THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions

Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2017-001669

THE STATE ..... RESPONDENT

v.

OSCAR JAMES SMALL, JR. ..... APPELLANT

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE CASE

Appellant, Oscar James Small, Jr., was tried before the Honorable R. Ferrell Cothran, Jr. and a jury from July 24 to July 27, 2017 for criminal sexual conduct with a minor under age eleven and exposing another to the HIV virus in the Orangeburg County Court of General Sessions. Indictment Nos. 2017-GS-38-1066, 2017-GS-38-0204. He was represented by W. Scott Palmer. The State was represented by Ashley Cornwell and Warren Giese.

Appellant was convicted on both indictments and sentenced to 25 years for criminal sexual conduct with a minor and a consecutive ten-year sentence for exposing another to the HIV virus.

This appeal timely follows.

STATEMENT OF RELEVANT FACTS

Appellant, Oscar Small was tried and convicted of the sexual assault of a young girl. Because he is HIV+, he was also tried for knowingly exposing another to the virus. This young girl's mother had mental health issues, and often lived in other places. The mother had been institutionalized three times. She had been diagnosed with ADHD, bipolar, and schizophrenia. ROA 58. Small's wife, Detra, was one of the child's godmothers. Deborah, Detra's sister, was also a godmother. When the child would visit, she and Small would treat the girl like a "princess." They bought her whatever she wanted; they took her to church. ROA 82, 106. At one point, they sought to adopt the little girl. Detra Small and Oscar Small were set to adopt the child, but then the mother changed her mind. ROA 307.

According to the child's aunt, before kindergarten the child began to act inappropriately, in a sexual way. ROA 64. The aunt overheard the child disclose a sexual assault to her mother over the phone. ROA 65. The police were not called. When the child started kindergarten, she got into trouble for doing inappropriate things with little boys. ROA 67. The aunt told the school what the child had earlier said, and then the school called the police. ROA 68. After the aunt met with the police, she and the child were instructed to speak to CASA. ROA 69. They went for an interview, but the equipment was broken. Later, the aunt and mother went back to CASA to find out why CASA had not contacted them again. ROA 70. They scheduled another appointment. ROA 71. The aunt testified the child was still acting inappropriately, "touching on herself, touching others." ROA 71. She was also wetting

her bed, and wetting herself. They scheduled an interview for December 10, 2015. After that interview, they scheduled an appointment with the hospital in Columbia. ROA 72.

During this time frame, the child was also around other men-- her two uncles, the aunt's step-brother, and Deborah's husband, Teddy. ROA 85.

Describing the house where the child said these events occurred, Detra described the living room floor as being unfinished. Appellant had removed the carpet, and was going to tile it as an anniversary present. There was exposed wood and tacks in that area of the house. ROA 320.

The key evidence offered against Small was the testimony of the child, who was 8 years old at the time of trial. ROA 92. The State also offered the testimonies of Dr. Carol Swiecicki, an expert qualified in the area of child abuse dynamics, and Dr. Susan Lamb, an expert qualified in the area of child sexual abuse and neglect.

The defense offered the testimonies of Demetria Roberts (the child's mother), Detra Small, Deborah Robinson, and Reverend Charles McLamore.

ARGUMENTS

I Did the trial court err in holding that the solicitor did not engage in impermissible bolstering of the alleged victim's testimony?

Prosecution witnesses cannot testify that they believe a child witness or offer any testimony that is intended to bolster a child witness' credibility. *Smith v. State*, 689 S.E.2d 629, 386 S.C. 562 (S.C., 2010),

Furthermore, it is impermissible for a prosecution witness to testify that a child witness gave a "compelling disclosure of abuse," or that the disclosure contained

details that were consistent with background information received from third parties like family members or police – testimony that amounts to commenting on the veracity of the child's accusations. An expert cannot vouch for the truthfulness of the child witness. *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (S.C., 2011).

The South Carolina Court of Appeals has identified testimony that lacked "relevance except insofar as it informs the jury [the child interviewer] believes the story told by the victim," including:

- "'we are looking for accuracy of information' given by the victim;"
- "we are going to ... make sure that what the child is telling us is based on something they would have experienced on their own body or that they would have seen or heard, the sensory information;"
- "those statements have a level of detail that ... they would be able to tell [only] if something were to have happened;"
- "we are also looking at ... are there other possible reasons, are there other possible explanations;"
- "we are looking to see if [this] could ... be explained in another way;"
- "we are looking to be sure it adds up;"
- "we are looking to see if what they tell us throughout the interview is the same from the beginning to the end;"
- "we are also looking at their behavior and the way they are expressing themselves in the interview ... their behavior and their language;"

- "in forming her 'opinion as to whether ... something happened,' she considered whether the victim's statements were 'consistent with the other information' she has on the case;"
- "informing her 'opinion as to whether ... something happened,' she considered 'does this child appear to be giving statements that are similar to, in my experience, in my training and what I have learned, similar to what other children with the same experience may have had;'" and
- "The compelling findings are the things that we look at, that we talked about looking at earlier in terms of how the disclosure comes about in the interview with me; whether it is detailed, does it have consistency, does it have the sensory level of detail that a child typically wouldn't have, or *only would have if something had happened to them.*" (emphasis supplied by Court).

State v. McKerley, 397 S.C. 461, 466-67, 725 S.E.2d 139, 142-43 (Ct. App. 2012).

The South Carolina Supreme Court has identified additional testimony by state's experts that is expressly prohibited, including:

- Testifying "that the child was told to be truthful;"
- Providing "a direct opinion as to a child's veracity or tendency to tell the truth;"
- Making "any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a 'compelling finding' of abuse;"

- Making "any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter;" and
- Offering "an opinion that the child's behavior indicated the child was telling the truth."

State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013).

In *Briggs v. State*, 421 S.C. 316, 806 S.E.2d 713 (2017), the South Carolina Supreme Court again held that testimony that has no purpose other than to bolster a child witness' credibility is improper, including where an expert witness testifies that:

- She stressed to the child witness the importance of telling the truth;
- It is her belief the child witness has not been coached; Her role is to determine whether the child witness knows the difference between the truth and a lie; and,
- The assessment is done "for the purpose of finding out if something happened or didn't happen."

This type of testimony invades the province of the jury by informing them that the decision as to whether the allegations are truthful has already been made, and it directly conveys to the jury that the expert believes the child witness. "There was no purpose for this testimony except to bolster the victim's credibility, and thus it was improper." *Id.*

Although the forensic interviewer was not called to the stand in this trial, similar bolstering testimony was elicited from multiple witnesses, including Dr. Carol

Swiecicki, who was qualified as an expert in child abuse dynamics; Dr. Susan Lamb, who was qualified as an expert in the field of child sexual abuse and neglect specifically in the areas of examination, review, and diagnosis of child sexual and physical abuse; Destiny Roberts, Detra Small, and Deborah Robinson.

In addition to the repeated bolstering testimony by the witnesses, the solicitor herself made statements to the jury on numerous occasions that were designed to bolster the child witness' credibility.

Bolstering by the Prosecutor

The prosecutor's first statement to the jury in her opening was: "Why do adults hurt children like this? That is the one and only question [the child witness] asked me after we had met for the very first time..." ROA 39. The prosecutor continued to speak to the jury about the question that she said the child asked her, injecting her personal beliefs by saying that "[i]t was probably the most hurtful question I have ever been asked before." ROA 39.

This statement, which became the prosecutor's theme throughout trial and was repeated during the unsworn testimony of the child witness, served no purpose other than to inflame the jury by appealing to their emotions, to bolster the child's testimony, and to communicate to the jury why they should believe the child. Why should the jury believe the child's testimony? Because, if she was not telling the truth, she would not know to ask that question. The prosecutor continued to ask the jury, "And how does she even know that's a question that she should ask?" ROA 40.

During her opening statement, the prosecutor continued to bolster the child witness' testimony, telling the jury that "there are many people that do not want to testify in trial and many rape cases go un-prosecuted because the victim is too afraid." ROA 41. The jury was left to infer that the child witness, who is afraid like other rape victims, *must* be telling the truth because she is risking so much by testifying in the face of her fear.

During the child witness' unsworn testimony, the prosecutor bolstered her credibility several times as well. At the beginning of the child's testimony, the prosecutor says that she told the child witness to tell the truth: "And you remember that in the very beginning told you I was going to give you a grade and it wasn't based on what you said because as long as you tell the truth?" ROA 92.

She then told the child that she was grading the child based on whether she "speak[s] using your words," "speak[s] loudly," and "sit[s] still." ROA 92-93. There was no reason for the prosecutor to inform the jury that the prosecutor had told the witness to be truthful other than to bolster her credibility in the eyes of the jurors.

In the presence of the jury, the prosecutor continued to question the child witness at length as to whether she will tell the truth or tell a lie in the courtroom:

> Q All right. And [the child witness], do you know the difference between a truth and a lie?
>
> A Yeah.
>
> Q You do? What does it mean when you tell the truth?
>
> A You done good.
>
> Q And what happens if you tell a lie?

A You don't be good.

Q You don't be good. And if you tell a lie, do you get in trouble?

A Yes.

Q And if you tell a lie in here, what happens?

A You go to jail.

Q All right. So you don't want to tell a lie do you?

A Nope.

Q Okay. And when you talk to people, should you tell them the truth or should you tell them a lie?

A Truth.

Q All right. And I'm going to ask you a couple of things. Actually, I'm going to tell you a couple of things. And I want you to tell me if you think those things are the truth or if you think they're a lie, okay?

A (Nods in the affirmative)

Q So if I told you that your teacher last year was Ms. McRae, is that the truth or a lie?

A True.

Q And if I told you you have a baby brother, is that the truth or a lie?

A True.

Q If I said you're going to be in the tenth grade this year, is that the truth or a lie?

A Lie.

Q All right. And what would you say to make it true? What is the truth of that?
A I'm not going to be in the tenth grade. I will be in the second.

Q Good job. And do you promise that you will only tell the truth today?

A Yes.

Q And do you promise that if I say something that's a lie, you'll say it's a lie?

A Yes.

ROA 98-100.

Although the court must make a finding as to a child witness' competence to testify, these questions were asked and answered in the presence of the jurors, fitting into a greater pattern of bolstering of the child's credibility through witness testimony and statements made by the prosecutor herself.

Later, during the child witness' testimony, the prosecutor continued bolstering her credibility by reminding her and the jurors that the prosecutor has told the child witness she must only tell the truth:

> Q Okay. And did I tell you that anytime you talked with me, did I say you had to tell me the truth or did I say you could lie?
>
> A Truth.
>
> Q Truth. Okay.

ROA 117.

The prosecutor continued to elicit testimony from the child about the question that the prosecutor referenced in her opening statement:

> Q And do you remember after I finished asking you all those questions --
>
> A Yes.
>
> Q I let you asked me any question you wanted to know the answer to?
>
> A Yes.

Q Do you happen to remember what question I [sic] asked you?

A Yes.

Q What question did I [sic] ask you? I'm sorry. What question did you ask me. Do you remember what question you asked me?

A (Nods head affirmatively)

Q What question was that?

A Why do people do that to kids.

Q Why do people do that to kids?

A Uh-huh. (Affirmative response)

Q Okay. I wasn't able to give you a very good answer, was I?

A I don't know.

ROA 117-18.

With her questions of the child witness, the prosecutor clearly signaled to the jury that the child witness was being truthful, because the prosecutor told her repeatedly she must be truthful, and because, as the prosecutor asked the jury in her opening statement, "And how does she even know that's a question that she should ask?" ROA 40.

The prosecutor continued to belabor the point, asking the child witness if the witness always told the prosecutor the same things because the child was "always telling the truth." ROA 119. The prosecutor then asked if the child told the truth "every time you've talked about what Oscar did to you," and if she is "telling the truth now?" ROA 120.

Towards the end of the child's testimony, the prosecutor stated to the witness that she "did a great job answering the questions I had for you," a statement that had no purpose other than to signal to the jurors that the prosecutor was satisfied that the witness has been truthful.

The prosecutor's statements to the jury and statements made during the questioning of the child witness are no less prejudicial than if an expert witness had made them. Statements that "the child was told to be truthful," statements that "indirectly vouch for the child's believability," or "an opinion that the child's behavior indicated the child was telling the truth," are inadmissible bolstering. *Kromah,* 401 S.C. at 360.

Bolstering by Dr. Swiecicki

Although Dr. Swiecicki was not qualified as a forensic interviewer, the prosecutor elicited bolstering testimony from Dr. Swiecicki related to the forensic interviewing process by asking Dr. Swiecicki how the interviewer determined whether a disclosure is credible and truthful and whether the child has been coached:

> Q What are the signs that an interviewer typically looks for to determine the credibility of a disclosure? For instance, whether or not it's a credible, truthful disclosure or whether or not it's something that's been coached or told to the child?
>
> ROA 174.

Dr. Swiecicki responded by describing in detail how an interviewer ensures that the child witness is being truthful and has not been coached, including source monitoring and whether the child's statements are consistent with their age. ROA 174-75.

The prosecutor continued to question Dr. Swiecicki about *how to determine the credibility of a disclosure*: "Q And when you're determining the credibility of disclosure..." ROA 175, including whether leading questions are asked, whether responses are age-appropriate, and whether the child has been coached: "Q For instance, would you expect for a very young child under the age of seven to be able to retain specific details for coaching purposes?" ROA 176.

The questions and the answers elicited from the witness make it clear that the prosecution was attempting to qualify the witness as a "blind expert in the area of child abuse dynamics," but then eliciting the same testimony from the expert that the appellate courts have found inadmissible from a forensic interviewer, using the expert as a "surrogate forensic interviewer" in an attempt to avoid reversal by the appellate courts.

Although Swiecicki was not qualified as an expert in forensic interviewing and admitted that she had conducted only one forensic interview in her career, *the majority of questions that were asked of her were about the forensic interviewing process and how the interviewer determines whether a disclosure is credible.*

The testimony that was elicited from Dr. Swiecicki, including testimony about how to determine whether a disclosure is credible and whether a child has been coached, is impermissible bolstering. *See, McKerley,* 397 S.C. at 466-67, *Kromah,* 401 S.C. at 460, *Briggs* at 421.

Whether she was qualified as an expert in "forensic interviewing" or as an expert in "child abuse dynamics," the testimony and its prejudicial effect are the same.

Bolstering by Dr. Lamb

Dr. Susan Lamb was qualified as an expert "in the areas of examination, review, and diagnosis of child sexual and physical abuse." ROA 220. Dr. Lamb was not qualified as a "blind expert," as Dr. Swiecicki was, but rather Dr. Lamb's testimony was that she examined the child witness and determined that her exam was consistent with sexual abuse. ROA 252-53.

The bulk of Dr. Lamb's testimony also consisted of *how* Dr. Lamb would determine whether an abuse allegation is credible, including *how Dr. Lamb would diagnose whether abuse has occurred* and the following lines of questioning:

> Q. And so in order for there to be a diagnosis or a review regarding consistency or inconsistency of abuse, you have to be specialized to make that type of diagnosis; is that correct?
>
> ROA 222.
>
> Q. During the physical exam, what are you specifically looking for to determine if sexual abuse has occurred?
>
> ROA 225.
>
> Q. When making your diagnosis, do you also review behavioral and physical characteristics that are generally associated with sexual abuse?
>
> ROA 242.
>
> Q. And in your profession, when diagnosing sexual abuse, are you looking at prior sexual behavior and how that is applied to age of the child?
>
> ROA 244.

Dr. Lamb testified that, in order to make a diagnosis of whether sexual abuse occurred, she would also review information from third parties and incident reports:

> Q. And in getting those law enforcement reports, forensic interviews and things like that, when reviewing those, what do you look for in those things to assist with your diagnosis?
>
> A. So as far as referral sources, we look at if it's an incident report or a report there. We look at if they talked to the actual child. If there was an actual witness to what happened, those can be very helpful, so independent sources there that are credible witnesses.
>
> ROA 237.

Dr. Lamb testified as to what the "best kind of disclosures" are:

> So what you really want from a child is a free narrative, full of description, sights, sounds, basically what was going on ahead of time, after; kind of a full picture where you can see that they're seeing it in their mind and able to give that type of context. Those are the best kind of disclosures.
>
> ROA 239.

The prosecutor asks Dr. Lamb how many cases do not result in a diagnosis consistent with sexual abuse:

> Q. And in doing your review of these cases, how often do you determine that a case is not consistent with sexual abuse?
>
> A. Certainly. So about a third of my cases don't have any type of abuse or neglect in them. We don't diagnose 100 percent.
>
> ROA 247.

Dr. Lamb goes on to explain that the other two-thirds of her cases are "either undetermined with risk factors for abuse or diagnosed with abuse." ROA 247-48. Once she has made a diagnosis of abuse, she reviews the case with a child abuse

pediatrician, nurse practitioners, DSS, law enforcement, and a multi-disciplinary team, as a sort of quality-control peer review. ROA 248.

The testimony about the examination process, how many cases are determined not to be sexual abuse, and the review of the case with a team consisting of a wide range of professionals, coupled with the testimony that a *diagnosis* consistent with sexual abuse was made by this expert as to this child witness, is calculated to lead to the inescapable conclusion that the jury's decision has already been made for them – the decision was carefully considered and was made *by a team of trained professionals*, taking the decision out of the hands of the jury and lessening any sense of responsibility that the jurors would have for deciding the case themselves.

The prosecutor further drove this point home by reiterating that Dr. Lamb, and the child advocacy center where she is employed, do not "rubber stamp" allegations – they thoroughly examine the child, review all records, and consult with a team of professionals before diagnosing a child as having been sexually abused:

> Q. So even though you work at a children's hospital and employed by a child advocacy center, you're not there to rubber stamp every allegation as yep, it's abuse; yep, it's abuse?
>
> ROA 272.

Dr. Lamb testified that she examined the child witness in this case, including a full physical exam, blood draw and STD tests, and information from the child witness, aunt, mother, grandparents, and forensic interviewer, and that, although there were no physical signs of abuse or STDs, *her diagnosis was based on the fact that the child witness had already disclosed in a forensic interview.* ROA 249-253.

Dr. Lamb further testified that the child witness' exam was "consistent with her behavior, meaning that what she said could have happened..." At this point, an objection wad made by defense counsel and overruled by the court. Although Dr. Lamb did not finish her statement, her point was made. ROA 252-53.

The child witness had previously testified that Appellant's "wee wee" had black spots on it. ROA 107. Despite no evidence or testimony of lacerations, tearing, or abrasions caused by the alleged sexual contact, the prosecutor asked Dr. Lamb to explain why a child may see blood on a perpetrator's penis:

> Q. Okay. And would there ever be an occasion where a child could see blood or red on a perpetrator's penis?
>
> A. Certainly. I can think of two different scenarios in that case. The first would be if there's been some type of injury to the person receiving the sexual contact, so say something is lacerated, abraded, tore, then once the penis left contact with that person, there could be a little blood on the shaft of the penis from where they were in contact with the other person's blood. The other thing would –
>
> MR. PALMER: Your Honor, I'm going to object to this too. We dealt with this before trial. This is improper bolstering. This is not based on any objective finding that this doctor made. This is speculation and it's certainly designed to bolster the complaining witness's testimony.
>
> THE COURT: I don't think it's bolstering in that it's simply scientifically explaining certain facts, so I'll allow the question.

ROA 234-35.

Dr. Lamb's testimony that her diagnosis of sexual abuse was based on details that were consistent with background information received from third parties like family members or police and consistent with the child's behavior served no purpose other

than as a comment on the truthfulness of the child's accusations. *See State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (S.C., 2011).

Furthermore, the questioning and testimony elicited about blood on the penis, which was not based on any evidence presented during the trial, was solely presented in an attempt to bolster the child's credibility regarding the rather strange statement that the perpetrator's penis had black spots on it.

Bolstering by Detra Small

The prosecutor continues to elicit bolstering testimony during the testimony of lay witnesses. For example, in the prosecutor's cross-examination of defense witness Detra Small, she points out that Detra played a large part in raising the child witness, *and that she didn't raise her to lie*:

> Q. Yes, ma'am. But I think you would agree with me, and you've testified and I agree with you, that you love [the child witness] very much, don't you?
>
> A. Yes.
>
> Q. And you took a large part in raising her when she was younger?
>
> A. I did.
>
> Q. And you didn't raise her to lie, did you
>
> A. I did not.
>
> ROA 334.

Again, testimony "that the child was told to be truthful," providing "a direct opinion as to a child's veracity or tendency to tell the truth," or making "any statement that indirectly vouches for the child's believability" is inadmissible

bolstering that has been expressly prohibited by South Carolina's appellate courts. *Kromah*, 401 S.C. at 360.

Bolstering by Deborah Robinson

The prosecutor again elicits similar bolstering testimony during her cross-examination of defense witness Deborah Robinson:

> A. She was reared in our home, yes.
>
> Q. And through that, you told her not to lie, didn't you?
>
> A. Of course.
>
> Q. Because telling the truth is very important, isn't it?
>
> A. Yes, it is.
>
> ROA 356.

In her closing argument, the prosecutor reminds the jury how Deborah raised the child witness not to lie: "And she also told you she didn't raise [the child witness] to lie. She lies. She told [the child witness] not to." ROA 440.

Bolstering by Destiny Roberts

The prosecutor asks Destiny Roberts whether the child witness has ever said that she made it up or recanted:

> Q So despite all of this, she's still never said she made it up or recanted?
>
> A No, ma'am.
>
> ROA 74.

Issue Preservation as to Bolstering

Defense counsel made two objections to bolstering testimony during the trial, both during the testimony of Dr. Lamb. The first was in response to Dr. Lamb's testimony as to whether "a child could see blood or red on a perpetrator's penis," an inflammatory and prejudicial question and response that had no basis in the facts or testimony and that served no purpose other than to bolster the child's testimony that the perpetrator's penis had black spots on it:

> Q. Okay. And would there ever be an occasion where a child could see blood or red on a perpetrator's penis?
>
> A. Certainly. I can think of two different scenarios in that case. The first would be if there's been some type of injury to the person receiving the sexual contact, so say something is lacerated, abraded, tore, then once the penis left contact with that person, there could be a little blood on the shaft of the penis from where they were in contact with the other person's blood. The other thing would –
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> MR. PALMER: Your Honor, I'm going to object to this too. We dealt with this before trial. This is improper bolstering. This is not based on any objective finding that this doctor made. This is speculation and it's certainly designed to bolster the complaining witness's testimony.
>
> THE COURT: I don't think it's bolstering in that it's simply scientifically explaining certain facts, so I'll allow the question.

ROA 234-35.

Next, defense counsel made a contemporaneous objection to bolstering by Dr. Lamb in response to testimony that the child witness' exam was "consistent with her behavior, meaning that what she said could have happened..." The objection was overruled by the court. ROA 252-53.

After Dr. Lamb was excused from the witness stand, the court heard additional arguments from both sides on the bolstering objections and again overruled the objections. ROA 274-278.

In overruling the objection, the Court noted that it was improper for a forensic interviewer to testify but stated that this testimony was more like that of a pathologist in a murder case who is corroborating facts – *overlooking the fact that the bulk of the testimony by Dr. Lamb and Dr. Swiecicki was about the forensic interview process* even though the experts were not qualified in the field of forensic interviewing. Indeed, the second objection that was overruled was in response to testimony that our appellate courts have specifically found to be inadmissible – explaining why a child's disclosures are credible.

Defense counsel also requested a curative instruction on the bolstering, which was also denied by the court. ROA 286.

The record is replete with examples of bolstering. Defense counsel preserved the issue as to bolstering during Dr. Lamb's testimony but did not enter contemporaneous objections for bolstering during every witness' testimony.

Appellant respectfully asks this Court to reverse his conviction and order a new trial based on Dr. Lamb's testimony, and due to the cumulative effect of the exact same type of bolstering that was repeated by the prosecutor throughout Appellant's trial – bolstering that was extremely prejudicial and had the effect of denying Appellant a fair trial.

II Whether the solicitor's repeated, inflammatory arguments to the jury warrant reversal in the absence of a contemporaneous objection by trial counsel?

"While the general rule is the lack of a contemporaneous objection to an improper argument acts as a waiver, our supreme court has held that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." *State v. Mazique*, 419 S.C. 282, 296, 797 S.E.2d 730, 737 (S.C. App., 2016), *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994).

The cumulative effect of the solicitor's repeated, inflammatory arguments to the jury in both opening and closing statement, the solicitor's misrepresentations to the jury about the reasonable doubt standard, victim impact testimony elicited by the prosecutor, repeated bolstering during the testimony of no less than five witnesses, and violation of the golden rule by the prosecutor denied Appellant his right to a fair trial, prejudiced Appellant, and infected the entire proceeding with unfairness.

Why Do Adults Hurt Children Like This?

"Why do adults hurt children like this? That is the one and only question Keammani asked me after we had met for the very first time..." ROA 39. This appears to be the prosecutor's theme throughout trial, beginning with the first words of her opening statement.

"It was probably the most hurtful question I have ever been asked before." ROA 39. The prosecutor continues, inserting her own experience and her own beliefs into her statement to the jurors, at the very outset of the trial. The statements are bolstering of the child witness' testimony – why would the child ask that question if her allegations were not true? "And how does she even know that's a question that

she should ask?" ROA 40.

The prosecutor returns to this theme during the direct examination of the child witness, again inserting her personal belief and frustration:

Q And do you remember after I finished asking you all those questions --

A Yes.

Q I let you asked me any question you wanted to know the answer to?

A Yes.

Q Do you happen to remember what question I [sic] asked you?

A Yes.

Q What question did I [sic] ask you? I'm sorry. What question did you ask me. Do you remember what question you asked me?

A (Nods head affirmatively)

Q What question was that?

A Why do people do that to kids.

Q Why do people do that to kids?

A Uh-huh. (Affirmative response)

Q Okay. I wasn't able to give you a very good answer, was I?

A I don't know.

ROA 117-118.

This continued theme of "Why do adults hurt children," coupled with the prosecutor's personal belief and outrage, is impermissible bolstering, inflammatory, and prejudicial, and, in conjunction with the many other prejudicial and misleading statements by the prosecutor, had the effect of denying Appellant a fair trial.

Blood on the Penis

During the prosecutor's direct examination of Dr. Lamb, she elicited testimony as to extremely prejudicial and inflammatory facts that were not based on any testimony introduced at trial and were not based on the doctor's own findings:

> Q. Okay. And would there ever be an occasion where a child could see blood or red on a perpetrator's penis?
>
> A. Certainly. I can think of two different scenarios in that case. The first would be if there's been some type of injury to the person receiving the sexual contact, so say something is lacerated, abraded, tore, then once the penis left contact with that person, there could be a little blood on the shaft of the penis from where they were in contact with the other person's blood. The other thing would –
>
> MR. PALMER: Your Honor, I'm going to object to this too. We dealt with this before trial. This is improper bolstering. This is not based on any objective finding that this doctor made. This is speculation and it's certainly designed to bolster the complaining witness's testimony.
>
> THE COURT: I don't think it's bolstering in that it's simply scientifically explaining certain facts, so I'll allow the question.
>
> ROA 234-35.

Appellant assumes that prosecutor was attempting to bolster the child witness' testimony that there were black spots on the perpetrator's penis; however, there was no testimony and no facts were introduced at trial that there was blood or red on the perpetrator's penis.

The testimony also had the effect of leaving the jurors with an image of a child victim's private parts that are *torn, abraded, and lacerated* – when, in fact, the child witness' physical exam was perfectly normal.

Although defense counsel objected to the bolstering and did not specifically complain of the obvious prejudicial effect of the testimony, defense counsel also noted that it was speculation. Although Appellant believes this was sufficient to preserve the objection in this instance, it also, in conjunction with the many other prejudicial and misleading statements by the prosecutor, had the effect of denying Appellant a fair trial and Appellant's convictions should be reversed even in the absence of a contemporaneous objection. *See State v. Mazique,* 419 S.C. 282, 296, 797 S.E.2d 730, 737 (S.C. App., 2016), *Toyota of Florence, Inc. v. Lynch,* 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994).

More Prejudicial Penis Questions

The prosecutor continues to paint an image for the jurors that has no basis in the facts or testimony in this case by asking Dr. Swiecicki questions about how a child might describe ejaculation:

> Q Would it be consistent if they said that the penis was open and that some dripped, anything of that nature?
> A It really depends on what happened how they describe it. But, you know, that would be something -- a lot of times you're asking again sensory information and they might use words like it was wet or it was sticky, things to describe that sensory, which depends on what happened, whether ejaculation happened or not.
>
> ROA 179.

At this point in the trial, the child witness had already testified *that there was no ejaculation,* and the child witness did not use words like an open penis was dripping, wet, or sticky.

Knowing that there was no such allegation in this case, there was no valid purpose for the prosecutor to elicit this type of testimony other than to paint a picture of an open, wet, dripping, sticky penis (that caused the child's private parts to be torn, abraded, and lacerated) – facts that were not true, had no place in this trial, that were extremely prejudicial, and served only to inflame the prejudices and emotions of the jurors.

This line of questioning, with Dr. Swiecicki and Dr. Lamb, was calculated to appeal to the jury's passions and prejudices by playing on the jury's fear of violent child rapists and desire to protect children – using made-up facts that had no place in this case. The questions and responses invited the jury to convict Appellant, even if the evidence did not prove his guilt beyond a reasonable doubt, in order to protect children from violent rape. It was improper, not relevant, inflammatory, and prejudicial to Appellant. *See State v. Liberte*, 336 S.C. 648, 653, 521 S.E.2d 744 (Ct. App. 1999).

Superheroes Need to Stop the Monster

In her closing argument, the prosecutor informed the jurors that they should be superheroes, like Superman, Batman, Spiderman, or Wonder Woman, for the child witness. She describes Appellant as a monster who committed heinous acts and who the juror-superheroes must stop to ensure that he never hurts her again:

> Because in a day and time and age where superhero movies are coming back in style and comic book heroes are Superman, Batman, Spiderman or Wonder Woman, are prevalent in society today again, you also have the opportunity to be a superhero. You might not have the wooden stake, the golden bullet, the jumping tall buildings and the visibility, but you can be a little girl's superhero

> and make sure that the monster that did the heinous acts to her that we had listened to never hurts her again.
>
> ROA 443-44.

The prosecutor goes on to tell the jurors they must also be superheroes *for every other child in the country*, to ensure that Appellant doesn't also hurt *those* millions of children. She tells the jurors that their "superpower" is the word "guilty:"

> And you can be a superhero to every other child in this county, in this state, in this nation by making sure that he never has the opportunity to hurt any of them either. And the way that you use your superpower is one word and that word is guilty.
>
> ROA 444.

Reference to Appellant as a Predator

Twice during her closing argument, the prosecutor refers to Appellant as a "predator," a characterization that is unfair and prejudicial to Appellant:

> If being desperate means that I want to take a *sexual predator* who raped a five-year-old little girl multiple times on multiple occasions, while knowing he had HIV, off the streets makes me desperate, then he is absolutely right. I am desperate for conviction to take *that predator* off the streets so that he never hurts another child again.
>
> ROA 443.

Desperate for a Conviction

The prosecutor's lengthy explanation in closing argument as to her personal belief that Appellant is guilty and her desperation for a conviction were also inflammatory, unfair, and prejudicial to Appellant.

Defense counsel did state in his opening argument that his reason for not objecting when the prosecutor made herself a witness by "testifying" in her opening

about her conversations with the child witness was because he wanted the jurors to see "how desperate they are for conviction:"

> Why did I let it happen? Because I want you to see how desperate they are for a conviction. This case isn't about putting a conviction on the scoreboard to further someone's career or get someone reelected. It's about doing justice.
>
> ROA 47.

These statements, however, *in response to the prosecutor's own inappropriate comments during open argument*, could not justify the prosecutor's lengthy, inflammatory argument, interjection of her personal beliefs, and urging of the jurors to also feel desperate for a conviction during closing argument:

> Mr. Palmer at the beginning of this trial when he talked about emotion and not considering sympathies and child things, he told you that I was desperate. I was desperate for a conviction. Maybe he's right. If being desperate means that I want to take a sexual predator who raped a five-year-old little girl multiple times on multiple occasions, while knowing he had HIV, off the streets makes me desperate, then he is absolutely right. I am desperate for conviction to take that predator off the streets so that he never hurts another child again. And if being desperate means that you have to stand up and protect a little girl who has faced obstacle after obstacle in her young life and demand justice for the things that that little girl had to go through by making sure that that defendant can never hurt anybody ever again, then I sincerely hope that you as jurors are also desperate in this case.
>
> ROA 443.

References to Unrelated Prosecutions and Appeal to Law and Order

The prosecutor repeatedly referred to unrelated cases and the effect that the jury's decision may have on unrelated prosecutions. She began in her opening statement by telling the jurors that rape cases often come down to "the victim's word versus the defendant's word." Victims are afraid because they will be called a liar,

cases don't get prosecuted and jurors find defendants not guilty because they don't know who to believe:

> And because of that, there are many people that do not want to testify in trial and many rape cases go un-prosecuted because the victim is too afraid. They don't want to take the stand and be subjected to cross-examination and called a liar. And even in the cases when the victim does testify, oftentimes it's hard for a jury because you're so ingrained now into looking for DNA and fingerprints, that they have a hard time knowing who to believe. And based on that, a lot of these cases are found not guilty.
>
> ROA 41-42.

In her closing argument, the prosecutor states that "[t]he solicitor's office dismisses just as many cases as we prosecute," implying that she has already decided what the truth is and lessening the jury's sense of responsibility for their own decision. She goes on to remind the jury that the expert witnesses have also given their opinion that the child was sexually abused, further lessening the jury's sense of responsibility since trained experts have already decided that the abuse has occurred:

> The solicitor's office dismisses just as many cases as we prosecute. It's not my job to get convictions. It is my job to prosecute a crime where a crime has occurred and ask you the jury to make a finding of fact as to whether or not there is probable cause; if it's your belief beyond a reasonable doubt that that crime occurred. My job isn't convictions. My job is to get to the truth. And in this case, the truth is that that defendant raped a five-year-old little girl multiple times. And they gave you their expert opinion that this case is consistent with sexual abuse.
>
> ROA 442.

The prosecutor also urges the jurors to find Appellant guilty to ensure that he does not hurt the child witness again *and* to protect all of the children in our country:

> You might not have the wooden stake, the golden bullet, the jumping tall buildings and the visibility, but you can be a little girl's superhero and make sure that the monster that did the heinous acts to her that we had listened to

> never hurts her again. And you can be a superhero to every other child in this county, in this state, in this nation by making sure that he never has the opportunity to hurt any of them either.
>
> ROA 443-44.
>
> You know what he also can't do if you find him guilty? He can't rape anymore five-year-olds. Use your superpower. Stand firm in your convictions. Have the courage to come out and let him know that you are never going to let him do this to her again.
>
> ROA 444-45.

It is impermissible for a prosecutor to attempt to "minimize the jurors' own sense of responsibility for appellant's fate by stressing that [s]he had [her]self already made the same decision that [s]he was now asking them to make," which includes references to the solicitor's own decisions to prosecute or references to the effect of the jury's decision on other, unrelated prosecutions. *State v. Woomer*, 277 S.C. 170, 284 S.E.2d 357 (1981) (the solicitor attempted to minimize the jury's sense of responsibility for appellant's fate by stressing that he himself had already made the same decision he was asking them to make), *State v. Butler*, 277 S.C. 543, 290 S.E.2d 420 (1982) (again, the solicitor attempted to minimize the jury's sense of responsibility for appellant's fate by stressing that he himself had already made the same decision he was asking them to make), *State v. Davis*, 239 S.C. 280, 122 S.E.2d 633 (1961) (prosecutor stated "if you turn this defendant loose you might as well be turning these other defendants loose also..."), *State v. Rudd*, 355 S.C. 543, 586 S.E.2d 153 (S.C. App. 2003) (solicitor stated Defendant "has had many protections before he gets into this court of law to face you jurors"), *State v. Sloan*, 278 S.C. 435, 298 S.E.2d 92 (1982) (solicitor tells jurors if they find Defendant not guilty the murder will go

unsolved), *State v. Smart*, 278 S.C. 515, 526, 299 S.E.2d 686, 692-93 (1982) (finding solicitor's closing argument urging that "law officers who risked their lives in [the defendant's] recapture would be aggrieved by a sentence less than death" and implying that "other citizens of Lexington County including himself would strongly disapprove of a life sentence," to be improper, noting that "[j]urors are simply not to consider the opinions of neighbors, officials or even other juries") (emphasis added), *cert. denied*, 460 U.S. 1088, 103 S. Ct. 1784, 76 L.Ed.2d 353 (1983), overruled in part on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), *State v. Thomas*, 287 S.C. 411, 339 S.E.2d 129 (1985) (solicitor tells the jury the case had already been examined by a magistrate and a grand jury, a preliminary hearing has been held, and an appeal would enable a higher court to review any decision made by them), *U.S. v. Barker*, 553 F.2d 1013 (6th Cir. 1977) (prosecutor tells jury that if they do not find the defendant guilty, "we might as well open all the banks and say, 'Come on and get the money, boys, because we'll never be able to convict them.'")

"It is beyond the bounds of propriety for a prosecutor to suggest that unless this defendant is convicted it will be impossible to maintain "law and order" in the jurors' community." *See Barker*, 553 F.2nd at 1025, *Brown v. United States*, 125 U.S. App. D.C. 220, 370 F.2d 242, 246 (1966), *United States v. Wiley*, 534 F.2d 659, 665 (6th Cir. 1976) ("if this man goes free you have chalked up one point for the criminal").

The prosecutor's repeated improper arguments to the jury minimized "the jurors' own sense of responsibility for appellant's fate by stressing that he had himself already made the same decision that he was now asking them to make," *Woomer,* 277

S.C. at 175, and so "infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. Christoforo*, 416 U.S. 637 (1974).

The Golden Rule

In her closing argument, the prosecutor also blatantly encouraged the jurors to put themselves in the child witness' shoes:

> But if you're trying to base your conviction, your decision, on whether or not his penis was yellow, you have to think about it from where that little girl is sitting and what that little girl was seeing and thinking about.

ROA 433.

The only possible use for arguments that ask the jurors to put themselves in an alleged victim's shoes "is to improperly arouse the passions and prejudices of jurors, urging them to abandon their sworn role as fair and impartial arbiters of the facts and view the evidence from an improper perspective." *Henry v. State*, Opinion No. 25861 (SC 2004) (improper for solicitor to state: "put yourself in Margaret's shoes, size six."), *citing State v. McDaniel*, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (reversing conviction and remanding for new trial in sexual assault/robbery case where solicitor used "you" or a form of "you" some forty-five times, asking the jury to put themselves in place of the victim); *Forrestal v. Magendantz*, 848 F.2d 303, 309 (1st Cir. 1988) (stating golden rule argument is universally condemned and listing factors to determine whether it is reversible error); *U.S. v. Teslim*, 869 F.2d 316, 328 (7th Cir. 1989) (holding it is improper for prosecutor to urge jurors to place themselves in party's shoes); *State v. McHenry*, 78 P.3d 403, 410 (Kan. 2003) (golden rule arguments are not allowed because they encourage jury to depart from neutrality and

decide case on improper basis of personal interest and bias); *Caudill v. Commonwealth*, 120 S.W.3d 635, 675 (Ky. 2003) (prohibited golden rule argument is one in which prosecutor asks jurors to imagine themselves or someone they care about in position of crime victim); *Garron v. State*, 528 So.2d 353, 358-360 (Fla. 1988) (prosecutor's golden rule arguments during penalty phase of capital case, taken as a whole, demonstrated classic case of attorney who has overstepped bounds of zealous advocacy and entered into forbidden zone of prosecutorial misconduct, requiring new trial); *State v. Carlson*, 559 N.W.2d 802, 811-812 (N.D. 1997) (golden rule argument is improper and should be avoided in civil and criminal actions, but brief comment in prosecutor's rebuttal argument did not constitute reversible error); *Hayes v. State*, 512 S.E.2d 294, 297 (Ga. App. 1999) (an improper golden rule argument asks jurors to consider case, not objectively as fair and impartial jurors, but rather from biased, subjective standpoint of litigant or victim).

"[T]he solicitor asking the jurors to put themselves in the place of the victim is improper and constitutes reversible error." *State v. Reese*, 359 S.C. 260, 597 S.E.2d 169 (S.C. App. 2004), *see also State v. White*, 246 S.C. 502, 144 S.E.2d 481 (1965).

This violation of the Golden Rule, along with the cumulative effect of the solicitor's repeated, inflammatory arguments to the jury in both opening and closing statement, the solicitor's misrepresentations to the jury about the reasonable doubt standard, victim impact testimony elicited by the prosecutor, and repeated bolstering during the testimony of no less than five witnesses, denied Appellant his right to a fair trial, prejudiced Appellant, infected the entire proceeding with unfairness, and

is a clear example of a "flagrant case where a vicious, inflammatory argument results in clear prejudice," even in the absence of a contemporary objection. *State v. Mazique*, 419 S.C. 282, 296, 797 S.E.2d 730, 737 (S.C. App. 2016), *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994).

Victim Impact Testimony

The prosecutor spent a considerable amount of time introducing testimony about the effect that the allegations have had on the child witness, including how she is no longer able to go to church, visit Holly Hill, ride her bike, play with the dogs, or go on vacations with her family members, all activities that she loved and that she has been deprived of since the allegations were first made.

Beginning with the child witness' aunt, Destiny Roberts, the prosecutor elicited that, after the allegation was made, the child witness was never again allowed to go to Holly Hill or to speak to her godmothers, "Me-Me" (Deborah Robinson) and "Te-Te" (Detra Small):

> Q After that night, did you ever allow [the child witness] to go back to Holly Hill?
>
> A No, ma'am.
>
> Q Did you allow her to talk to Me-Me or Te-Te or Oscar ever again?
>
> A No, ma'am.
>
> ROA 67.

Later, she continues, eliciting testimony that the child witness has no longer been able to go on vacations with her godmothers, get presents from them, or go to church with them:

Q Has she been able to go back to Holly Hill with Me-Me or Te-Te?

A No, ma'am.

Q Has she been able to go on vacations with them?

A No, ma'am.

Q Has she been able to get any presents?

A No, ma'am.

Q Has she been able to go back to church –

A No, ma'am.

Q -- with them?

A No, ma'am.

ROA 74.

During the child witness' testimony, the prosecutor elicited testimony about all the things that the child witness loved to do with her godmothers, who bought her toys and took her on vacations, that she is now deprived of:

Q Okay. And what would you do when you were in Holly Hill?

A Play.

Q Play. Did you have your own bike?

A Yes.

Q All right. And were there dogs to play with?

A Yes.

Q Did you like playing with the dogs?

A Yes.

Q All right. Did you have your own bedroom there?

A Yes.

Q Tell me about your bedroom?

A It had lots of toys.

Q Yeah. And did you have a TV in your bedroom?

A Yes.

Q You did?

A Uh-huh. (Affirmative response)

Q Wow. Did you have lots of pretty clothes?

A Yes.

Q All right. And did Me-Me and Ti-Ti buy you toys and presents when you would see them?

A Yeah.

Q All right. Did you ever go on trips or vacations with Me-Me and Ti-Ti and dada?

A Yes.

Q Were those fun?

A Yes.

Q Can you tell me about a time you went on vacation with them?

A (Nods head affirmatively)

Q Tell me one time?

A When I went to go see Oscar grandma.

Q When you visited Oscar's grandma?

A Uh-huh. (Affirmative response)

Q That was fun. Do you remember where she lives?

A She was in the hospital.

Q Oh, she's in the hospital?

A Uh-huh. (Affirmative response)

Q Did you ever go somewhere fun on vacation?

A Uh-huh. (Affirmative response)

Q Where was someplace fun that you went?

A Where they got slides before they took me home.

Q Where they had slides?

A Uh-huh. (Affirmative response)

Q Well, that sounds like fun too. So you really liked going to Holly Hill when you were little, huh?

A Yes.

Q And you really loved your Me-Me and Ti-Ti and dada, didn't you?

A Yes.

Q Is there a time when you didn't want to go to Holly Hill anymore?
A Yes.

Q Why didn't you want to go to Holly Hill anymore?

A What Oscar did to me.

ROA 102-04.

This line of questioning, purposefully eliciting victim impact testimony, was woven into the prosecutor's presentation of her case. First, the prosecutor elicited

testimony from the aunt and child witness about how much the child witness loves her godmothers and all the fun things that they did for her, including buying her toys, taking her to church, and taking her on vacations. She established that the child witness stopped going to see her godmothers due to the allegations. She goes through the child witness' testimony detailing the allegations, and then returns to the victim impact testimony to drive home the things that the child witness is now deprived of as a result of the allegations:

> Q Okay. Now, let me ask you this. Since you told what happened to you in Holly Hill, have you been able to go back to Holly Hill?
>
> A Nope.
>
> Q No?
>
> A No.
>
> Q No. And so have you been able to go back to church?
>
> A In Holly Hill? Nope, not to my selection.
>
> Q And have you been able to go and ride your bike or play with the dogs anymore?
>
> A Not to my selection.
>
> Q Okay. Have you gotten to go on vacations with Me-Me and Ti-Ti anymore?
>
> A Not to my selection. Well, for vacation I went to a Frankie's Fun Park.
>
> Q Frankie's Fun Park. Who did you go to Frankie's Fun Park with?
>
> A My mama, my auntie, her boyfriend, which she's not married to him.
>
> Q She's not married to him?
>
> A (Shakes head negatively)

Q Okay. And was that recently?

A And my grandma, my cousin and his son and his sister, and him and his sister.

Q Okay. But not with Me-Me or Ti-Ti?

A No, huh-uh. (Negative response)

Q You haven't been on any more vacations with them?

A (Shakes head negatively)

Q Okay.

A I been to Chuck E Cheese too.

Q That's fun too. Well, let me ask you this. All those fun things that you used to do in Holly Hill, do you miss doing those things?

A Not to my selection.

Q You don't miss doing any of that stuff with them?

A Yes.

Q Yes, you do?

A With Detra and Deborah but not Oscar.

Q You miss doing it with Detra and Deborah but not Oscar?

A Uh-huh. (Affirmative response)

ROA 120-21.

The prosecutor then ended her direct examination of the child witness with testimony about how much the child witness loves her godmothers and wishes she could see them:

Q And if Oscar didn't live there anymore, would you want to go back and play with Me-Me and Ti-Ti?

A Yes.

Q Do you miss Me-Me and Ti-Ti?

A Uh-huh. (Affirmative response)

Q Do you love them?

A Yeah.

Q All right. Well, [the child witness] I think you did a great answering the questions I had for you.

ROA 121-22.

This victim impact testimony that was repeatedly elicited by the prosecutor throughout the presentation of the State's case was not relevant to the charges against Appellant and it was calculated to appeal to the juror's emotions and prejudices, evoking sympathy for the child witness and inviting the jury to convict Appellant based on considerations other than guilt or innocence.

The victim impact testimony, along with the cumulative effect of the solicitor's Golden Rule violation, repeated inflammatory arguments to the jury in both opening and closing statements, the solicitor's misrepresentations to the jury about the reasonable doubt standard, and repeated bolstering during the testimony of no less than five witnesses, denied Appellant his right to a fair trial, prejudiced Appellant, infected the entire proceeding with unfairness, and is a clear example of a "flagrant case where a vicious, inflammatory argument results in clear prejudice," even in the absence of a contemporary objection. *State v. Mazique*, 419 S.C. 282, 296, 797 S.E.2d 730, 737 (S.C. App. 2016), *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442

S.E.2d 611, 615 (1994). Respectfully, Appellant asks this Court to reverse his convictions and remand his case for a new trial.

III Whether the solicitor's characterization of reasonable doubt as "more likely than not" and "probable cause" during closing argument warrant reversal in the absence of a contemporaneous objection by trial counsel?

Perhaps the most disturbing and egregious statements by the prosecutor involved her instructions to the jury that they should convict Appellant if they find that Appellant "most likely" committed the crime, if they find "probable cause" that he committed the crime, or if they find that he "most probably" committed the crime.

In her initial closing argument, the prosecutor told the jurors that reasonable doubt means "most likely:"

> You sit in this jury box today, and after thinking about all the evidence, you think the defendant *most likely* committed these crimes, then you must find him guilty because *that is proof beyond a reasonable doubt.*
>
> ROA 392 (emphasis added).

Defense counsel did not object, but addressed the prosecutor's statements in his closing argument:

> And I agree with what the solicitor said on her PowerPoint that the burden of proof is beyond a reasonable doubt. I do, however, take issue with the way she described that because she used the term most likely or more likely. That's not what the burden of proof is about. That's in a civil case where you say more likely than not by a preponderance of the evidence. The burden of proof is much stronger than that.
>
> The burden of proof says that beyond a reasonable doubt -- and a reasonable doubt will be defined by Judge Cothran.
>
> ROA 397.

Although the prosecutor's brief misstatement in her initial closing argument may have seemed inadvertent, she then repeated the "most likely" argument in her reply argument, doubling down on the claim that reasonable doubt is *more likely than not* and taking it even further, telling the jurors that they only need to find *probable cause* that Appellant is guilty in order to convict him:

> It is my job to prosecute a crime where a crime has occurred *and ask you the jury to make a finding of fact as to whether or not there is probable cause*; if it's your belief beyond a reasonable doubt that that crime occurred.
>
> ROA 442 (emphasis added).
>
> And we talked about reasonable doubt. And *perhaps* Mr. Palmer is right that reasonable doubt is not most likely. *I think a better term is it's what most probably occurred. Probable cause beyond a reasonable doubt.*
>
> ROA 442 (emphasis added).

The prosecutor's purposeful, repeated misstatement of the law regarding reasonable doubt is outrageous and had the effect of denying Appellant one our most precious rights: the right to proof beyond a reasonable doubt, decided by a jury of his peers.

In *State v. Liberte,* 336 S.C. 648, 521 S.E.2d 744 (S.C. App. 1999), our Court of Appeals reversed the defendant's convictions when the prosecutor said to the jury: "Ladies and gentlemen, I want to ask you right now to listen to the judge's instructions about reasonable doubt, and *ask yourselves is it being used as a sword to attack law and order, to attack law enforcement, to attack people who are trying to keep drugs off our streets?" Id.* at 652. The Court reversed the convictions, despite there being "no doubt that the evidence against the Defendants was very strong and

that there was no tangible evidence supporting their defense," and despite a curative instruction given by the trial judge. *Id.* at 656. *See also Simmons v. State*, 331 S.C. 333, 503 S.E.2d 164 (1998) (reversing, despite overwhelming evidence of guilt, where prosecutor misstates the law concerning parole eligibility of defendant). Respectfully, Appellant asks this Court to reverse his convictions and remand his case for a new trial.

CONCLUSION

Based on the foregoing, Appellant's convictions should be reversed, and a new trial ordered.

Respectfully submitted,

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October 10, 2018.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY

Court of General Sessions

The Honorable R. Ferrell Cothran, Jr. Circuit Court Judge

Appellate Case No. 2017-001669

Oscar James Small, Jr.....Appellant,

v.

State of South Carolina.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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October 10 2018