain. Appellant took exception to the ruling. (R.p.582, line 1-p.583, line 21).

Joyce completed her testimony on direct and was cross-examined by Appellant. She admitted filing for divorce and wanting proceeds from the sale of the marital home. Appellant then thoroughly questioned her about the incident in the garage, including the lighting, the clothing worn by the participants, and other particular details. (R.p.588, line 5-p.598, line 15). During his closing argument, Appellant argued Joyce was a biased witness calling her: "an interested party who's trying to further their [sic] own cause in getting leverage in a divorce proceeding." (R.p.792, lines 15-18).

Analysis

The trial court appropriately exercised its discretion by choosing not to impose limits on Appellant's cross-examination of Joyce. Indeed, the trial judge repeatedly told Appellant there were no limits on cross-examination. Thus, Appellant's constitutional right to confront Joyce and to conduct a meaningful cross-examination of her concerning bias was fully protected. U.S. Const. amend. VI; Gracely, supra; Aleksey, supra; Gillian, supra.

In addition, the trial court did not commit an abuse of discretion when it recognized the undeniable nexus between the allegedly threatening communications and Appellant's prior bad acts, and ruled cross-examination concerning those communications would open the door to previously excluded testimony about the prior bad acts. In the communications, Joyce said: "I'll contact the Newspaper there in Charleston tomorrow to discuss with them the doing a story on preditors [sic] in your

own backyard . . . I think this jurisdiction thing needs some light shined on it." (Court's Exhibit Number 12) (emphasis added). As suggested by Appellant, the communications could be construed as evidence of bias because they arguably linked Joyce's testimony in the instant case to her displeasure with Appellant challenging jurisdiction in the divorce. However, they are not limited in this regard. They also suggest Appellant is a "predator," which indicates Joyce was referring to multiple incidents of sexual abuse, including those against Jennifer. The trial judge made a finding of fact that the allegedly threatening communications which could be evidence of Joyce's bias were linked to the Lyle evidence. (R.p.577, line 18-p.578, line 14). This Court is bound by that factual finding because it is supported by evidence in the record. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Manning, 400 S.C. 257, 264, 734 S.E.2d 314, 317 (Ct. App. 2012).

Appellant argues Joyce would not have needed to mention the Lyle evidence to answer questions regarding the emails. (Brief of Appellant p. 20). Yet, Joyce testified once, without objection, that the primary reason she left Appellant and was seeking a divorce was because she witnessed the incident with the victim in the garage and knew it was not the first time she had seen Appellant engaged in inappropriate behavior with a child. She should not have been restricted in giving similar testimony if specifically asked about that divorce. The divorce and the prior bad act were inexorably linked, and the trial judge made an appropriate ruling. "The appropriate question under a Confrontation Clause analysis is whether there has been any interference with the defendant's opportunity for effective cross-examination at trial." Gillian, 360 S.C. at 450, 602 S.E.2d at 71 (emphasis added). Here, the trial court did not interfere with

Appellant's opportunity for effective cross-examination. Appellant's convictions should be affirmed.

Harmless Error

In Gracely our supreme court acknowledged "[a] violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis." Id. at 375, 731 S.E.2d at 886. Whether such an error is harmless in a particular case depends upon a host of factors . . . . The factors include [1] the importance of the witness's testimony in the prosecution's case, [2] whether the testimony was cumulative, [3] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, [4] the extent of cross-examination otherwise permitted, and, of course, [5] the overall strength of the prosecution's case. Id. (quoting Van Arsdall, 475 U.S. at 684 (emphasis added in Gracely)).

The purpose of Rule 608(c), SCRE, is that a defendant be allowed to explore any "bias, prejudice, or other motive to misrepresent" such that the jury gets a clear picture of a witness with which to judge her credibility. Cross-examination is the tool used to highlight any biases that may exist. Here, the trial court allowed a meaningful cross-examination with numerous opportunities for impeachment, including specifically allowing Appellant to inquire into the fact that Joyce was seeking a divorce. The additional cross-examination sought by Appellant would at best have been marginally relevant. Furthermore, Joyce's testimony about the incident in the garage was cumulative to the victim's testimony about the abuse and corroborated that testimony on material points.

In regard to overall strength, although Joyce's testimony was important, it was only a portion of the strong testimony against Appellant. Appellant suffered no unfair prejudice as a result of the ruling regarding his cross-examination of Joyce concerning the allegedly threatening communications. See State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). Thus, the trial court did not err and his convictions should be affirmed.

IV.

The trial court properly declined Appellant's requested jury instruction on evidence of good character and good reputation where: (1) the requested charge would violate South Carolina's constitutional prohibition against charging juries "in respect to matters of fact"; (2) Appellant failed to call character witnesses during trial or otherwise make proof "by testimony as to reputation or by testimony in the form of an opinion" as to his character to warrant the charge; and (3) the charge taken as a whole properly charged the law to be applied. Furthermore, to the extent the trial court's decision was error, the error was harmless because the evidence presented at trial conclusively established Appellant's guilt beyond a reasonable doubt.

Appellant argues the trial court erred in refusing to charge the jury that evidence of good character alone may create reasonable doubt. He contends "the charge on good character was necessary to counter the solicitor's use of [Appellant's] reputation against him" in the State's opening statement and closing argument. The State disagrees and submits Appellant's argument is without merit because: (1) the requested good character charge violates an explicit prohibition in the South Carolina Constitution against charging juries in respect to matters of fact, (2) Appellant failed to call character witnesses during trial or otherwise make proof "by testimony as to reputation or by testimony in the form of an opinion" as to his character to warrant the requested charge, and (3) the jury charge taken as a whole properly charged the law to be applied. In addition, the State submits

any error in refusing to give the requested charge was harmless beyond a reasonable doubt because the evidence presented at trial conclusively established Appellant's guilt.

Standard of Review

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Wharton, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009).

Procedural History & Facts

During the trial, the trial judge asked the solicitor to pass up the State's requests to charge and noted Appellant had already passed his up. (R.p.553, line 22-p.554, line 1). Appellant had submitted written requests to charge including the following charge on good character:

> When a person is charged with a crime, the law permits the proof of his good character and reputation, because under some circumstances, a person might be entitled to a verdict of not guilty, in taking into consideration his good character and reputation, when without it, a verdict of guilty might be authorized. Evidence of good character and good reputation may alone create a doubt sufficient to acquit the accused and should be considered by the jury. The weight you give to that testimony, like all other testimony in the case, is for you to determine and decide, in your good judgement.

(R.p.936).

In a preliminary charge to the jury, the trial court noted: "I'm not permitted to comment on the facts during the course of the trial." (R.p.56, lines 4-6). During the State's opening statement, the solicitor argued in part:

> We've probably all heard the term, a wolf in sheep's clothing. That's what this case is about. Erick Arroyo is the wolf in sheep's clothing. To the outside world, he was the model citizen. A navy veteran, an engineer, a husband, a father, a decent neighbor. No one thought bad of him. He was a good guy.
>
> [The victim], his niece, knew the wolf inside. He was a different Erick Arroyo to her.
>
> . . . .
>
> This great guy that everybody admired and everybody in the family looked up to started by just rubbing her back, going a little further down, reaching under the covers while she's sitting on the couch rubbing on the inside of her pants. And it became their secret.
>
> . . . .
>
> That's how this case came to the light of law enforcement. [The victim] finally tells everything that's been happening for over almost fifteen months. It took two people to catch him in the act because no one could believe that there really was this wolf in sheep's clothing. But they exist.

(R.p.57, line 16-p.62, line 7). Appellant responded in part by describing himself as: "Fifty-four years old, bronze medal winner in Afghanistan. A career, Air Force enlisted man. Navy veteran. Highly respected in the community." (R.p.66, lines 16-18).

During trial Appellant cross-examined several State's witnesses about his reputation; however, he did not call any character witnesses in his defense and did not offer any direct testimony as to his reputation or in the form of an opinion pursuant to Rule 405(a), SCRE. Appellant asked the victim about Appellant's role in the family. She said everybody adored him and thought he was number one. She said she also liked him and liked getting to go live at his house. (R.p.70, line 25-p.71, line 7). Appellant's estranged wife Joyce later acknowledged Appellant was a Naval officer, got a Bronze Star in Afghanistan, and was well respected. (R.p.608, lines 20-24).

In his defense, Appellant called Solicitor's office investigator Amanda Faulkner to the stand. She acknowledged Appellant was a discharged naval flight officer and a

medal-winning combat veteran; however, she did not testify about his reputation or give an opinion about his character. (R.p.703, lines 20-25). Appellant also testified in his defense and though he commented on his career in the Navy, he did not say a word about his reputation or and did not offer an opinion about a pertinent character trait. (R.p.713, lines 1-3).

During his closing argument, Appellant described the stigma of being called a child molester after having received a medal for serving in the Navy in Afghanistan. (R.p.776, lines 13-16). He argued his reputation was already tarnished by the allegation. (R.p.793, lines 3-7). The State argued that Appellant may be a Navy veteran and a bronze medal winner, but this did not give him a free pass to molest the victim. (R.p.803, lines 17-20). After charging the jury, the trial court stated: "Now, you had a request for a character charge which I said I would not charge. Do you still want that charge?" Appellant replied: "Yes, sir" and it was marked as Court's Exhibit Number 13.

Analysis

First, the State submits the requested jury charge was properly refused because it would have violated the South Carolina Constitution as an impermissible charge on the facts. The Constitution provides, "Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, sec. 21. Thus, the trial judge must refrain from all comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of witnesses, the guilt of the accused or as to controverted facts. State v. Smith, 288 S.C. 329, 331, 342 S.E.2d 600, 601 (1986).

> The intention of this section [former Article V, section 26] was intended clearly to leave to the jury all questions of fact, and to prevent the judges from forcing upon juries their own convictions as regards matters of fact. The force and effect of any evidence is for the jury; it is for them to

> determine what credence they will give to it and what weight it will have with them. The juries are the judges of all matters of fact, and cannot look to the court for a controlling view; they are to form their own conclusions from the facts submitted to them, and the court cannot employ its influence over the minds of the jurors to force upon them its conclusions in any case. The court is not at liberty to give its conclusions in any particular portions of the testimony. The real object of this clause in the Constitution is to leave the decision of all questions of fact to the jury exclusively, uninfluenced by any expressions of opinion by the judge. The judge's position would naturally add great weight to any opinion he might express upon any question of fact arising in a case, and for this reason he should carefully refrain from and avoid expressing any opinion that he may have formed from the facts as to the force, weight, and effect, leaving it to the jury to draw their own conclusions, and not impress upon them any impressions that the testimony may have made in the mind of the judge. The juries are to determine all questions of fact, uninfluenced by the judge and unbiased by his impressions.

State v. Mahaffey, 125 S.C. 313, 118 S.E. 623, 623 (1923) (quoting State v. Smalls, 98 S.C. 299, 82 S.E. 421 (1914)). Appellant's requested charge includes instructions that evidence of good character and reputation may entitle a person to a verdict of not guilty, and that it "may alone create a doubt sufficient to acquit the accused." By selectively focusing on good character and reputation evidence and the force and effect that evidence should have on determinations of reasonable doubt, and the verdict itself, the trial court would effectively be forcing upon the jury its own conviction as to a matter of fact and would be employing its influence over the minds of the jurors if it gave the requested charge. This is unconstitutional, and the practice of giving a "good character" charge to juries in South Carolina should end.

Second, the State submits Appellant was not entitled to the requested charge because he failed to call character witnesses during trial or otherwise offer proof of his character so as to warrant the charge. The Rules of Evidence provide: "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 in very limited circumstances. Rule 404(a), SCRE. The Rules allow that: [e]vidence of a pertinent trait of character may be offered by an accused, Rule 404(a)(1), SCRE; however, they specify the method for proving character by explaining: "proof may be made by testimony as to reputation or by testimony in the form of an opinion," and that: "[o]n cross-examination, inquiry is allowable into relevant specific instances of conduct." Rule 405(a), SCRE.

During trial, Appellant cross-examined two State's witnesses about his reputation; however, he did not call any character witnesses in his defense, did not offer any direct testimony as to his reputation, and did not offer any direct testimony in the form of an opinion pursuant to Rule 405(a), SCRE. The solicitor did not inquire into relevant specific instances of Appellant's conduct on cross-examination, presumably because Appellant had not actually offered proof of his character or a trait of character on direct. If he had, the State would have been permitted to question Appellant about any specific instance of his conduct, including his prior bad acts of sexually assaulting Jennifer Rueda twenty years before he sexually assaulted the victim. In those cases where our appellate courts have approved "good character" charges, the accused took an affirmative act to introduce direct testimony of his or her good character. State v. Lee-Grigg, 387 S.C. 310, 315, 692 S.E.2d 895, 897 (2010); State v. Harrison, 343 S.C. 165, 168-69, 539 S.E.2d 71, 72-73 (2000); State v. Lyles, 210 S.C. 87, 89-90, 41 S.E.2d 625, 626 (1947).

Third, the State submits Appellant suffered no prejudice from the trial judge's refusal to give a specific charge on good character because the jury charge taken as a

whole properly charged the law to be applied. The trial court gave the jury a correct and detailed charge on the State's burden of proof, the presumption of innocence, reasonable doubt, the roles of the judge and jury, and the credibility of witnesses. (R.p.804, line 14-p.809, line 12). Taken as a whole, these charges adequately instructed the jury on the concepts in the requested "good character" charge, including reasonable doubt and the jury's duty to decide what weight to give to testimony. In a similar circumstance, our supreme court has held that a trial judge was within his discretion in refusing to charge the jury to take into consideration the interest or bias of the witness and to observe his demeanor where the judge charged the jury that they were the sole judge of the witness' credibility and could believe one witness against many or only a portion of a witness' testimony, because the appellant failed to show prejudice resulting from the judge's decision. State v. Bamberg, 270 S.C. 77, 82, 240 S.E.2d 639 (1977). Here, the trial judge likewise acted within his discretion in refusing to charge the jury on good character, because the charge taken as a whole properly charged the law to be applied. Wharton, supra. For all of these reasons, the trial court did not err in refusing the good character charge.

Furthermore, even assuming the trial judge erred in declining to instruct the jury on good character, any error was entirely harmless and had no impact on the ultimate outcome of Appellant's case in light of the evidence at trial. Accordingly, the trial judge's decision not to instruct the jury on good character resulted in no prejudice to Appellant and had no impact on the outcome of his case. See State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). ("Error is harmless beyond a reasonable

doubt where it did not contribute to the verdict obtained."). Appellant's convictions should be affirmed.

V.

Appellant's claim that the trial court erred in tolling his probation until he completes a sexual abuse program is not preserved for appeal, and even if preserved, the trial court acted within its discretion in determining the start date of Appellant's term of probation.

Appellant argues the trial court erred in tolling his probation until he completes a sexual abuse program. He claims this order anticipates he will be civilly committed under the sexually violent predator (SVP) program, and that any order which would toll probation for a person committed in the SVP program is invalid pursuant to our supreme court's decision in State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013). The State disagrees and submits Appellant's argument should be denied and dismissed for several reasons.

Initially, the State submits Appellant's argument is not preserved for appeal because it was neither raised to nor ruled upon by the trial court. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). Appellant did not submit a motion to reconsider the trial court's sentence or otherwise object or challenge the portion of the sentence which purports to "toll" his probation at some point in the future; therefore, his current argument should not be addressed in this appeal. Furthermore, the argument is entirely speculative because it is based upon a future event which may or may not occur. "Commitment of someone under the SVP Act typically begins when a person convicted of a sexually violent offense is scheduled to be released from custody," In re Care and Treatment of Brown, 372 S.C. 611, 643 S.E.2d 118 (Ct. App. 2007), and proceeds

through a multi-step process of checks and balances culminating in a trial where the State has the burden to prove the person is a sexually violent predator beyond a reasonable doubt. S.C. Code Ann. § 44-48-40 through -100 (Supp. 2012). At this point, there is no way to know whether Appellant will even outlive his term of incarceration much less be committed to the SVP program upon his release. This court should decline to rule on an issue which is speculative and not ripe for review. Appellant argues that: "after Miller, [the State] cannot seriously contend this term of Arroyo's sentence is not invalid." (Brief of Appellant p. 23). However, as explained below, the State submits Miller is inapplicable and the challenged term of Appellant's sentence is entirely appropriate.

Miller does not apply because it addressed an action taken by the circuit court during a probation violation hearing, a completely different procedural posture than that faced by the trial judge in Appellant's case. In Miller, the defendant's probation had already begun when he was deemed an SVP and subjected to civil commitment. A probation officer issued a citation and asked the circuit court to toll the term of probation until the defendant was released from his SVP commitment. The Supreme Court decided the tolling of probation must be premised on a violation of a condition of probation or a statutory directive; therefore, Miller's probation could not be tolled under the circumstances of his case. Miller, 404 S.C. at 37, 744 S.E.2d at 537. Here, the "tolling" order was part and parcel of the original sentence and was imposed by the sentencing judge rather than in the context of a probation hearing, so Miller has no direct application. Instead, the State submits the order was not an order to "toll" a term of probation at all, and instead was an appropriate order by the sentencing court to set the date on which the term of probation would begin.

The South Carolina Code provides: "After conviction or plea for any offense, except a crime punishable by death or life imprisonment, the judge of a court of record with criminal jurisdiction at the time of sentence may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation." S.C. Code Ann. § 24-21-410 (2007). It further provides that "[t]he period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended within the above limit." S.C. Code Ann. § 24-21-440 (2007) (emphasis added). This Court has acknowledged that: "Sections 24-21-410 and 24-21-440 vest the sentencing judge with broad authority to determine the beginning date of a term of probation, so long as the term of the probation does not exceed five years." State v. Lee, 350 S.C. 125, 133-34, 564 S.E.2d 372, 377 (Ct. App. 2002) (emphasis added). Here, the sentencing court exercised that broad authority and ordered that Appellant's probation not begin until after he completes a sexual abuse program. As such, it was a proper exercise of the court's discretion and it should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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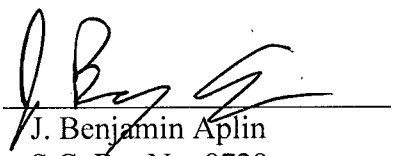
BY: 
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Columbia, South Carolina
November 19, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
J.C. Buddy Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2013-000694

THE STATE,.....RESPONDENT

v.

ERICK ARROYO,.....APPELLANT.

CERTIFICATE OF COUNSEL

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

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November 19, 2014

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