STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Greenville County
Honorable Robin B. Stillwell, Circuit Court Judge

THE STATE,

Petitioner,

vs.

ONTARIO STEFON PATRICK MAKINS,

Respondent.

Appellate Case No. 2020-000024

BRIEF OF PETITIONER

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PETITIONER'S STATEMENT OF ISSUE ON APPEAL

The Court of Appeals erred by finding the therapist indirectly bolstered Victim's testimony by stating she treated Victim. The therapist was allowed to testify to the circumstances of treatment and also provide expert testimony on trauma resulting from sexual abuse pursuant to Schumpert; and the therapist never indicated directly or indirectly that she believed Victim.

STATEMENT OF THE CASE

Respondent Makins was indicted for criminal sexual conduct with a minor in the first degree, criminal sexual conduct with a minor in the third degree, and lewd act on a minor. Following trial on December 5-8, 2016, a jury found Makins guilty of criminal sexual conduct with a minor in the third degree, and acquitted Makins of the other two charges including criminal sexual conduct in the first degree. The Honorable Robin B. Stilwell sentenced Makins to ten years imprisonment. During sentencing, Makins apologized to Victim's mother. R. p. 369.

Makins appealed, and following briefing and oral argument, the Court of Appeals reversed the conviction in a published opinion. State v. Makins, 428 S.C. 440, 835 S.E.2d 532 (Ct. App. 2019). The State filed a petition for rehearing and requested the hearing be heard en banc. The Court of Appeals denied the petition for rehearing on December 16, 2019.

The State filed a petition for writ of certiorari to this Court on January 7, 2020, Makins filed his return on February 18, 2020, and the State made its reply to the return on February 26, 2020. This Court granted the State's petition for writ of certiorari on April 24, 2020. This Brief of Petitioner follows.

STATEMENT OF FACTS

Respondent Makins molested his girlfriend's younger sister from the time she was five to eight years old. Victim disclosed the abuse to her second grade teacher, Mary Jill Kroske, roughly a week after a representative from the Julie Valentine Center spoke with the class about inappropriate touching. R. p. 108. On March 20, 2015, Victim lagged behind as the class left for recess and said, "Ms. Kroske, do you remember those ladies that came to us?" and Kroske answered, "yes." Victim replied, "Well that happened to me." R. p. 109, lines 4-11. Victim disclosed she was sexually abused to Kroske, who in turn reported the disclosure to the guidance counselor. R. pp. 109-10.

Victim's Mother testified Victim was ten years old at the time of trial. Mother has four daughters aged ten to twenty-nine years old. According to the transcript, at the time of trial, her daughter Toi was nearly twenty years old. Makins is Toi's boyfriend, and they have two children together – M.M. (age 9) and C.M. (age 6). R. pp. 143-45; p. 147. Mother testified Toi and Makins were together since they were in middle school, and Mother had considered Makins a son. Makins spent a lot of time with the family and babysat Victim. R. p. 147; p. 150.

The school called Mother and advised her Victim told her teacher her "brother" sexually abused her. Mother did not believe it at first, because "brother" is how Victim referred to Makins and she did not believe Makins would do that. However, when she went to school and spoke to Victim, she implored Victim, "Tell the truth," and Victim replied "I am." R. p. 153.

Mother testified at the time Victim acted out a lot. Mother would check on Victim in her room at night and see Victim with her hands in her panties. Victim wet the bed a lot. She became adamant at times about not wanting to go to Toi's apartment. R. pp. 153-54. After the disclosure, Mother took Victim to the Julie Valentine Center for a forensic interview and took her to counseling.

She testified Victim had trouble focusing, behaving in school, and sleeping at night. R. pp. 154-55. Since Victim reported the abuse, Mother and Victim no longer interacted with Makins and did not have regular contact with Toi or Toi's cousins. R. pp. 156-58.

Victim testified she often went to Toi's house. Sometimes Makins watched Victim while Toi was at work. R. pp. 172-73. Victim testified one time, she was playing with her nephews and they threw cups of water at each other in the bathroom. Makins called them into the living room, one at a time, to punish them. He called Victim and told her to suck his penis. R. p. 175. She testified she was made to perform oral sex on other occasions, more times than she could remember. R. pp. 175-76. Makins also touched her "butt" and made Victim touch his penis. R. pp. 177-79. This sometimes happened while the nephews were outside but also happened when the nephews were playing video games. Sometimes the nephews were in the same room. R. pp. 181-82. Victim found she wanted to leave Toi's as soon as she arrived and would call her mother to go home. R. p. 183.

Victim told her teacher, Ms. Kroske, about the abuse. R. p. 184. Victim admitted she previously lied when she said Makins threatened not to tell, but explained she lied because she was previously scared to tell about the abuse. R. pp. 192-93; pp. 195-96. She testified she misses Toi and her nephews, but she told because "[Makins] is a child molester." R. pp. 184-85. She explained a child molester is a person who touches children on their private parts. R. p. 187. She testified she drew a picture of herself and Makins during therapy. R. p. 186.

Investigator David Piccone interviewed Victim and referred her to the Julie Valentine Center. He also interviewed Makins, who denied committing any sexual abuse, but admitted he sometimes was alone with Victim when he babysat her. R. pp. 203-04; pp. 209-10.

Christine Carlberg from the Julie Valentine Center conducted a forensic interview during

which Victim described being sexually abused by Makins. The video recording of the interview was admitted as State's Exhibit 2. R. pp. 228-32. During the interview, the Victim was clearly reluctant to talk about the abuse. She was visibly angry and sometimes grunted responses to the interviewer's questions. When asked a general question if anything happened, she replied "no" and later said she did not want to talk about it. State's Exhibit 2 (8:30-9:30). Victim complained she wanted to go home. She slumped over on her chair – her body language would continue to be telling throughout the interview. Victim told the interviewer she told her mother and teacher, but she did not want to tell the interviewer what she told them. (9:30-10:30). Victim said she was worried about Makins and was scared to tell. (11:00-11:30).

She then indicated by nodding her head in agreement that she was abused, and she told the interviewer it occurred more than one time. (12:00-13:00). She held up five fingers to answer the question of what age the abuse began and indicated by showing eight fingers that the abuse lasted until she was eight years old. (circa 13:00). The abuse occurred at Toi's house. Victim asked the interviewer if Makins was arrested. She angrily exclaimed, "You already know, don't you" as an answer to either her question or the interviewer's question about what happened. Victim pushed her chair to the edge of the room as the interviewer continued the inquiry on the difficult topic. (13:00-14:30). She slumped out of the chair onto the floor as she faced more questions. (16:00). She told the interviewer Makins is mean, Makins is scary, and he is a child molester. (17:00-17:15). She described a child molester as someone who touches a child in the private parts of their body. (17:30-17:45). Victim indicated, by pointing, that Makins did that to her. She said it occurred more than one time. (circa 18:00). Victim angrily said it felt scary. (18:45-19:00). Makins told her not to tell anyone. (21:00). She told the interviewer he also made her touch his rear. (25:00-25:30). Victim

told the interviewer the abuse occurred every time she was at Toi's house. She told the interviewer he made her touch him with his pants pulled down, and threatened to kill her or her family if she told. (30:00-31:30). The interviewer suggested she draw while the interviewer briefly left the room. While the interviewer was away, Victim drew a picture and said "Devil." (34:00-36:00). She later identified the person she drew as Makins. (39:00-39:15). At the end of the interview, Victim appears relieved and unburdened.

Kristen Rich, a licensed counselor, provided Victim with therapy. R. p. 245. She is certified in trauma focused cognitive behavioral therapy. She defined trauma as an event of a shocking nature that "tragically shifts your life." R. p. 243, lines 11-20. Rich testified she has treated about 500 children, of which about 125 to 150 suffered trauma from sexual abuse. R. pp. 248-49.

She explained the purpose and process of therapy: she evaluates the patient, assessing the difficulties the patient has and any symptomology the patient is experiencing, and "then [does] an assessment, a diagnosis, and then provide[s] a treatment plan to help them feel better and do better." R. p. 242, lines 12-20. Rich testified some of the symptoms a child might exhibit after suffering trauma are avoidance, hyperviligence, sleep problems, and somatic symptoms. R. pp. 251-52. They may suffer from intrusive thoughts or feel shame. Symptoms often overlap. R. pp. 252-53. Rich also testified about delayed and piecemeal disclosure. R. pp. 251-55. Rich never testified Victim suffered trauma and never testified Victim suffered any symptoms of trauma.

Rich testified she treated Victim, and Victim disclosed she was abused during a therapy session. R. p. 275. Victim drew a picture in therapy which was admitted **without objection** as State's Exhibit 4. R. P. 372. It depicts Makins forcing Victim to perform oral sex. It is important to note that Makins was acquitted of the conduct in the picture, which was the factual basis for the

charge of criminal sexual conduct in the first degree.

ARGUMENT

The Court of Appeals erred by finding the therapist indirectly bolstered Victim's testimony by stating she treated Victim. The therapist was allowed to testify to the circumstances of treatment and also provide expert testimony on trauma resulting from sexual abuse pursuant to Schumpert; and the therapist never indicated directly or indirectly that she believed Victim.

The Court of Appeals found the trial court erred by allowing Rich to provide both expert testimony on trauma and testimony that she treated Victim. Note Rich never testified why she was treating Victim. The Court of Appeals found the testimony was bolstering because "Rich's testimony implied she was treating Victim for sexual trauma because Victim had suffered such trauma." State v. Makins, 428 S.C. 440, 835 S.E.2d 532, 537 (Ct. App. 2019). The opinion ignores that expert and factual testimony on rape trauma is admissible to prove a sexual assault occurred. State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993) ("[B]oth 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.") *overruled on other grounds by* State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). In other words, the Court of Appeals found the trial court erred because Rich's testimony "implied" what she could have expressly testified to, that Victim suffered from post-traumatic syndrome (PTSD).

In Makins' return to the State's petition for writ of certiorari, Makins attempted to defend the Court of Appeals' opinion by claiming Schumpert was somehow overruled, despite this Court affirming Schumpert's continuing validity in State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015). Makins' analysis depends on improperly conflating the legitimate probative value of Rich's expert

testimony, as clearly permitted by Schumpert, with a claim of unfair prejudice. However, Rich provided the jury permissible expert testimony in the form of general background information on trauma and the behaviors of sexually abused children. Additionally, Rich testified she treated Victim and Victim disclosed sexual abuse. Rich did not testify about any symptoms of trauma Victim might have suffered, although this would be permissible under Schumpert. Rich did not provide an opinion, provide a conclusion, or make any findings. She certainly did not comment on Victim's credibility – directly or indirectly. No bolstering occurred. Accordingly, the Court of Appeals erred in reversing the conviction and sentence.

Rich's testimony/how the issue arose at trial

Rich explained the term trauma to the jury as follows:

> [T]rauma is a very bad event where somebody feels like they might be hurt or killed or something very bad might happen to them. And generally, it's shocking in nature where somebody feels helpless or terrorized or horrified, and if that occurs to them. So something out of the ordinary that's bad. It's worse than falling down and skinning your knee. It's something that tragically shifts your life.

R. p. 243, lines 11-20. Rich gave the following examples of events which could result in trauma: car accidents, witnessing domestic violence, physical abuse, sexual abuse, witnessing the death of a loved one that's traumatic or violent, robberies, kidnappings, or house fires. R. p. 243, line 23 – p. 244, line 5. Rich noted it was important during therapy for the patient to talk about the traumatic events the patient experienced. R. p. 244.

Rich was then qualified as an expert in treatment of child trauma and child abuse dynamics. R. pp. 249-50. Rich further explained a child experiencing trauma often will show some avoidance by not wanting to be around the setting of the trauma or "a person that reminds them of the trauma."

R. p. 251, lines 6-11. Traumatized children may also become hypervigilant out of fear the traumatic event will happen again. R. p. 251, lines 12-15. They may have difficulty sleeping and suffer nightmares. R. p. 251, lines 16-20. The children may act out at school or home, and suffer emotional difficulties. R. p. 251, lines 21-25. The trauma may manifest itself in somatic symptoms, intrusive thoughts, or mood disturbances. R. p. 252, lines 1-13.

The prosecutor asked Rich about whether any symptoms the child may experience are particular to sexual abuse trauma. Rich explained:

> So sexual abuse trauma is strongly correlated with that. It's sometimes, you know, bedwetting, pulling out hair, wanting to avoid particular situations, being frightened or being in certain situations.
>
> Sometimes children who have been abused by a particular type of perpetrator, they want to avoid that. So avoid – some children want to avoid men. Some children want to avoid certain situations.

R. p. 252, line 17 – p. 253, line 1. Note in the instant case, no testimony was elicited that Victim pulled her hair out, suffered nightmares, suffered intrusive thoughts, was frightened, or sought to avoid men.

Rich explained trauma associated with sexual abuse tends to be more situational. The secretive and seductive nature of child sexual abuse creates a traumatic situation different than, for example, a car accident. Because the abuse occurring in the context of a personal relationship will violate that relationship, the child will often feel shame, fear, insecurity, or guilt, and display these feelings as symptoms of the trauma resulting from the abuse. R. p. 253, lines 5-20.

Rich explained disclosure is often delayed because the abuser threatens the child or the child's family. The child may also fear the child will be in trouble if the child discloses the abuse or may fear the abuser will be in trouble. R. p. 254. Rich explained disclosure tends to be piecemeal:

the child may disclose a fraction of the abuse to test the non-offending parent or may disclose only what is bothering them the most at that moment then perhaps disclose more as they become more comfortable or feel safer. R. p. 255. The child may want to push aside recollections of the abuse or may "close up because they don't want to hurt the adults in their life." R. p. 256, lines 8-17. Rich explained sometimes children experience difficulty discussing the abuse they experienced, so counselors may let the child draw what happened to them. R. p. 256, line 21 – p. 257, line 6.

When the prosecution began to ask about the therapy Rich provided to Victim, defense counsel interposed the first objection to the testimony, pretrial or before the jury. Once the jury was out, defense counsel moved for a mistrial. R. pp. 257-59. Strangely, defense counsel claimed the reason he waited to interpose the objection was because he wanted to be sure the witness treated the child. R. p. 259, lines 5-11. In fact, during the earlier in limine motion, the prosecutor informed counsel and the trial court that Rich would testify about "some details of her treatment of this victim." R. p. 46, lines 15-22.

Defense counsel's objection was not timely: defense counsel belatedly complained that Rich testified of the five hundred patients she treated, about 120 to 150 were treated for trauma related to sexual abuse. R. p. 259, lines 18-23. Defense counsel claimed Rich's testimony conveyed she believes the child because she is saying to the jury she would not have treated the child if the child was not suffering trauma. R. pp. 260-61. The prosecution noted at that point in Rich's testimony, the testimony was the equivalent of "blind expert" testimony and Rich did not testify she believed the victim. The prosecutor indicated she would not elicit testimony from Rich as to what symptoms Victim suffered. R. p. 261. Defense counsel's reply was to complain that Rich's expert testimony was supported by fact witness testimony from other witnesses like Victim's mother, who would

testify to Victim's demeanor and symptoms. R. pp. 262-63. However, defense counsel did not explain how that is different from cases where a blind expert testifies generally about symptoms of child abuse that corroborates another witness's fact testimony.

The trial court denied the mistrial motion. R. p. 270. The trial court then returned from a brief recess and announced it would limit the State's inquiry into Rich's specific treatment and diagnosis. R. pp. 271-72. Defense counsel made no objection at that time to the trial court's ruling or the sufficiency of its limitation on Rich's testimony. R. p. 273-74. See State v Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (where appellant objects, but fails to request further relief or object to the court's failure to give a curative instruction, no issue is preserved for review).

After the jury returned to the courtroom, Rich testified she provided treatment to Victim, and Victim disclosed sexual abuse during a therapy session. R. p. 275. Victim also drew a picture, admitted as State's Exhibit 4. Rich laid foundation for the exhibit and testified to Victim's explanation of the drawing. **Defense counsel did not object to the exhibit or any of the testimony surrounding it.** R. pp. 275-79; p. 372 (Exhibit 4). Rich testified Victim disclosed the abuse occurred between the time Victim was five years old and seven or eight years old, and the abuse always occurred at Toi's house. R. p. 280. At no point did Rich testify she diagnosed Victim with PTSD or that Victim suffered any symptoms of trauma, and Rich did not provide any testimony implying she believed Victim's disclosures.

The Standard of Review is whether the trial court abused its discretion; the trial court did not commit an error of law.

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

(Ct. App. 2002). "A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

In the instant case, the Court of Appeals' opinion is unclear as to what error of law, if any, the trial court committed. Indeed, the logic of the Court of Appeals' decision to reverse Makins' conviction is difficult to ascertain from its opinion even as it explains the rules established by this Court in State v. Anderson, 413 S.C. 212, 218 776 S.E.2d 76, 79 (2015) and State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). The Court of Appeals never explains how Rich's testimony in the present case violated the rules set by this Court in Anderson or Kromah.

Expert and factual testimony on trauma resulting from sexual abuse is admissible to prove the abuse occurred.

Expert testimony concerning trauma resulting from sexual abuse, such as the testimony provided by Rich in the instant case, is admissible to prove the sexual abuse occurred. "[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect." State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993) *overruled on other grounds by* State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). "Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior." State v. White, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004) (finding testimony is admissible in

prosecutions where the victim of sexual abuse is an adult).

The Court of Appeals found Rich's testimony was improper because it "implied she was treating Victim for sexual trauma because Victim suffered such trauma." However, it is proper for a person qualified as a mental health counselor to testify a victim suffered symptoms of trauma. If Rich's testimony "implied she was treating Victim for sexual trauma," such testimony is not impermissible because rape trauma evidence is admissible "to prove the elements of criminal sexual conduct since such evidence may make it more or less probable the offense occurred." White, 361 S.C. at 415, 605 S.E.2d at 544.

In White, Coles Badger, a psychotherapist treating the adult victim of a sexual assault, was qualified as an expert in post-traumatic stress disorder and the assessment and treatment of sexual abuse. This Court rejected the appellant's argument that Badger should not have been allowed to testify that the symptoms the victim suffered were consistent with a person suffering trauma, finding the testimony was "consistent with the probative purpose of admitting rape trauma evidence, i.e., to refute the defendant's contention that the sex was consensual **and to prove that a sexual offense occurred.**" Id. (emphasis added).

In Schumpert, the victim was interviewed by Heather Odell, from the Department of Social Services, and Ruth Strait, described in the opinion as a "mental health counselor." Odell's qualification as an expert was not challenged at trial. However, the appellant did object to Strait's qualification as an expert "in the field of sexual abuse" and she testified as to the symptoms victim disclosed to her and opined the behavioral symptoms were typical for sexual abuse. Appellant contended Strait was not qualified to give expert testimony on rape trauma syndrome and Strait's testimony on rape trauma evidence "to prove a rape actually occurred." Schumpert, 312 S.C. at 505-

06, 435 S.E.2d at 861.

This Court found no error, noting it already determined in State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) that "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." Schumpert, 312 S.C. at 506, 435 S.E.2d at 861-62.

Alexander held, "Evidence of behavioral and personality changes tends to establish or make more or less probable that the offense occurred." Alexander, 303 S.C. at 381, 401 S.E.2d at 149; see also State v. Henry, 329 S.C. 266, 277-78, 495 S.E.2d 463, 469 (Ct. App. 1997) (noting the State's expert was allowed to opine that the victim suffered from PTSD based on history provided from the victim, her mother, and the symptoms exhibited by the victim's behavior).

Note due to the trial court's [erroneous] ruling, Rich never testified she treated Victim for trauma, Victim suffered trauma, or Victim suffered symptoms of trauma. Rich was unduly prevented from testifying she diagnosed Victim with PTSD. Instead the jury was required to infer Victim suffered trauma from factual testimony from other witnesses, not Rich.[1] See State v. Johnson, 637 S.W.2d 157, 161 (Mo.App. 1982) ("[I]t was inferable from the testimony that these major voluntary changes in the victims' lives were made because of the sexual activities testified to and that such changes would not have been made if the activities had been consented to.") (cited with approval in Alexander, 303 S.C. at 381, 401 S.E.2d at 148).

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[1] Indeed, counsel attacked the prosecution's case by arguing to the jury Rich never testified Victim suffered from the symptoms "children perhaps suffer" and "nobody has said [Victim] suffered this symptom or had this symptom because of this." R. p. 328, lines 8-10; p. 329, lines 1-10.

Misapprehension of Bolstering

The Court of Appeals applied an overly broad understanding of the concept of indirect bolstering when it opined:

> We find Rich's opinion testimony addressing the various manifestations of child sexual abuse, followed immediately by her affirmative response that she treated Victim, implied she believed Victim was telling the truth with respect to her allegations of sexual abuse. **If Rich believed Victim had not been telling the truth, Rich would not have needed to treat her.** As the circuit court warned, Rich's testimony implied she was treating Victim for sexual trauma because Victim had suffered such trauma.

Makins, 428 S.C. at 448-49, 835 S.E.2d at 537 (emphasis added).

Therefore, the Court of Appeals found Rich's testimony that she provided therapy to Victim is bolstering because she would not treat Victim if she did not believe her. The problem with this assertion is that any therapist treating a child as a result of sexual abuse would be considered to "bolster" the victim's testimony regardless of whether the therapist was qualified as an expert. The logic of this holding, taken to its natural conclusion, is that a therapist could never testify that the therapist treated a victim of child abuse for trauma. This contravenes this Court's longstanding approbation of this sort of testimony. White; Schumpert; Alexander. The holding is also an unduly broad application of the concept of "indirect" bolstering addressed in Kromah.

The heart of the problem with the Court of Appeals' opinion is it's misapprehension of what constitutes improper bolstering. Rich did not directly or indirectly comment on Victim's credibility simply by stating she treated Victim. All relevant evidence in some way "bolsters" the strength of the offering party's case, and a trial court may not exclude evidence that bolsters other evidence absent a constitutional, statutory or rule-based principle of law providing for exclusion. State v.

Perry, 410 S.C. 191, 763 S.E.2d 603, 611 (Ct. App. 2014) (Few, C.J., concurring in part and dissenting in part).

"'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. Taylor, 404 S.C. 506, 745 S.E.2d 124, 128 (Ct. App. 2013) (*quoting* State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (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.'" Taylor, at 514-515, 745 S.E.2d at 128 (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)).

The idea that Rich recounting she treated Victim is bolstering – especially without Rich actually testifying as to why she was treating Victim – extends far beyond Kromah's concerns of obvious indirect comments on credibility extant in an expert's opinion finding abuse occurred or finding a disclosure of abuse is "compelling." Rich's testimony is clearly more akin to Coles Badger's testimony concerning symptoms of trauma that was approved by this Court in White.

The prosecution cited State v. Brown, 411 S.C. 332, 768 S.E.2d 246, 252-53 (Ct. App. 2015). In Brown, an expert witness who did not interview the victim provided testimony on the behaviors of sexually abused children. Brown distinguished McKerley and State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), plus similar cases the appellant relied upon, noting that unlike those cases the expert: (1) did not testify as a forensic interviewer, (2) never interviewed the victims, (3) did not prepare a report of the interview, (4) did not express any opinion regarding the credibility of the

allegations, and (5) did not express an opinion regarding the child victims. Id. at 344-45, 768 S.E.2d at 252-53. The same holds true in this case: although Rich did provide counseling for Victim, she did not conduct a forensic interview, and certainly none of the other four circumstances exist in the instant case. Ultimately, the Brown court found the expert's testimony, which merely provided broad testimony about the behaviors of sexually abused children, did not bolster the victims' testimony even though the expert's testimony did corroborate some of the reasons for the victims' delayed disclosure. Id. at 345, 768 S.E.2d at 253; see also State v. Cartwright, 425 S.C. 81, 96, 819 S.E.2d 756, 764 (2018) (finding the State's expert did not bolster victim's testimony: "[A]lthough [the expert's] testimony corroborated some of the minor victim's general behaviors, she properly testified in broad terms based on her expert qualifications.").

In the instant case, Rich testified about trauma and delayed disclosure. She testified she provided counseling to Victim, and Victim disclosed abuse. But Rich did not offer an opinion on Victim's veracity or even what symptoms, if any, Rich might have observed while treating Victim. She never so much as hinted as to whether she believed Victim. Her testimony was not bolstering.

Anderson does not apply because Rich did not link her testimony about the behaviors of sexually abused children to the Victim's behavior.

Further, the Court of Appeals misapprehended this Court's ruling in State v. Anderson, 413 S.C. 212, 218 776 S.E.2d 76, 79 (2015). In Anderson, the person who conducted a forensic interview of the child victim was qualified "as a forensic interviewer in child abuse assessment" without the trial court holding a hearing to determine if the forensic interviewer possessed the requisite experience in child abuse assessment. This Court found it was error for the trial court to deny an in camera hearing to determine if the forensic interviewer possessed the requisite expertise.

This Court also noted the forensic interviewer's behavioral expert testimony vouched for the Victim's credibility because she testified "only to those characteristics which she observed in the minor." Id. at 219, 776 S.E.2d at 79. In the instant case, Rich did not testify about any characteristics she observed in Victim. Therefore, she could not bolster Victim's testimony like the forensic interviewer did in Anderson.

The Anderson Court further found witnesses should not be qualified as experts in forensic interviewing or testify as to techniques in forensic interviewing before the jury. The Supreme Court set out a procedure for admitting forensic interviews where the interviewer would testify in camera to determine if the recording of the forensic interview met the "particularized guarantees of trustworthiness" under S.C. Code 17-23-175, but if the recording was admitted into evidence, the forensic interviewer would not be able to provide this same testimony to the jury that was provided in camera, and the forensic interviewer's testimony before the jury would be limited to only authenticating the interview and describing the behaviors and demeanor the child exhibited during the interview: "There is to be no testimony to such things as techniques, of the instruction to the interview subject of the importance of telling the truth, or that that purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted." Id. at 220-21, 776 S.E.2d at 80.

This Court also made the following suggestion:

> **The better practice**, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that he expert will vouch for the alleged victim's credibility.

Id. at 218-19, 776 S.E.2d at 79 (emphasis added). Even though suggesting the better practice of an

independent expert, rather than a forensic interviewer, to provide expert behavioral testimony, this Court did not outright ban the practice, as it noted in Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017). This Court explained:

> Since Anderson, the Court of Appeals has on at least two occasions affirmed a trial court's qualification of a forensic interviewer as an expert to testify as to the behavior of child sex abuse victims. See State v. Barrett, 416 S.C. 124, 130, 785 S.E.2d 387, 390 (Ct. App. 2016) *cert granted* (Mar. 24, 2017) (finding "no error" in qualifying a forensic interviewer as an expert to testify "regarding general behavioral characteristics" of child sex abuse victims); State v. White, 416 S.C. 135, 138, 784 S.E.2d 695, 696 (Ct. App. 2016) (finding "the trial court acted within its discretion" when it qualified "the forensic interviewer as an expert in the dynamics of child abuse").

Id. at 332-33, 806 S.E.2d at 722. Of course, Rich was not a forensic interviewer, she was providing treatment to Victim to help Victim – as Rich explained – "feel better and do better." R. p. 242.

The testimony did not violate Kromah – Kromah specifically allows Rich to testify as to the circumstances of her interview, which would include the fact she was treating Victim.

The Court of Appeals cited State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), noting a forensic interviewer should avoid statements: (1) explaining the child was told to be truthful; (2) expressing a direct opinion as to a child's veracity or tendency to tell the truth; (3) indirectly vouching for the child's believability, such as a statement the interviewer has made a "compelling finding" of abuse; (4) indicating to a jury the interviewer believes the child's allegations in the current matter; or (5) providing an opinion that the child's behavior indicated the child was telling the truth. Makins at 535 (citing Kromah, 401 S.C. at 360, 737 S.E.2d at 500).

First, Rich was not conducting a forensic interview, she was treating Victim, although the jury never found out what for due to counsel's objection. However Rich did not: (1) testify she told

the Victim to be truthful; (2) express an opinion about the Victim's veracity or tendency to tell the truth; (3) make any findings or offer any opinions that indirectly vouched for the Victim such as a "compelling finding" of abuse (Rich did not make any findings or conclusions at all); (4) make a statement indicating she believed the child's allegations; or (5) provide an opinion that Victim's behavior indicated she was telling the truth (Rich did not testify about Victim's behavior at all). Kromah, supra.

This Court in Kromah specifically allowed for forensic interviewers to testify as to (1) "**the time, date, and circumstances of the interview**;" (2) "any personal observations regarding the child's behavior or demeanor;" or (3) "a statement as to events that occurred within the personal knowledge of the interviewer." Id. (emphasis added). Therefore, the prosecutor complied with Kromah, as well as Anderson; and the trial court's preemptive concerns about bolstering, referenced in the Court of Appeals' opinion, never materialized as evidenced by trial counsel's lack of objection. The reality is the trial court unduly limited the State's testimony in contravention of Schumpert and what the Court of Appeals identified as bolstering – testimony that Rich treated Victim – is specifically allowed in Kromah as part of the explanation of the circumstances of Rich's interview (or treatment) of Victim.

The Court of Appeals discussed State's Exhibit 4, a drawing Victim drew during a therapy session with Rich. It is important to note that trial counsel indicated he did not object to the drawing and made no objection to any of the testimony surrounding it. R. pp. 275-79. When Rich provided further foundational testimony and explained her discussion with Victim as she drew the drawing, counsel never interposed an objection. Therefore, any complaint about the drawing or testimony surrounding it was not preserved for review. Additionally, Rich's testimony explaining why she

suggested Victim draw rather than explain the incident of abuse is hardly the sort of technique prohibited by Kromah such as swearing the Victim to tell the truth. It is not testimony that impacts the jury's exclusive role in determining credibility and it is not bolstering.

Anytime 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. Rich never commented on the veracity of the victim – directly or indirectly.

Rich was treating Victim, not conducting an investigative or forensic interview.

Further the Court of Appeals misconstrued this Court's opinions in Anderson and Kromah when it found Rich's role was the functional equivalent of a forensic interviewer. In Kromah, the Supreme Court recognized a forensic interviewer is tasked with collecting facts, not providing therapy. Kromah, 401 S.C. at 357, 737 S.E.2d at 499. This Court, in a footnote, observed, "Forensic interviewers might be useful as a tool to aid law enforcement officers in their initial investigative process, but this does not make their work appropriate for use in the courtroom." Id. at 401 S.C. at 499 n. 5, 737 S.E.2d at 358, n. 5. Likewise, this Court in Anderson recognized one "purpose of [a forensic] interview is to allow law enforcement to determine whether a criminal investigation is warranted." Anderson, 413 S.C. at 221, 776 S.E.2d at 80. Briggs cited both Kromah and Anderson in noting the dual purpose of forensic interviews was to collect facts for court and serve an investigatory purpose for law enforcement. Briggs v. State, 421 S.C. at 327-28, 806 S.E.2d 719-20.

However, Rich's role in this case was to provide therapy, she was not part of the investigative team and her role was not to collect facts for court but to treat Victim. Note, as a result of Makins' objection, Rich did not testify why she was treating the victim. She never testified, as trial counsel

claimed, that she only treated children suffering from trauma. Her testimony showed only roughly a quarter of her patients were children being treated for trauma related to sexual abuse. R. pp. 248-49.

Note that in Footnote 4 of its opinion, the Court of Appeals mistakenly cited S.C. Code § 17-23-175 as the basis for Rich being allowed to testify as to the abuse reported by Victim. However, the disclosure of abuse was admissible under the outcry exception to the hearsay rule and not Section 17-23-175. Section 17-23-175 provides for the admission of a recording of an investigative (forensic) interview. An "investigative interview" is defined as "the questioning of a child by a law enforcement officer, a Department of Social Services case worker, or other professional interviewing the child on behalf of one of these agencies, or in response to a suspected case of child abuse." S.C. Code Ann. § 17-23-175 (Supp. 2010). Rich was not conducting an investigative interview on behalf of an agency – she was providing therapy to Victim. As Rich testified, her goal for treating her patients was to formulate "a treatment plan to help [patients] feel better and do better." R. p. 242, lines 12-20.

In the instant case, because Rich was providing Victim therapy and not conducting an investigative interview, and because the sessions were not recorded, the testimony was not elicited pursuant to section 17-23-175. Instead, the basis for allowing Rich to testify Victim disclosed abuse to her is the outcry exception to hearsay which allows limited corroborative testimony in criminal sexual conduct cases when the victim testifies. See Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). This exception allows hearsay testimony that a victim complained of a sexual assault, but is limited to the victim's report of the time and place of the sexual assault, and should not include the identity of the perpetrator or particulars of the assault; however, counsel made no objection that the testimony exceeded this exception, certainly for strategic reasons. Makins utilized

the content of the exhibit to impeach Victim's credibility during closing argument. R. pp. 376-78. See Watson (finding counsel was not ineffective for failing to object to testimony exceeding the outcry exception where counsel did not object for strategic reasons). Makins did not argue on appeal that the testimony exceeded the outcry exception. This misapprehension of the applicability of section 17-23-175 represents the Court of Appeals' further conflation of the role of a forensic interview as an investigative tool with the mental health treatment provided by therapists for symptoms of a victim's trauma.

Makins failed to object to the sufficiency of the curative instruction.

Further, counsel failed to object to the sufficiency of the trial court's curative instruction. When the trial court declined Makins' motion for mistrial, after Makins renewed the motion after the State rested its case, the trial court offered a curative instruction. Tr. pp. 288-89; p. 376. During the trial court's instructions to the jury, the trial court advised the jury, "[U]nderstand that no witness, even an expert witness, can vouch for the credibility of another witness' testimony." R. p. 344, lines 11-13. Following instructions, not only did Makins not make any exceptions to the instructions to the jury, Makins did not challenge or object to the sufficiency of the "curative" instruction. R. p. 354, lines 18-23. Only **after** the jury began deliberating did Makins object to the sufficiency of the curative instruction. R. p. 360, lines 5-9.

"Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). Because counsel failed to object to the sufficiency of the curative instruction, the issue was not preserved for review.

Makins received a remedy in response to his objection.

Additionally, the trial court provided a remedy to the substance of trial counsel's complaint by not allowing testimony about Rich's specific treatment for, and diagnosis of, trauma.

When the prosecution began to ask about the therapy Rich provided to Victim, defense counsel interposed the first objection to the testimony, pretrial or before the jury. Once the jury was out, defense counsel moved for a mistrial. R. pp. 257-59. Defense counsel claimed Rich's testimony conveyed she believes the child because she was saying to the jury she would not have treated the child if the child was not suffering trauma. R. pp. 260-61 (Rich never said that and counsel's recollection of that testimony was inaccurate). The prosecution noted at that point in Rich's testimony, the testimony was the equivalent of "blind expert" testimony and Rich did not testify she believed the victim. R. p. 261. The trial court denied the mistrial motion. R. p. 270. The trial court then returned from a brief recess and announced it would limit the State's inquiry into Rich's specific treatment and diagnosis. R. pp. 271-72. Defense counsel made no objection at that time to the trial court's ruling or the sufficiency of its limitation on Rich's testimony in lieu of mistrial. R. pp. 273-74.

Because Makins did not renew his mistrial motion immediately following this ruling, the issue is not preserved for review. See State v Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (where appellant objects, but fails to request further relief or object to the court's failure to give a curative instruction, no issue is preserved for review).

No Prejudice

The improper admission of evidence is reversible error only when the admission causes prejudice. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Unfair prejudice does

not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (internal quotation marks omitted).

In the instant case, Makins' arguments for prejudice are really complaints about the legitimate probative force of Rich's testimony. For instance, the jury could properly consider testimony provided by Victim's mother in conjunction with testimony provided by Rich about symptoms of trauma some victims of sexual abuse experience, and conclude the symptoms Mother observed in Victim is evidence of trauma Victim experienced, and therefore evidence the sexual abuse occurred. See State v. Cartwright, 425 S.C. 81, 96, 819 S.E.2d 756, 764 (2018) (finding the State's expert did not bolster victim's testimony: "[A]lthough [the expert's] testimony corroborated some of the minor victim's general behaviors, she properly testified in broad terms based on her expert qualifications.").

Therefore, the evidence presented did not create a danger of unfair prejudice. Further, in light of the evidence at trial, any error was harmless beyond a reasonable doubt. Mitchell, 286 S.C. at 573, 336 S.E.2d at 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). To the extent it was even likely a jury could infer that Rich admitting she treated Victim was an indication Rich believed her report of sexual abuse, this jury did not let it interfere with their role in determining credibility as the jury acquitted Makins of Criminal Sexual Conduct in the First Degree, which was based on the conduct Victim reported to Rich, but not the forensic interviewer, and is the conduct depicted in State's Exhibit 4, discussed extensively in the Court of Appeals' opinion. R. p. 372. This alleged bolstering, as oblique as it is, simply was not reasonably likely to have changed

the outcome of trial.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the Court of Appeals' opinion granting Respondent a new trial and should affirm the conviction and sentence.

Respectfully submitted,

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