STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Union County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2013-000435

The State, Respondent,

vs.

Stephen Douglas Berry, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court properly allowed in the subsequent bad act testimony as it was clearly relevant, highly probative, and was evidence of a common scheme or plan.

II. The trial court did not err in allowing the State's expert to testify regarding behaviors she observed in the victim and her concerns regarding those behaviors. The expert did not impermissibly bolster or vouch for the child and did not testify outside her area of expertise.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

The victim lived were her father and siblings after her parents divorced. She also spent time with her grandmother. (T.101-102; R. 28-29). The victim began attending New Life Baptist Church. Appellant served as the youth pastor for the church. (T.102; 142; R. 29; 69). After the victim got to know Appellant, he and his daughter, with whom the victim had become good friends, moved to a home very close to the victim's father.

After church one Sunday in May 2010, the victim intended to ride home with Appellant. Instead, he took her to his previous residence telling her he had to pick up some items and make sure his daughter got everything. (T.107-108; R. 34-35). Once inside, the victim went to Appellant's daughter's room and verified she got everything. (T.108-109; R.35-36). Appellant then came up behind the victim, hugged her, and touched her behind. (T.109-110; R. 36-37). After a brief conversation, Appellant again approached the victim, hugged her, and told her she was beautiful. He then began rubbing her legs and unbuttoned and unzipped her pants. The victim pushed him away, but he came right back and pulled her pants and underwear down. He then placed his finger insider her vagina. (T.110-111; R. 37-38).

After briefly walking away, Appellant began walking toward the victim again while unbuttoning and unzipping his pants. Appellant turned the victim around and attempted to sodomize the victim. After the victim was able to prevent him from doing so on several occasions, Appellant went to another part of the room and masturbated until he ejaculated. (T.112-113; R. 39-40).

On a second occasion, Appellant lured the victim to his new house under the guise of showing her where all the bedrooms would be and letting her see the newly

refurbished house. Once inside, they sat on the floor to talk about the boy the victim liked. Appellant attempted to stick his finger inside the victim's vagina. She resisted several times and "eventually gave in because there was no use in even trying to stop it." (T.116-117; R. 43-44).

The victim testified to several more incidents of sexual battery by Appellant at his house and at her house. (T.117-122; R. 44-49). She testified the incidents would occur at least once a week during the 2010-2011 school year. She further testified the incidents occurred in her room at her father's house, or over at Appellant's house. (T. 122-125; R. 49-52). The victim then explained one incident went farther than Appellant putting his finger inside her vagina. She explained while lying on the floor watching a movie, Appellant came up behind her and put his penis inside her vagina. Later he told her that she "wasn't a virgin anymore." (T.129-131; R. 56-58).

After an in camera hearing, the victim continued testifying and explained Appellant continued to put his finger in her vagina at various times after she turned sixteen. She explained the continuing incidents occurred at her house, in his house, or in his car. (T.141; R.68).

ARGUMENT

I. The trial court properly allowed in the subsequent bad act testimony as it was clearly relevant, highly probative, and was evidence of a common scheme or plan.

Appellant contends the trial court erred in allowing the victim to testify to the non-consensual sexual assaults committed by Appellant after the victim turned sixteen and which were outside the range of the charges in the indictment for criminal sexual conduct with a minor in the second degree. He maintains the testimony regarding the incidents was not relevant, the acts were not criminal in nature, the testimony was inadmissible under Rule 404(b), SCRE, and the testimony's probative value was substantially outweighed by its prejudicial effect. The testimony regarding the acts occurring after the victim's sixteenth birthday was properly admitted by the trial court as it was highly relevant and probative in explaining what took place between the time the victim turned sixteen and when she finally disclosed the continuous illicit abuse. Further, the testimony was admissible under Rule 404(b), and described clearly criminal conduct which the court found was established by clear and convincing evidence.

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001); State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."). An abuse of discretion occurs when the trial court's ruling lacks any evidentiary support or is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

Relevance

"'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." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." See e.g., In re Care and Treatment of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003). "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). Determination of relevancy is largely within the discretion of the trial court and will not be reversed absent an abuse of that discretion. See State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001) ("The trial court is given broad discretion in ruling on questions concerning the relevancy of evidence, and its decision will be reversed only if there is a clear abuse of discretion."). Further, "[t]he mere fact that the 'other acts' at issue occurred after the events charged in the indictment does not render them irrelevant." United States v. Whaley, 786 F.2d 1229 (4th Cir. 1986).

The testimony in this case regarding the continued illegal sexual batteries by Appellant was clearly relevant. As the solicitor explained, the testimony established the basis for the delay between the victim turning sixteen and the date she finally disclosed the abuse. (T.70-71; R. 11-12). If the testimony was prohibited, the jury would be lead to believe the contact between the victim and Appellant ended when she turned sixteen, a fact which is clearly in dispute, and the victim then waited several months to disclose the abuse. Any question regarding the delay in the disclosure or in the nature of their

relationship is eliminated by allowing the testimony to explain what took place from when she turned sixteen in November until her disclosure in March. The trial court properly admitted the relevant testimony to explain the events surrounding Appellant's abuse of the victim and the victim's disclosure.

Rule 404(b)

Generally, evidence of prior bad acts is inadmissible to prove the specific crime charged; however, an exception exists for evidence tending to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or (5) the identity of the person charged with the present crime. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923).

"The common scheme or plan exception 'is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties.'" State v. Weaverling, 337 S.C. 460, 469, 523 S.E.2d 787, 791 (Ct. App. 1999) (quoting State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955) (emphasis added)); see also, State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (holding the "prosecutrix's testimony regarding prior attacks was admissible under [the common scheme] exception to show the continued illicit intercourse forced upon her by Appellant.").

Additionally, the South Carolina Supreme Court and this Court have both upheld the continuing illicit conduct standard to admit other bad acts as part of a common scheme or plan. See State v. Clasby, 385 S.C. 148, 157, 682 S.E.2d 892, 897 (2009);

State v. Kirton, 381 S.C. 7, 36, 671 S.E.2d 107, 121-22 (Ct. App. 2008). As this Court explained in Kirton: "All of Kirton's alleged activity was directed toward the same victim. The six to seven year pattern of escalating abuse of Victim by Kirton is the essence of grooming and continuous illicit activity." Kirton, 381 S.C. at 36, 671 S.E.2d at 121-22 (emphasis added). Similar conduct occurred on multiple occasions in Clasby and the Court found the admission of the uncharged prior bad act evidence "consistent with our jurisprudence." Clasby, 385 S.C. at 158, 682 S.E.2d at 897.

The testimony in this case, as specifically found by the trial court, was properly admitted as common scheme or plan. The court found the victim's testimony established the other acts by a clear and convincing standard and this has not been challenged. Further, the victim's testimony indicated Appellant continued the same conduct, digitally penetrating the victim. The testimony established the incidents happened in the same manner and in the same locations as the conduct forming the basis of the charge of criminal sexual conduct with a minor brought against Appellant. (T.138; R. 65). The testimony verified the other bad acts were similar in nature, State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), and demonstrated a continued illicit conduct in which Appellant digitally penetrated the victim without her consent. Clasby, 385 S.C. at 156-157, 682 S.E.2d at 896.

Appellant also contends the court erred in failing to exclude the testimony because the subsequent acts of digital penetration were not criminal in nature. First, this argument completely ignores the facts testified to by the victim. She specifically stated he digitally penetrated her without her consent. (T.139; R. 66). Even though she could have consented because she was over sixteen, she did not. As a result, the actions of

Appellant were criminal. See e.g., S.C. Code Ann. § 16-3-654 (Criminal Sexual Conduct Third Degree); S.C. Code Ann. § 16-3-600 (C)(1)(a)(i) (Assault and Battery First Degree); S.C. Code Ann. § 16-3-600 (D)(1)(b) (Assault and Battery Second Degree).

Even if the acts were not criminal, the testimony would still be admissible under Rule 404(b), which specifically applies to "[e]vidence of other crimes, wrongs, or **acts**." Rule 404(b), SCRE (emphasis added). The testimony need not be criminal to be admissible to demonstrate the common scheme or plan. As long as the trial court found the acts established by clear and convincing evidence, the testimony is admissible. The court in this case found the victim credible, found the acts established by clear and convincing testimony, and this finding as not been challenged on appeal. (T.139-141; R. 66-68).

Prejudice

Even if the evidence is clear and convincing and falls within a Rule 404(b) exception, the trial judge must exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Weaverling, 337 S.C. at 468, 523 S.E.2d at 791. In the present case, the probative value of the demonstrated continuous illicit intercourse substantially outweighs any prejudice resulting from its admission. As the Supreme Court explained in Clasby: "Given there was no physical evidence to corroborate [the victim's] testimony regarding the indicted offenses of CSC with a minor, first degree and lewd act upon a child, we find her testimony of Clasby's sustained illicit conduct was extremely probative to establish the charged criminal sexual conduct underlying the offense of lewd act upon a child." Clasby, 385 S.C. at 158-59, 682 S.E.2d at 898.

The testimony of the continuous contact and illegal conduct in this case was extremely probative to establish the criminal sexual conduct with a minor charge. Further, as discussed above, without the testimony the jury would be lead to believe contact ended upon the victim's sixteenth birthday and would have a question regarding why disclosure took several months given the apparent lack of contact. The testimony indicating the contact of the exact same nature continued until nearly the time of disclosure is highly probative. Accordingly the trial court properly admitted the testimony of Appellant's prior sexual acts as a common scheme or plan.

II. The trial court did not err in allowing the State's expert to testify regarding behaviors she observed in the victim and her concerns regarding those behaviors. The expert did not impermissibly bolster or vouch for the child and did not testify outside her area of expertise.

Appellant maintains the trial court erred in allowing the State's expert to testify regarding behaviors observed in the victim and symptoms of post-traumatic stress disorder (PTSD). He also argues the testimony constituted vouching and was a violation of State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). His arguments regarding vouching and violating the directives of Kromah are not preserved for review on appeal. Further, the testimony by the expert was not improper as she did not vouch for the victim. She testified to concerns she had related to behaviors she personally witnessed through her treatment of the victim, and as a result, all her testimony was properly admitted.

Preservation

First, any argument regarding vouching or the State violating the directives of Kromah is not preserved for review on appeal. During the testimony of the State's expert, Appellant objected several times relying on Kromah. The trial court sustained those objections and prohibited the State from exploring areas which could result in vouching or impermissible bolstering of the victim. (T.454; 459; 462; 463; 469-472; 474; 475; R.116; 119; 122; 123; 124-127; 129; 130). The State then explored the symptoms of trauma seen in child victims, and possible PTSD. At this point, Appellant objected in an off the record conference. (T.475-476; R. 130-131). Later, counsel placed her objection on the record, indicating her objection went to the qualification of the State's expert to discuss PTSD because she was a social worker and not a medical doctor. (T.522; R.140). Nothing in her objection addressed vouching, bolstering, or Kromah. As

a result, the issues related to vouching and Kromah are not preserved for review on appeal because a party may not argue one ground at trial and another on appeal. State v. Brockmeyer, 406 S.C. 324, 355, 751 S.E.2d 645, 661 (2013); see also, State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (same).

Additionally, Appellant only other objection during the testimony in question was a very generic objection; Appellant's counsel stated: "Your Honor, I'm going to object." (T.477; R. 132). This generic objection did not preserve any issues for review on appeal. See State v. Jennings, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) ("An objection must be made on a specific ground."); State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007) (finding a broad generic objection not sufficient to preserve issue for review on appeal); State v. Varvil, 338 S.C. 335, 340, 526 S.E.2d 248, 251 (Ct. App. 2000) (finding [a] general objection is ordinarily insufficient to preserve an issue for appeal.).

Merits

On the merits, the State's expert merely discussed behavioral changes in the victim, which was properly admitted as rape trauma evidence. Further, her discussion of PTSD and its symptoms were appropriate in light of her qualifications. Finally, none of her testimony vouched for or otherwise impermissibly bolstered the victim's testimony.

Rape Trauma Testimony

First, the State's expert did not diagnose the victim with PTSD. She merely identified behaviors and characteristics witnessed in the victim during her treatment with the State's expert that caused the expert concern. This testimony did not indicate the

cause of her trauma or behavioral changes, but merely indicated what the new behaviors were and that changes had occurred.

The Courts of this state have examined behavioral testimony in several cases. Initially in State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987), the South Carolina Supreme Court held expert testimony regarding common behavioral characteristics exhibited by child victims of sexual abuse was not admissible to establish abuse had occurred. The Court held this evidence admissible only to rebut a defense claim that the victim's response was inconsistent with such a trauma. Id. at 100-101, 359 S.E.2d at 61. The Supreme Court changed direction in State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), holding trauma testimony of a rape victim is relevant to prove the elements of criminal sexual conduct since such evidence makes it more or less probable that the offense occurred.

In State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), the South Carolina Supreme Court considered expert testimony regarding rape trauma syndrome. The expert testified to characteristics commonly found in sexual assault victims. Id. at 505, 435 S.E.2d at 861. The Supreme Court overturned its holding in Hudnall, and specifically found: "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."

This Court had a chance to address similar behavior testimony in State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). In Weaverling, an expert testified regarding behavior and characteristics of a sexually abused victim. This Court stated: "Expert testimony concerning common behavioral characteristics of sexual assault

victims and the range of responses to sexual assault encountered by experts is admissible." Id. at 474-475, 523 S.E.2d at 794 (citing Frenzel v. State, 849 P.2d 741 (Wyo.1993); State v. Lujan, 192 Ariz. 448, 967 P.2d 123 (1998) (opinion testimony describing behavioral characteristics outside jurors' common experience is permitted as long as it meets other admissibility requirements)). This Court explained:

> Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. Frenzel, *supra*. It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor. Id. See also Lujan, *supra* (when facts of case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—like reactions of child victims of sexual abuse—expert testimony on general behavioral characteristics of such victims should be admitted).

Id. at 475, 523 S.E.2d at 794.

Numerous other states which have considered the issue have also found it admissible, finding the behavioral traits appropriate testimony for an expert. See State v. J.Q., 617 A.2d 1196, 1206 (N.J. 1993) ("There does not appear to be a dispute about acceptance within the scientific community of the clinical theory that CSAAS identifies or describes behavioral traits commonly found in child-abuse victims."); State v. Reser, 767 P.2d 1277, 1282 (Kan. 1989) ("There are numerous cases from other jurisdictions where expert testimony regarding characteristics of sexually abused children has been held properly admitted as providing helpful background information to the jury."); Keri v. State, 347 S.E.2d 236, 238 (Ga. App. 1986) (finding expert testimony assisted jury in understanding why sexually abused children are secretive, why they were frightened, why they act out and become disciplinary problems, and why the children could not give

specific dates for the acts they say were committed by the defendant); see also John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45-46 (2010).

The testimony by the State's expert merely explained the common behaviors and characteristics of a trauma victim and in particular a sexual trauma victim. Such testimony is clearly proper under Schumpert and Weaverling. Her further testimony regarding behaviors she witnessed in the victim was also proper testimony as it was based on her personal observations. The expert's concern that resulted from the behaviors is well within the gambit of Schumpert and is not impermissible. As a result, the testimony from the State's expert was properly admitted.

Qualification of Expert

The trial court properly found the State's expert qualified to discuss PTSD and its symptoms. The expert testified she was a psychotherapist and a licensed, independent social worker. Her practice specialized in working with adolescents, young children, and their families. She testified she had a Bachelor of Arts degree in psychology, and a master's degree in social work. She further testified to her extensive training beyond her master's degree to enable her to work specifically with children. (T.444-445; R. 106-107).

The expert testified she had over 800 hours of training regarding child sexual abuse and working with abused children. She testified she has worked with sexually abused children since 1984 when she started at a residential treatment facility. She then worked for the Department of Social Services (DSS) in their sexual abuse unit handling child sexual abuse investigations and became a supervisor in the unit. After obtaining her

master's degree, she worked at Safe Homes Rape Crisis in Spartanburg and developed their child therapy program for children who had been sexually abused. She has co-developed training curriculum with the College of Social Work to train DSS caseworkers to identify, diagnose, and treat child sexual abuse. Since 1995 she has been in private practice also working with child victims of sexual abuse. (T.446-447; R. 108-109). Finally, the expert testified she has been qualified in family and general sessions court as an expert in child sexual abuse assessment and treatment in eight or nine counties, and she has testified at trial as an expert over two hundred times. (T.447-448; R. 109-110).[1]

Appellant contends because she does not have a medical degree, the State's expert was not qualified to render an opinion regarding the victim's symptoms of and suffering of PTSD. This same argument was made and rejected in State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997). In Henry, this Court analyzed the appropriateness of a social worker rendering an opinion regarding PTSD without being a medical doctor. The Court found a medical background was not necessary as long as the expert demonstrated the requisite training and experience in the subject field. Id. at 277-278; 495 S.E.2d at 468-469. Specifically, the Court enounced:

> Henry does not challenge the substance of Badger's testimony. Rather, he argues the State failed to present evidence she was qualified to give the diagnosis of PTSD. Henry cites her lack of a medical degree. The challenge mounted by Henry blithely ignores the recognized principle of law that a witness is competent as an expert provided the witness has acquired by reason of study or experience or both such knowledge and skill in a business, profession, or science that she is better qualified than the jury to form an opinion on the particular subject of testimony. See Botehlo v. Bycura, 282 S.C. 578, 320 S.E.2d 59 (Ct. App. 1984). Luculently, in the case *sub judice*, Coles Badger possessed

[1] She was qualified by the trial court without *voir dire* or objection from Appellant.

> the requisite skill, training, experience, learning, and knowledge to render an opinion in regard to PTSD.

Henry, 329 S.C. at 277-278, 495 S.E.2d at 468-469.

The Henry Court referenced its prior opinion in Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988). While a civil case, the Court in Honea analyzed the propriety of a social worker offering testimony regarding a sexual assault victim's psychiatric diagnosis. The Court explained:

> To qualify as an expert, a person must have acquired by study or practical experience such special knowledge of the subject matter of his or her testimony as would enable the person to give guidance and assistance to the jury in solving a problem about which the jury's good judgment and average knowledge is inadequate. Botehlo v. Bycura, 282 S.C. 578, 320 S.E.2d 59 (Ct.App.1984); Allen v. State, 365 So.2d 456 (Fla.Dist.Ct.App.1978), dismissed 368 So.2d 1373 (1979). There is no exact requirement concerning how knowledge or skill must be acquired. Hopkins v. Comer, 240 N.C. 143, 81 S.E.2d 368 (1954). A witness may be competent to testify as an expert although the witness acquired his or her knowledge through practical experience and not by scientific study, training, or research. 31 Am.Jur.2d Expert and Opinion Evidence § 27 at 526 (1967). Even where the problem presented may be one that usually requires some scientific knowledge or training, a person with long experience may testify as an expert although he or she did not pursue a special study of the matter. Id. at 526-27.

Honea, 295 S.C. at 530-531, 369 S.E.2d at 849. The Court concluded:

> Considering each social worker's education, her post-graduate training, her clinical experience with victims of sexual assault, and her opportunities to observe Honea, we hold the trial judge committed no abuse of discretion in determining that each social worker was qualified as an expert to give opinion evidence regarding Honea's mental condition.

Id. at 531, 369 S.E.2d at 849. The Court reiterated its opinion in its ruling on the Petition for Rehearing:

> In our decision, we also have acknowledged that one other than a psychiatrist may give an expert opinion concerning a person's mental condition. See Commonwealth v. Gallagher, 353 Pa.Super. 426, 510 A.2d 735 (1986) (wherein the court upheld the trial court's admission of expert testimony on rape trauma syndrome from a witness who did not have a medical degree and listed cases supporting its conclusion that an expert witness need not hold a medical degree in order to testify that a complainant exhibits symptoms of rape trauma syndrome).

Honea, 295 S.C. at 537, 369 S.E.2d at 852.

Considering the State expert's education, training, clinical experience, and years of treating and observing the victim in this case, the trial court in the case *sub judice* did not commit an abuse of discretion in allowing testimony regarding the child's behavior and the concern the expert had that the behaviors were symptomatic of PTSD.[2]

Vouching or Bolstering

Finally, even if Appellant's contention the expert's testimony violated the dictates of Kromah and constituted vouching was preserved, it is without merit. The Supreme Court in Kromah explained: "Our courts have previously held that '[t]he assessment of witness credibility is within the exclusive province of the jury,' and that witnesses generally are 'not allowed to testify whether another witness is telling the truth.' Kromah, 401 S.C. at 358, 737 S.E.2d at 500 (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)).

This Court recently stated:

[2] It is important to note no actual diagnosis of PTSD was rendered by the State's expert. She expressed concerns but referred the victim to a psychiatrist. (T.477; 479-480; R. 132; 134-135).

> "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). Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain "the assessment of witness credibility . . . within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

State v. Taylor, 404 S.C. 506, 514-515, 745 S.E.2d 124, 128 (Ct. App. 2013). Any time an expert testifies or provides evidence which supports the underlying charge levied by the victim, it does not result in improper or impermissible bolstering or vouching. It is only when the testimony invades the province of the jury and makes a comment on the credibility or veracity of the victim.

The expert in this case testified extensively to observed behaviors, testimony specifically allowed under Kromah. Kromah, 401 S.C. at 360, 737 S.E.2d at 500 (allowing witness to testify to "any personal observations regarding the child's behavior or demeanor"). At no time did the State's expert indicate the child was telling the truth regarding her victimization at the hand of Appellant. Further, as discussed above, this testimony was specifically admitted under Alexander and Schumpert.

Additionally, the testimony regarding generally observed characteristics did not impermissibly bolster or vouch for the victim. The Georgia Court of Appeals found testimony about child sexual abuse syndrome admissible. McCoy v. State, 629 S.E.2d 493, 494 (Ga. Ct. App. 2006); see also, Keri v. State, 347 S.E.2d 236, 238 (Ga. App. 1986) (finding expert testimony assisted jury in understanding why sexually abused

children are secretive, why they were frightened, why they act out and become disciplinary problems, and why the children could not give specific dates for the acts they say were committed by the defendant). Relying on its longstanding supreme court precedent, the Court found:

> The expert witness testified as to common characteristics of child sexual abuse syndrome, such as secrecy, delayed disclosure, helplessness, and accommodation. He offered no opinion, however, as to whether the victims in this case were being truthful. He left that determination for the jury. Since "[l]aymen would not understand this syndrome without expert testimony, nor would they be likely to believe that a child who denied a sexual assault, or who was reluctant to discuss an assault, in fact had been assaulted."

McCoy, 629 S.E.2d at 494 (quoting Allison v. State, 535 S.E.2d 805 (Ga. 1987)).

The Montana Supreme Court recently stated:

> We have consistently upheld the use of experts to explain the complexities of child sexual abuse. Child sexual abuse is a topic that many or most jurors have no common experience with. This is particularly so when the alleged victim and perpetrator are family members. Child sexual abuse victims often respond to the abuse with seemingly puzzling and contradictory behavior. The expert's testimony educates and enlightens the jury. The jury can then make a more informed decision when it assesses the victim's credibility.

State v. Robins, 297 P.3d 1213, 1217 (Mont. 2013) (emphasis added).

The information provided by the State's expert enables the jury to make an informed decision; it does not in any way remove the determination from the jury of whether the child is being truthful. Accordingly, nothing in the State's expert's testimony regarding the victim's behavior or the characteristics of PTSD removed the determination of credibility from the jury. The expert did not usurp the jury's role as fact finder and

determiner of the truth. Accordingly, the trial court properly admitted the testimony as it did not vouch for or impermissibly bolster the victim's testimony.

CONCLUSION

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

Respectfully submitted,

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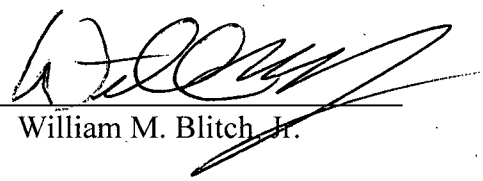
BY: 
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September 16, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Union County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2013-000435

The State, Respondent,

vs.

Stephen Douglas Berry, Appellant.

CERTIFICATE OF COUNSEL

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

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