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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BEAUFORT COUNTY
The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No: 2019-001196

ARTHUR FRANKLIN SMITH, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

SECOND SUPPLEMENTAL APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Arthur Franklin Smith, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 26673
Heard February 19, 2009 – Filed June 22, 2009

VACATED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport and Assistant Attorney General Michelle J. Parsons, all of Columbia and Solicitor I. McDuffie Stone, III, of Hampton, for Petitioner.

Chief Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE BEATTY: In this case, Arthur Franklin Smith (Respondent) was convicted of first-degree criminal sexual conduct (CSC) with a minor and sentenced to twenty years in prison. The trial judge granted Respondent a new trial on the ground the minor victim's aunt "coached" him while he was testifying at trial. The State appealed this decision to the South Carolina Court of Appeals.

In a divided opinion, the Court of Appeals affirmed the order of the trial judge. State v. Smith, 372 S.C. 404, 642 S.E.2d 627 (Ct. App. 2007). The State petitioned for and was granted a writ of certiorari for this Court to review the decision of the Court of Appeals. We find the State did not have a right to appeal the trial judge's order. Accordingly, we vacate the opinion of the Court of Appeals.

FACTUAL/PROCEDURAL HISTORY

In the summer of 1998, Respondent, his two minor sons (John Doe and Richard Roe), his wife, and his daughter moved to Bluffton, South Carolina from New York. Shortly after the move, Respondent and his wife were divorced. Doe was removed from his mother's custody after his brother, Richard Roe, discovered him engaging in sexual behavior with the son of his mother's boyfriend. Doe, Roe, and their sister were ultimately placed in the custody of their uncle and aunt, Cynthia Solak, who lived in West Virginia.

Following Doe's exhibition of sexual preoccupation, sexual acting out, and destructive behavior, he underwent counseling and eventually revealed Respondent's molestation of him during one of the counseling sessions.

As a result, Respondent was indicted for first-degree CSC with a minor. At trial, Doe described in detail the sexual abuse. On cross-examination, Doe acknowledged that prior to trial, he and his aunt (Solak), had reviewed the questions that would likely be asked and discussed his testimony. Doe also admitted that he had looked over to Solak while testifying. However, Doe maintained on re-direct examination that "[t]hese are my answers." Doe also acknowledged that he revealed the sexual abuse while living with Solak because he felt "safe."

After Doe's testimony, Respondent's counsel asked the trial judge to remove Solak from the courtroom while Doe's older brother, Richard Roe, testified during an *in camera* hearing on a Lyle[1] issue. In making this request, counsel stated:

> I didn't object after [Solak] testified to [her] be[ing] in the courtroom. But it was apparent during [Doe's] testimony that there were motions and mouth movement[s] and things going back and forth between the witness and Miss Solak and that was reported to me by individuals in the courtroom.

Subsequently, Solak voluntarily left the courtroom.

Following Roe's *in camera* testimony, Respondent's counsel moved for a mistrial on the ground that Solak improperly coached and influenced Doe during his testimony. In the alternative, counsel moved to strike Doe's testimony. Counsel contended that Solak's misconduct compromised the validity and credibility of Doe's testimony. The trial judge denied counsel's motions, stating:

> You did not, as an officer of the court, call it to my attention so that I could take appropriate action so you knew it was going on . . . and took no action.
>
> And so I think that is a waiver and I do find - - And I watched [this] young man testify - - that I do not believe that this caused any - - influenced his answers because he was basically going over the same things so I'm not going to declare a mistrial . . . .

In response, Respondent's counsel claimed that she was not aware of the "magnitude of what was taking place" until she finished her cross-examination of Doe and sat down with her co-counsel who informed her of what he saw between Doe and Solak during the testimony.

The judge then reiterated his denial of the mistrial motion and the motion to strike Doe's testimony, explaining:

> [I]f co[-]counsel knew it, you're charged with knowing it too, because he's sitting at the table with you.
>
> Having failed to bring the matter to the court's attention, you know, if it's a strategic matter, you decided to ask him about it and knowing- - you did not make - - ask for a sidebar or anything, which you could have.
>
> I frankly think what you did was probably the best way because I think the jury's much more influenced in determining the credibility of testimony as to whether or not the will of the young man was overridden by the people in authority . . . .
>
> I have the utmost confidence in the jury to render a just verdict in this case. I believe it certainly is made more difficult by that unfortunate thing happening.

At the conclusion of the State's case, Respondent's counsel renewed the mistrial motion. The trial judge again summarily denied the motion.

After the jury found Respondent guilty of first-degree CSC with a minor, the trial judge sentenced him to twenty years in prison. The next day, the trial judge heard testimony regarding Respondent's motion for a new trial specifically with respect to the issue of Solak's coaching of Doe during his testimony.

At the hearing, Respondent's counsel offered the testimony of three individuals who were present in the courtroom during Doe's testimony.[2]

The first witness testified "I couldn't see [Doe] from where I was so I don't know what he was doing but I could see her sitting over there and she was nodding her head back and forth, up and down and verbally saying stuff." When asked by the trial judge whether it appeared that Solak was trying to assist Doe in answering the questions, the witness responded, "That's what it appeared to be; however, I couldn't see him so I don't know, you know, if he was looking at her but I assumed he was . . . ."

The second witness also testified that she observed Solak making motions with her head during Doe's testimony. She believed Solak was "trying to give the minor, twelve-year old answers to the questions that were being asked."

The third and final witness testified she observed Solak make head gestures toward Doe. She stated she thought Respondent's counsel had observed the motions stating, "when you were questioning him you asked him a question and, and I think you noticed his eyes going towards her. And that's when you moved over in front of her."

After the post-trial hearing, the trial judge granted Respondent's motion for a new trial. In so ruling, the judge found: 1) Solak "used body language and other non-verbal signals in the

courtroom during [Doe's] testimony and such communications were directed at [Doe] during his testimony"; 2) "[s]uch behavior on the part of [Solak] may have overridden [Doe's] free will"; and 3) "[Solak's] behavior and the potential for corruption of [Doe's] testimony clearly denied [Respondent] a fair trial."

The State appealed the trial judge's order to the Court of Appeals. In a divided opinion, the Court of Appeals affirmed the grant of a new trial. State v. Smith, 372 S.C. 404, 642 S.E.2d 627 (Ct. App. 2007). The majority prefaced its analysis by implicitly finding that the State could appeal the decision on the ground it was based on an error of law. Id. at 408, 642 S.E.2d at 629-30. The majority also concluded that Respondent's counsel's failure to contemporaneously object to the coaching did not waive Respondent's right to request a mistrial given the record did not clearly show the coaching was apparent to Respondent's counsel during Doe's cross-examination. Id. at 409-10, 642 S.E.2d at 630-31. Additionally, the majority believed the trial judge did not have all of the relevant information or much time to consider the issue when he initially denied the mistrial motions. Having determined the issue to be preserved, the majority found evidence in the record to support the trial judge's decision to grant a new trial. Id. at 409, 642 S.E.2d at 630.

The dissent advocated reversing the order of the trial judge and reinstating Respondent's sentence. Id. at 410, 642 S.E.2d at 631. The dissent believed Respondent received the relief sought in his request to remove Solak from the courtroom after Doe's testimony. Because Solak voluntarily left the courtroom, the dissent found counsel's request did not preserve the coaching issue for appellate review. Id. at 411, 642 S.E.2d at 631. Moreover, the dissent determined Respondent waived the issue because his counsel was apprised of Solak's conduct during Doe's testimony but did not object or request a mistrial until after Doe's brother, Roe, testified. Because there was no contemporaneous objection by Respondent's counsel, the dissent found the trial judge erred by granting Respondent's motion for a new trial on this issue after the judge had initially concluded that Respondent waived the coaching issue. Id. at 412, 642 S.E.2d at 632.

This Court granted the State's petition for a writ of certiorari to review the decision of the Court of Appeals.

DISCUSSION

The State contends the trial judge erred in granting Respondent a new trial. In support of this contention, the State avers: 1) the issue was not properly preserved at trial, and 2) the judge erroneously substituted his judgment for that of the jury.

In response, Respondent asserts this Court should dismiss the State's appeal because the State had no right to appeal the order granting Respondent a new trial. In the alternative, Respondent claims the trial judge properly granted him a new trial when it became apparent that Solak improperly coached Doe during his trial testimony.

As a threshold issue, we must resolve whether the State had the right to appeal the trial judge's order. "The State may only appeal a new trial order if, in granting it, the trial judge committed an error of law." State v. Johnson, 376 S.C. 8, 10, 654 S.E.2d 835, 836 (2007). "When determining whether an error of law exists, and therefore whether the State has the right to an appeal, it is necessary to consider the merits of the case." Id. at 11, 654 S.E.2d at 836.

In order to review the merits of this case, we must initially determine whether Respondent was procedurally barred from making a new trial motion challenging Solak's "coaching" of Doe.

Although counsel failed to object to Solak's coaching during Doe's cross-examination, we find the issue was properly preserved in that counsel timely raised the issue to the trial judge and obtained a ruling. After Doe's cross-examination, counsel became aware of the extent of Solak's coaching once she conferred with her co-counsel and other individuals in the courtroom who observed Solak's conduct. At that point, she informed the trial judge of the situation and moved for a mistrial. In view of this procedural posture, we conclude counsel's objection was sufficiently contemporaneous and provided the trial judge an opportunity to rule on the mistrial motion. See State v. McIntosh, 358 S.C 432, 445 n.7, 595 S.E.2d 484, 491 n.7 (2004) (finding objection was sufficiently contemporaneous where defendant's attorney objected after second improper question); cf. State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) (stating that "[h]aving denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object . . ., Appellant is procedurally barred from raising these issues for the first time on appeal").

Because counsel posited a timely objection and received a ruling, we find the grounds for the mistrial motion and, in turn, the new trial motion were not waived. See State v. Nelson, 331 S.C. 1, 6 n.6, 501 S.E.2d 716, 718 n.6 (1998) (stating "the ultimate goal behind preservation of error rules is to insure that an issue raised on appeal has first been addressed to and ruled on by the trial court").

Furthermore, at the time the trial judge ruled on the motion for a mistrial, he was not aware of the magnitude of Solak's misconduct. In fact, after Respondent's counsel requested to have Solak removed from the courtroom, the judge indicated that he did not notice Solak's alleged coaching. However, at the hearing on the new trial motion, the trial judge was more fully apprised of Solak's "coaching" of Doe. Based on this additional evidence, the trial judge was able to thoroughly consider the mistrial motion and conclude that his prior ruling regarding waiver was not proper under these circumstances. Thus, not until the new trial hearing was the trial judge able to make an informed decision based upon all the relevant facts, law, and arguments. See I'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments."); Rhoad v. State, 372 S.C. 100, 108 n.3, 641 S.E.2d 35, 39 n.3 (Ct. App. 2007) ("Until an order is written and entered, the judge is free to change his mind and amend prior rulings."); cf. State v. Floyd, 295 S.C. 518, 520, 369 S.E.2d 842, 843 (1988) (stating a ruling on a motion in limine is subject to change based on events at trial). Consequently, we find the mistrial issue was not waived and the trial judge properly considered it as a ground for granting Respondent a new trial.

Having found Respondent did not waive the mistrial issue, we now address the merits of this issue in conjunction with determining the State's right to appeal. Thus, the question becomes whether the trial judge's grant of a new trial constituted an error of law.

This Court is confined by an extremely limited "abuse of discretion" standard of review regarding the grant of a new trial in the circumstances presented in this case. See State v. Simmons, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983) (stating the grant or denial of a new trial is within the trial judge's discretion and will not be overturned on appeal absent a clear abuse of discretion); 23A C.J.S. Criminal Law § 1605 (2008) ("Except in certain circumstances,

it is reprehensible for a spectator to try to influence a witness while the witness is testifying, or to try to convey directions to the witness as to the answers that should be given. It is largely within the discretion of the trial judge as to what should be done when such conduct occurs.").

Based on our review of the record, there is evidence to support the judge's decision. All parties admitted that Solak acted inappropriately in mouthing words and making nonverbal signals to Doe during his testimony. Clearly, the trial judge was in the best position to assess the credibility of the witnesses that testified at the hearing on the motion for a new trial. State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 190 (Ct. App. 2003) ("The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity.").

Because Doe was the key witness in the prosecution's case, we cannot disregard the trial judge's conclusion concerning the prejudicial impact on Respondent's right to a fair trial. Cf. Sharp v. Commonwealth, 849 S.W.2d 542, 546-47 (Ky. 1993) (reversing trial judge's denial of defendant's motion for a mistrial where child witness was coached by a family friend and finding "the violations here as so egregious and inimical to the concept of a fair trial that they cannot be disregarded in the name of trial court discretion"); State v. Dayhuff, 158 P.3d 330, 342 (Kan. Ct. App. 2007) (holding trial court's refusal to allow defendant, at the time of trial, to develop a factual basis for his motion for a mistrial that was based on the allegation that the child advocate's gestures during child witness's testimony served to coach or vouch for the child warranted a new trial).

Although we are aware of the trauma a trial may bring to minor victims, we reach our decision constrained by our standard of review and the necessity to uphold the integrity of the judicial system. In view of the clearly improper "coaching" by Solak of the minor victim, we find the judge did not abuse his discretion or commit an error of law in granting Respondent a new trial. In so holding, we are guided by the following principle:

> When it is made to appear that anything has occurred which may have improperly influenced the action of the jury, the accused should be granted a new trial, although he may appear to be ever so guilty, because it may be said that his guilt has not been ascertained in the manner prescribed by law.

State v. Britt, 235 S.C. 395, 425, 111 S.E.2d 669, 685 (1959) (emphasis added), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Because we find the trial judge properly exercised his authority to grant a new trial upon the facts, we conclude the judge's decision was not predicated "wholly upon error of law." See State v. Dasher, 278 S.C. 395, 399-400, 297 S.E.2d 414, 416 (1982) (recognizing trial judge's power to grant a new trial upon the facts)[3]; cf. State v. Des Champs, 126 S.C. 416, 418, 120 S.E. 491, 492 (1923) ("[W]here the grant of a new trial in a criminal cause is predicated wholly upon error of law, we think an appeal by the [S]tate will lie."). Accordingly, we hold the State did not have the right to appeal the trial judge's order.

CONCLUSION

Based on the foregoing, we hold the State did not have the right to appeal the trial judge's decision to grant Respondent a new trial. As a result, we vacate the opinion of the Court of Appeals.

VACATED.

WALLER, PLEICONES and KITTREDGE, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. In my view, the State had a right to appeal the trial judge's granting of a new trial because the order was based upon an error of law.

In reviewing the trial court's order granting a new trial, the majority is correct to observe that we review the trial court according to an abuse of discretion standard. However, we must apply this standard in the context with which a trial court may exercise its discretion to grant a new trial. We have said many times that the granting of a mistrial is an extreme measure that should only be taken where an incident is so grievous that prejudicial effect can be removed in no other way. *State v. Beckham*, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) (citing *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998)). Furthermore, we must consider the entire trial record when considering whether the trial court abused its discretion in ordering a new trial. *See State v. Johnson*, 334 S.C. 78, 91, 512 S.E.2d 795, 803 (1999) ("The prejudicial character of the error must be determined from its relationship to the entire case.")

My review of the record reveals no evidence to support the trial court's finding that Respondent was "clearly denied" a right to a fair trial. In my view, the trial court's own factual finding that Solak's behavior "may have over-ridden the victim's free will" does not support such a conclusion. Doe confirmed that his testimony was his own, and Solak left the courtroom once it was alleged that she was coaching Doe's testimony. Even if Solak's behavior did result in some degree of prejudice to Respondent, I believe this prejudice was outweighed by the ample evidence in the record to support the jury's verdict. I find no foundation for the trial court's order and believe that the trial court abused its discretion in granting Respondent a new trial. I would therefore reverse the opinion of the court of appeals, reverse the order of the trial court, and reinstate Respondent's conviction and sentence.

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[1] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

[2] Neither Doe nor Solak testified at this hearing as they had already returned to their home in West Virginia.

[3] In Dasher, a jury found the defendant guilty of conspiracy to violate the South Carolina Controlled Substance Act. After the verdict, the defendant filed a post-trial motion for judgment in his favor notwithstanding the verdict. Prior to sentencing, the trial judge, without the assignment of any grounds, "supplanted the jury verdict of guilty and entered a verdict of his own of not guilty." Dasher, 278 S.C. at 395, 297 S.E.2d at 414. The State appealed the trial judge's decision. Finding no precedent in this state to support the trial judge's decision, this Court reversed. Id. at 400, 297 S.E.2d at 416. In so ruling, this Court reasoned that "[t]his is not a case in which a trial judge has granted a *new trial* upon the facts (a power which he admittedly has), but rather one in which a trial judge has entered a verdict of *not guilty* in the face of conflicting evidence (a power he has never had in this jurisdiction)." Id. Because the trial judge set aside the verdict of the jury in the face of conflicting facts and substituted his judgment for that of the jury, this Court concluded that the judge committed an error of law. Id. at 400, 297 S.E.2d at 417.

The instant case is distinguishable from Dasher. Here, the trial judge did not set aside the verdict of the jury. Instead, the trial judge properly exercised his authority to grant a new trial upon the facts given "an injustice had been done" during the trial. Id. at 400, 297 S.E.2d at 416. Thus, unlike the trial judge in Dasher, the judge did not invade the province of the jury or substitute his verdict for that of the jury.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ARTHUR SMITH,

APPELLANT

APPELLATE CASE NO. 2011-200306

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. Whether the trial court reversibly erred by permitting testimony of the forensic interviewer regarding the identity of Appellant as the individual who molested the complaining witness during Appellant's trial for criminal sexual conduct with a minor where the trial court previously ruled such identification was impermissible?

II. Whether the trial court reversibly erred by permitting testimony of the State's expert in the field of sexual deviancy regarding the relationship of the length of delay in an individual's disclosure of sexual abuse and the credibility of such disclosure?

III. Whether the trial court reversibly erred by permitting the Complaining Witness to refresh his recollection by reading his testimony from the previous trial to refresh his recollection after he could not remember specific details of the alleged incident, where the Complaining Witness' prior testimony was tainted by in-court coaching and formed the basis for the first trial court's grant of a new trial?

STATEMENT OF THE CASE

Appellant Arthur Smith was indicted by the Beaufort County grand jury on September 25, 2003, for first degree criminal sexual conduct with a minor (CSCM 1st). R. 71; R. 235 (Indictment). His case proceeded to trial before the Honorable Jackson V. Gregory and a jury. The jury found Appellant guilty, and the trial court sentenced him to twenty years.

The next day, the court heard testimony regarding Appellant's motion for a new trial based on the in-trial coaching of the minor child witness by his guardian, Cynthia Solak. The trial court granted Appellant's motion for a new trial, finding: (1) that the guardian used body language and other non-verbal signals in the courtroom during the child's testimony and such communications were directed at the child during his testimony; (2) that such behavior on the part of the guardian may have overridden the child's free will; and (3) that the guardian's behavior and the potential for corruption of the child's testimony clearly denied Appellant of a fair trial.

The State appealed the trial court's order. On February 5, 2007, the South Carolina Court of Appeals affirmed the grant of a new trial. The State's petition for certiorari to the Court of Appeals was granted on December 6, 2007. On June 22, 2009, the South Carolina Supreme Court held that, "[i]n view of the clearly improper 'coaching' by Solak of the minor victim, we find the judge did not abuse his discretion or commit an error of law in granting . . . a new trial."[1] Consequently, the Court of Appeals opinion was vacated because "the State did not have a right to appeal the trial judge's order."

[1] State v. Smith, 383 S.C. 159, 164, 679 S.E.2d 176, 179 (2009).

Appellant's case was called again for trial on the charge of CSCM 1st, this time before the Honorable Roger M. Young, Sr., and a jury from September 19 through 21, 2011. R. 68. Gail Lovell (Counsel) represented Appellant, while James Bannon represented the State. R. 68. Appellant was found guilty, and the trial court sentenced him to thirty years incarceration. R. 220, lines 10-19; R. 232, line 3—R. 233, line 19; R. 237 (Sentence sheet).

STATEMENT OF THE FACTS

Appellant Arthur Smith's case resulted in the grant of a new trial due to in-trial coaching of the Complaining Witness[2] by his aunt Cynthia Solak (Solak).[3] That ruling was appealed by the State, and ultimately decided by the South Carolina Supreme Court. Specifically, the Court found as follows:[4]

> Because [Complaining Witness] was the key witness in the prosecution's case, we cannot disregard the trial judge's conclusion concerning the prejudicial impact on [Smith's] right to a fair trial.
>
> . . . . .
>
> In view of the clearly improper 'coaching' by Solak of the minor victim, we find the judge did not abuse his discretion or commit an error of law in granting . . . a new trial.

As a result, the Supreme Court vacated the opinion of the Court of Appeals because "the State did not have a right to appeal the trial judge's order."

On September 19, 2011, a pretrial motions hearing was held in Appellant's retrial, at which the State called several witnesses including the Complaining Witness. R. 1; R. 24, line 3—R. 35 line 14. During the Complaining Witness' testimony, he could not recall certain conduct allegedly committed by Appellant. Specifically, the Complaining Witness did not recall instances of oral sex. R. 26, lines 19-21. The State then sought to refresh the Complaining Witness' memory regarding these allegations by having him read his prior impermissible testimony from Appellant's first trial—the same trial that resulted in the grant

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[2] The Complaining Witness was twelve years of age when he testified at Appellant's first trial, and nineteen years of age at the time of the present trial.

[3] R. 88, lines 2-24; State v. Smith, 383 S.C. 159, 679 S.E.2d 176 (2009).

[4] Smith, 383 S.C. at 168, 679 S.E.2d at 181 (emphasis added).

of a motion for new trial due to the Complaining Witness' testimony being tainted by in-trial coaching from Solak:

> Q. Now, . . . do you remember testifying in a hearing prior to this one?
>
> A. Yes.
>
> Q. Okay. And would seeing a transcript of that hearing refresh your recollection as to what might have occurred?
>
> A. Yeah.

R. 26, line 22—R. 27, line 2. Counsel objected as follows:

> Objection, your honor. I object to the form which you are showing him the transcript. . . . I don't think he can read it over and then testify. So that would just remind him of the things that he's not testifying to now, which would then go back to our underlying issue of which we are trying to separate out this trial from.

R. 27, lines 5-11 (emphasis added).

During the course of discussion on the matter, Counsel repeatedly objected to the use of the Complaining Witness' prior testimony. R. 29, lines 3-9; R. 33, line 24—R. 34, line 4. However, the trial court ultimately ruled that the State was allowed to refresh the Complaining Witness' recollection with his prior testimony, observing that the only issue was whether the Complaining Witness' memory should be refreshed there at the pretrial hearing, later that day, or the following day before the jury:

> Well, ultimately one way or another, he's going to get a chance to refresh his memory, whether it's at this hearing today or it's after the hearing today or in front of the jury tomorrow. As long as the defense gets the opportunity to talk about how his memory of this incident was not so clear before he had it refreshed, and I suppose that's the way to cure that.

R. 31, line 24—R. 34, line 13; R. 33, lines 5-22 (emphasis added). The State sought and was permitted to use the prior improper testimony at the pretrial hearing, after which the Complaining Witness testified that oral sex occurred, as well as threats by Appellant after the alleged offense. R. 31, lines 21-23; R. 34, line 3—R. 35, line 5.

The following day during trial, the Complaining Witness' testimony before the jury included the information from the prior trial that the State used during the pretrial hearing to refresh his recollection. R. 108, lines 15-17; R. 109, lines 11-13; R. 109, lines 21-25; R. 110, lines 17-24. Counsel later renewed her objection as follows:

> And I also need to put something on the record that I wanted to bring out and reinforce that I had made objections in limine, motions in limine, objecting to the testimony of [Sibling 1], [Sibling 2], [Solak], and [Complaining Witness], and I wanted to be sure that that was an ongoing objection. While I may not have mentioned at the time they were coming in, I wanted to make sure the record was preserved that I did object. I do want a continuing objection to their testimony.

R. 141, line 21—R. 142, line 4. The trial court acknowledged her objection by saying, "All right." R. 142, line 5. Counsel then asked if that could be part of the record, and the court further confirmed Counsel's objection by stating, "So noted. Okay." R. 142, lines 6-8.

The State also presented forensic interviewer Kendra McIlvee Twitty (Twitty) as a witness in its case-in-chief. R. 142, lines 14-18. At one point, Twitty testified that the Complaining Witness "disclosed that he had to suck his dad's penis," and the trial court sustained Counsel's objection. R. 148, line 8-14. The court further admonished that "the question was the time and place. I instruct the jury to disregard that last answer." R. 148, lines 12-14. However, Twitty again provided testimony regarding Appellant's identity as the alleged perpetrator:

> Q. If I would show you a copy of your report, would it refresh your recollection as to the time frame of the abuse?
>
> A. Absolutely.
>
> . . . . .
>
> Okay, I had written [Complaining Witness] reported that he was about six or seven years old when his dad started doing these things to him.

R. 149, lines 6-15 (emphasis added). Yet, the trial court overruled Counsel's timely objection, and permitted the testimony to stand. R. 149, lines 16-17.

Tod Lynch-Stanley (Lynch-Stanley) also testified on behalf of the State, and was qualified as an expert in the field of sexual deviancy. R. 178, lines 19-20; R. 181, lines 12 – 14. The State not only elicited testimony regarding delayed disclosure by a victim of sexual abuse, but also elicited testimony regarding the impact of delayed disclosure on credibility:

> Q. Does the length of the delay in the disclosure have any—in your opinion, does it erode the credibility of the disclosure?

R. 189, line 5—R. 192, line 24; R. 196, lines 21-23 (emphasis added).

Over Counsel's immediate objection, the trial court permitted Lynch-Stanley to testify:

> No, it really doesn't.
>
> . . . . .
>
> I think when you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure.

R. 197, lines 1-22 (emphasis added).

The jury found Appellant guilty as charged. R. 220, lines 10-19. The trial court imposed a sentence of thirty years incarceration. R. 232, line 3—R. 233, line 19; R. 237 (Sentence sheet). This appeal follows.

ARGUMENT

I. The trial court reversibly erred by overruling Counsel's objection to testimony of the forensic interviewer regarding the identity of Appellant as the individual who molested the complaining witness during Appellant's trial for criminal sexual conduct with a minor where the trial court previously ruled such identification was impermissible.

The trial court reversibly erred by permitting Twitty to testify regarding the identity of Appellant as the alleged perpetrator of the offense. Such testimony is expressly forbidden by both the South Carolina Rules of Evidence and case law. Further, Appellant was prejudiced by Twitty's improper testimony, particularly due to its cumulative effect with the Complaining Witness' testimony. As a result, Appellant respectfully requests reversal of his conviction, and remand of his case for a new trial.

"The rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001) (reversing the PCR court where counsel was ineffective for failing to object to hearsay evidence that corroborated the victim's testimony). One exception permits corroborative testimony in criminal sexual conduct (CSC) cases, the scope of which is limited to the time and place of the alleged assault. Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 632 (2010) (interpreting and applying Rule 801(d)(1), SCRE). "The corroborative testimony cannot include 'details or particulars' regarding the assault." Id. Moreover, the limited exception in CSC cases permitting such corroborative hearsay testimony applies when the victim testifies. Dawkins, 346 S.C. at 156, 551 S.E.2d at 262 ("When the victim testifies, evidence from other witnesses is that the victim complained of the sexual assault is admissible in corroboration.").

In the present case, the trial court repeatedly acknowledged the rule restricting corroborative hearsay testimony to time and place in cases of alleged sexual abuse. In fact, at one point, the court specifically cautioned the State regarding such testimony. Yet, even after once sustaining Counsel's objections to testimony from Twitty identifying Appellant as the alleged perpetrator of sexual abuse to the Complaining Witness, the trial court failed to sustain Counsel's objection to the same when Twitty again gave such impermissibly corroborating hearsay testimony:

> Okay, I had written [Complaining Witness] reported that he was about six or seven years old when his dad started doing these things to him.

R. 149, lines 6-15 (emphasis added).

This testimony went well beyond merely the time and place of the alleged offense, and specifically included the identification of Appellant as the perpetrator of sexual abuse. As a result, the trial court erred in failing to sustain Counsel's objection, and instead permitting improper testimony.

Appellant was also prejudiced by the forensic interviewer's improper corroborating hearsay. First, although Twitty's testimony was cumulative the Complaining Witness' testimony, "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration. Accordingly, admission of the evidence mandates reversal of the conviction." State v. Barrett, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989); see also Smith, 386 S.C. at 567, 689 S.E.2d at 632 (quoting with approval Dawkins, 346 S.C. 156-57, 551 S.E.2d at 263). Second, there was no physical evidence in the case to corroborate the allegations. Therefore, the testimonial evidence against Appellant regarding the specific

offense alleged was bolstered by the improper hearsay testimony of Twitty in the eyes of the jury. As a result, Appellant was prejudiced by the trial court's erroneous ruling.

II. The trial court reversibly erred by overruling Counsel's objection to testimony of the State's expert in the field of sexual deviancy regarding the relationship of the length of delay in an individual's disclosure of sexual abuse and the credibility of such disclosure.

The trial court reversibly erred by permitting testimony regarding the credibility of a witness' disclosure where disclosure was delayed. Such testimony improperly bolstered the credibility of the Complaining Witness in the case where Lynch-Stanley treated the Complaining Witness, and where his disclosure regarding the alleged offense was delayed.

"The law is clear that it is improper for a witness to give testimony as to his or her opinion about the credibility of a child victim in a sex abuse matter." State v. Hill, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011)). This is because "[t]he assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)).

In the case at bar, Lynch-Stanley's testimony constituted improper bolstering of the Complaining Witness' credibility. The State specifically asked:

> Does the length of the delay in the disclosure have any—in your opinion, does it erode the credibility of the disclosure?

R. 196, lines 21-23 (emphasis added). Lynch-Stanley replied, "No, it really doesn't. . . . . I think when you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure." R. 197, lines 1-22 (emphasis added). Therefore, in his capacity as an expert, Stanley-Lynch was essentially permitted to tell the jury that the delay in the Complaining Witness' disclosure of the alleged abuse does not affect the credibility of that disclosure. Such testimony on the witness' credibility is forbidden. Accordingly, the trial court erred in allowing Lynch-Stanley's testimony regarding credibility.

Further, Appellant was prejudiced by the trial court's error. The heart of the State's case relied upon the jury's determination of witness credibility. The evidence introduced by the State to prove the charged offense was not physical evidence, such as DNA, or even results of a physical examination. Rather, the evidence against Appellant was largely testimonial from the Complaining Witness regarding specific conduct comprising the alleged offense, and from the Complaining Witness' two siblings who testified regarding alleged instances of prior bad acts by Appellant pursuant to Rule 404(b) of the South Carolina Rules of Evidence. Importantly, the testimony from the Complaining Witness and each of his siblings included instances of delayed disclosure. As a result, the expert witness' impermissible testimony improperly bolstered not only the credibility of the Complaining Witness' testimony, but also the credibility the two 404(b) witnesses. Accordingly, because credibility was crucial to the State's case, Appellant was prejudiced by the trial court's error. See, e.g., State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94-95 (2011) (reversing where "[t]he only evidence presented by the State was the children's accounts of what occurred and other hearsay evidence of the children's accounts."); State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 492 (2001) ("An officer's improper opinion which goes to the heart of the case is not harmless."). As such, Appellant respectfully requests reversal of his conviction, and remand for a new trial.

III. The trial court reversibly erred by permitting the Complaining Witness to read his testimony from the previous trial after he could not remember specific details of the alleged incident, where the Complaining Witness' prior testimony was improper and formed the basis for the first trial court's grant of a new trial.

The trial court erred by allowing the State to use the Complaining Witness' prior trial testimony to refresh his recollection at Appellant's present trial where the Complaining Witness' testimony from the first trial was tainted by in-trial coaching to the point that it caused the first trial court to grant a new trial. Although Rule 612 of the South Carolina Rules of Evidence generally permits refreshing a witness' recollection with prior writings, it was used here by the State to reintroduce tainted testimony that was so prejudicial to due process and fundamental fairness that it caused a new trial in the first case. The trial court erroneously permitted the Complaining Witness to refresh his recollection regarding substantive matters pertaining directly to the allegations against Appellant by using the testimony from the first trial that was tainted by in-trial coaching. Therefore, Appellant respectfully requests reversal of his conviction, and remand for a new trial.

Rule 612 of the South Carolina Rules of Evidence generally permits a witness to use a writing to refresh his memory for the purpose of testifying either (1) while testifying, or (2) before testifying, so long as the adverse party is permitted to inspect the writing and cross-examine the witness on it "if the court in its discretion determines it is necessary in the interests of justice." Rule 612, SCRE; See also State v. Dean, 72 S.C. 74, 51 S.E. 524, 526 (1905) ("[T]he rule is stated that a witness may refresh his memory from notes taken by counsel or other persons at a former trial, or from his own testimony at a previous trial, or from a copy of the same.").

However, the use of prior testimony to refresh a witness' recollection is not unfettered. As indicated by the United States Supreme Court in United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 60 S.Ct. 811 (1940), the use of prior sworn testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge. Id. 310 U.S. at 233, 60 S.Ct. at 849 (addressing the use of witness' prior grand jury testimony to refresh recollection at trial). Thus, the trial court's decision is still subject to review under the abuse of discretion standard. For example, "there would be error where under the pretext of refreshing a witness' recollection, the prior testimony was introduced as evidence." Id. 310 U.S. at 234, 60 S.Ct. at 849. Further, use of such material could be prejudicial in cases "where essential ingredients of the crime were dependent on testimony elicited in that manner or where the evidence of guilt hung in a delicate balance if that testimony was deleted." Id. 310 U.S. at 235, 60 S.Ct. at 850.

Additionally, the competence of the proposed writing must also be established prior to its use. As the United States Supreme Court also indicated in Putnam v. United States, 162 U.S. 687, 16 S.Ct. 923 (1896), it is "clear that, where a memorandum or writing is presented to a witness for the purpose of refreshing his memory, it must either have been made by the witness or under his direction, or he must be connected with it in such a way as to make it competent for the purpose for which it is proposed to use." Putnam, 162 U.S. at 694, 16 S.Ct. at 926.

In the present case, the State was allowed to "refresh" the Complaining Witness' recollection through the use of incompetent evidence that was not originally the product of his own memory: namely, the trial transcript of the Complaining Witness' prior

testimony that was the product of in-trial coaching. As the South Carolina Supreme Court previously found regarding the Complaining Witness' testimony from the first trial, "[a]ll parties admitted that Solak acted improperly in mouthing words and making nonverbal signs to [Complaining Witness] during his testimony." Smith, 383 S.C. at 181, 679 S.E.2d 167. Thus, the Court agreed that the acts amounted to "clearly improper 'coaching' by Solak of the minor victim," and determined that "the trial judge properly exercised his authority to grant a new trial upon the facts given 'an injustice had been done' during the trial." Smith, 383 S.C. at 181-82 n.3, 679 S.E.2d 168-69 n.3. Therefore, the Complaining Witness' trial testimony from Appellant's first trial was irreparably tainted and unquestionably incompetent: it was the product of in-trial coaching. See, e.g., Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 357, 166 S.E.2d 297, 299 (1969) ("It is well settled in this jurisdiction that a decision of this court on a former appeal is the law of the case."); see also Ackerman v. McMillan, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996) ("Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form.") (emphasis added) (citing 5 C.J.S. Appeal and Error § 975(a) (1993)). Moreover, the prior "coached" testimony was so tainted and prejudicial that the only way to ensure Appellant's fundamental constitutional right to a fair trial was to grant a new trial. Id.

Yet, in the pretrial hearing of Appellant's second trial, the trial court permitted the State to refresh the Complaining Witness' recollection regarding substantive allegations through the use of his prior tainted testimony. This was error. The Complaining Witness' testimony from the first trial was not a product of his own memory, and the law

of the case is that this tainted testimony was so prejudicial that it warranted a new trial. Indeed, the fact that the Complaining Witness could not recall the allegations of oral sex or threats from Appellant without relying on the transcript testimony tainted by in-trial coaching indicates that such information was never a product of the Complaining Witness' memory in either the first or second trial. In essence, the trial court permitted the State to import into the second trial the same taint that caused a new trial to be granted in the first trial. Cf. State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009) (reversing in second trial where the same impermissible testimony regarding foot impressions was entered into evidence that was previously ruled impermissible on appeal from the first trial). As a result, the trial court erred by permitting the State to refresh the Complaining Witness' recollection using the tainted testimony from the first trial.

Appellant was also prejudiced by the trial court's error. As indicated above, the Complaining Witness was unable to recall or make any allegations regarding forced oral sex or threats by Appellant without resorting to prior tainted testimony. Thus, the State would not have been able to support these particular aspects of alleged conduct to either the trial court during the pretrial hearing, or to the jury during the trial itself without first resorting to the tainted testimony.

Further, the State's proffered 404(b) testimony of the Complaining Witness' siblings regarding prior bad acts under a theory of common scheme or plan would not likely have been admissible without the common testimonial thread of forced oral sex followed by threats to satisfy the substantial similarity requirement. Major components of similarity between the acts allegedly done to the Complaining Witness and the acts allegedly done to the siblings relied upon by both the State in its proffer, and the trial

court in its ruling admitting the 404(b) testimony, were the alleged acts of oral sex and threats by Appellant.[5] R. 38, line 25—R. 39, line 20; R. 40, line 18—R. 41, line 12.

Therefore, without the specific allegations by the Complaining Witness of oral sex and accompanying threats—which the State supplied to the Complaining Witness through the use of tainted testimony from the first trial—the State would not likely have been able to meet the similarities requirement for admission of the 404(b) testimony from the Complaining Witness' siblings. State v. Wallace, 384 S.C. 428, 433-34, 683 S.E.2d 275, 277-78 (2009) ("When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." Also listing factors the trial court should consider "when determining whether there is a close degree of similarity between the bad act and the crime charged.").

Accordingly, Appellant was prejudiced by the trial court's error. He respectfully requests reversal of his conviction, and remand for a new trial.

[5] The remaining two factors relied upon by the court were approximate age ranges of the Complaining Witness and his siblings when each was allegedly abused, and location in the house of the alleged conduct. R. 40, line 18—R. 41, line 12.

CONCLUSION

For the foregoing reasons, Appellant Arthur Smith respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,

Breen Richard Stevens
Appellate Defender

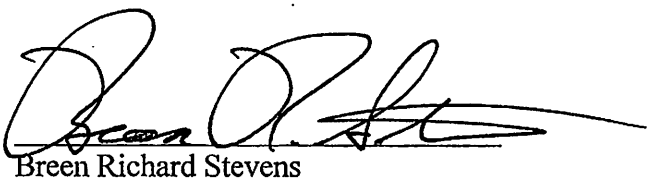
ATTORNEY FOR APPELLANT

This 16th day of May, 2013.

CERTIFICATE OF COUNSEL

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

May 16, 2013



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ARTHUR SMITH,

APPELLANT

APPELLATE CASE NO. 2011-200306

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of May, 2013.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of May, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Roger M. Young, Sr., Circuit Court Judge
Appellate Case No. 2011-200306

THE STATE OF SOUTH CAROLINA, RESPONDENT,

v.

ARTHUR SMITH, APPELLANT.

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II. **Assuming the issue was preserved for review, the trial court properly permitted testimony from the expert witness, who was not the forensic interviewer of the victim, regarding the length of delay in making a disclosure and its effect on the credibility of a disclosure where Appellant opened the door to this testimony in his cross-examination of the expert. Further, Appellant was not prejudiced where the expert never vouched for the credibility of the particular victim in this case.**

III. **Assuming the issue was preserved for review, the trial judge properly allowed the victim to refresh his recollection using a transcript from the previous trial and Appellant was not prejudiced.**

STATEMENT OF THE CASE

Appellant was indicted in Beaufort County in September 2003 for criminal sexual conduct with a minor in the first degree. He proceeded to trial on November 15-16, 2004, before the Honorable Jackson V. Gregory and the jury found him guilty. Judge Gregory sentenced Appellant to twenty years. Appellant subsequently moved for a new trial. A hearing on Appellant's motion for new trial was held on November 17, 2004. In a written order dated April 19, 2005, Judge Gregory granted Appellant's motion, and the State appealed. On June 22, 2009, the South Carolina Supreme Court affirmed the trial judge's grant of a new trial.

Appellant was tried again before the Honorable Roger C. Young, Sr., and a jury on September 19-21, 2011. The jury found Appellant guilty and Judge Young sentenced Appellant to thirty years. A timely notice of appeal was served and filed.

ARGUMENT

Background

After the victim and his parents moved from Buffalo, New York to Beaufort County, South Carolina, the victim's parents separated and the victim lived primarily with his biological mother. (R. p. 106-107). The victim visited his biological father, Appellant, at his house from time to time. (R. p. 107). During these visits, beginning around when the victim was six years old, Appellant would perform oral and anal sex on the victim. (R. p. 108). He would also make the victim perform oral sex on him and make him try to perform anal sex. (R. p. 109-110). The sexual abuse always occurred in Appellant's house, specifically in Appellant's bedroom, when the two of them were alone. (R. p. 108, lines 18-22). Appellant threatened to kill the victim or break his bones if he told anyone what was happening. (R. p. 110, lines 20-24). The victim stated that the abuse continued for about two years. (R. p. 110, lines 2-5). He testified that the sexual abuse made him feel "terrible" and "angry" and that it hurt. (R. p. 109, lines 11-20). Because he was scared, the victim did not tell anyone about the abuse until after he stopped having contact with Appellant. (R. p. 110-11).

The victim's aunt obtained custody of the victim and his two siblings in November 2001. (R. p. 91). At the time, the victim was "acting out" and exhibiting behavior that was "concerning." (R. p. 92). Specifically, the victim fondled other children, was physically aggressive, and destroyed property. (R. p. 92-93). The victim was sent to two different counseling centers because of these behaviors. (R. p. 93-94). One of the victim's counselors testified that it appeared that the victim had been sexually abused and that he was suffering from symptoms of post-traumatic stress disorder. (R. p. 186-88). The victim's aunt learned, in January 2002, that the victim had been sexually

abused. (R. p. 95). After allowing the victim to spend more time in counseling trying to deal with his health issues, she took the victim, in May 2003, to file a police report regarding the sexual abuse. (R. p. 94-95). The victim had a forensic interview shortly thereafter and disclosed that he had been sexually abused in his biological father's bedroom and that it began around age six or seven. (R. p. 148-49). The forensic interviewer recommended that the victim have no contact with his biological father. (R. p. 150, lines 1-4).

The victim's brother testified at Appellant's trial that Appellant also sexually abused him beginning around age six. (R. p. 118-19). The abuse involved oral and anal sex either in Appellant's bedroom or his bedroom, and Appellant threatened to hurt his mother if he told anyone about the abuse. (R. p. 119; p. 122-23). Additionally, the victim's sister testified that Appellant sexually abused her when she was six and seven years old. (R. p. 126-27). She testified that Appellant made her touch his penis with her hand and her mouth, and he would touch her vagina and her "butt." (R. p. 127). The abuse mainly occurred in Appellant's bedroom. Appellant told her that she should not tell anyone about the abuse. (R. p. 128).

Following trial, Appellant was convicted of criminal sexual conduct with a minor in the first degree and was sentenced to thirty years. (R. p. 220; p. 233).

I. The testimony of the forensic interviewer going beyond "time and place" was merely cumulative to other testimony in the record and admission of the testimony was harmless.

Relevant Facts

Before the testimony of the forensic interviewer, the trial judge ruled that the forensic interviewer's testimony would be limited to "time and place" in accordance with Rule 801(d)(1)(D), SCRE. (R. p. 131, lines 17-19; p. 133, lines 13-17). Subsequently,

before the jury, the forensic interviewer was asked whether the victim disclosed abuse to her, and she stated that the victim disclosed that "he had to suck his dad's penis." (R. p. 148, lines 8-10). Defense counsel objected, and the judge sustained the objection and instructed the jury to disregard the witness's last answer. (R. p. 148, lines 11-14). The forensic interviewer then testified that the victim told her the abuse happened when he was around six or seven years old and continued for a number of years, and that the abuse occurred in "his dad's bedroom." (R. p. 148, line 19 – p. 149, line 2). Defense counsel again objected, but the court overruled the objection. (R. p. 149, lines 3-4). When the solicitor asked the forensic interviewer to clarify the time frame of the abuse, the forensic interviewer responded that the victim "reported that he was about six or seven years old when his dad started to do these things to him." (R. p. 149, lines 6-15). Defense counsel objected, and the court overruled the objection. (R. p. 149, lines 16-17). Thereafter, on cross-examination, defense counsel elicited testimony that, following the interview, the forensic interviewer "made a recommendation that [the victim] not have contact with his biological father and that he be supervised at all times when he's around other children." (R. p. 149, lines 21 – p. 150, line 5).

Discussion

Assuming the court erred in overruling defense counsel's objection to the forensic interviewer's testimony that the victim "reported that he was about six or seven years old when his dad started to do these things to him," the error was truly harmless under the facts of this case. First, the challenged testimony was merely cumulative, not to the victim's testimony,[1] but to other un-objected-to testimony; specifically, the testimony of

[1] See State v. Jennings, 394 S.C. 473, 478-79, 716 S.E.2d 91, 93 (2011) (distinguishing between improper corroboration testimony that is merely cumulative to *the victim's testimony* and improper corroboration testimony that is merely cumulative to *other evidence*).

a police officer and other testimony of the forensic interviewer. The first witness in the case, Deputy Florencio, testified that the victim reported that he was "sexually assaulted by his father" in 1999 and 2000. (R. p. 82, lines 15-21). There was no objection to this testimony. Later, the forensic interviewer properly testified that the victim reported that the abuse happened in "his dad's bedroom." (R. p. 149, lines 2-4). See Rule 801(d)(1)(D), SCRE (permitting testimony limited to the time and location where the abuse occurred). Further, on cross-examination, defense counsel elicited testimony from the forensic interviewer that, after the interview, she recommended the victim "not have contact with his biological father." (R. p. 150, lines 1-4). See, e.g., State v. McKinney, 258 S.C. 570, 571, 190 S.E.2d 30 (1972) & State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) (a defendant cannot complain of an error which results from his own conduct, or to which his conduct has contributed).

The testimony being challenged on appeal was merely cumulative to the other testimony properly in the record. See State v. Kirton, 381 S.C. 7, 44, 671 S.E.2d 107, 126 (Ct. App. 2008) (sex abuse case where the court held that improper testimony which corroborated the victim was harmless where it was cumulative to other un-objected-to testimony in the record); see also State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004); State v. Price, 368 S.C. 494, 499-500, 629 S.E.2d 363, 366 (2006); State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Additionally, in the context of this case, where there was no genuine dispute about the identity of the perpetrator (see R. p. 77, line 18 – p. 79, line 6; p. 79-130; p. 142-50; p. 178-98; p. 202-203), the challenged testimony was insignificant and could not have affected the verdict. See State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (an error is harmless if it could not reasonably have affected the result of

the trial). The jury was well aware Appellant was the one accused of this crime and there was no suggestion anywhere in the record that anyone else committed the crime. Finally, although largely testimonial in nature, the evidence of Appellant's guilt was overwhelming. (See R. p. 79-130; p. 142-150; p. 178-98). See State v. Elders, 386 S.C. 474, 486-87, 688 S.E.2d 857, 864 (Ct. App. 2010) (even though admitting certain evidence was error, the error was harmless in light of the overwhelming evidence of the defendant's guilt). For all of these reasons, the challenged testimony was harmless beyond a reasonable doubt and its admission does not warrant reversal of Appellant's conviction.

II. Assuming the issue was preserved for review, the trial court properly permitted testimony from the expert witness, who was not the forensic interviewer of the victim, regarding the length of delay in making a disclosure and its effect on the credibility of a disclosure where Appellant opened the door to this testimony in his cross-examination of the expert. Further, Appellant was not prejudiced where the expert never vouched for the credibility of the particular victim in this case.

Relevant Facts

Tod Lynch-Stanley was qualified as an expert in "sexual deviancy" over the objection of the defense. (See R. p. 178-81). The judge immediately instructed the jurors that they were not required to accord extra weight to an expert's opinion and that they could give an expert's testimony as much weight as they felt it deserved.[2] (R. p. 181-82). Thereafter, the expert testified that he began treating the victim several years ago for "sexual acting out behavior" and other "aggressive behavior." (R. p. 182-83). He testified that in the course of treating the victim, he learned that the victim made a disclosure of sexual abuse. (R. p. 183, lines 18-21). He also testified that it appeared to him that the victim had been sexually abused. (R. p. 186, lines 1-5). However, he stated

[2] The judge elaborated on this instruction in the final jury charge. (See R. p. 215, line 17 – p. 216, line 15).

that his focus was on treating the symptoms the victim was experiencing rather than "trying to uncover sexual abuse." (R. p. 186, lines 7-9). The expert further testified that the victim appeared to have symptoms of post-traumatic stress disorder. (R. p. 186, lines 11-17). He then discussed the phenomenon of "delayed disclosure" and testified that delayed disclosure is typically caused by shame, intimidation, and fear of the consequences of telling someone about the abuse. (See R. p. 189-91). He also testified that generally, the longer the delay, the more extensive the abuse. (R. p. 191, lines 15-19). He indicated that the length of delay is correlated with the degree of shame, which could be heightened by the fact that the abuser was a family member. (R. p. 192, lines 5-15).

On cross-examination, defense counsel inquired about delayed disclosure and asked what a "long period of delayed disclosure" would be. (R. p. 195, lines 13-16). The expert testified that a long delayed disclosure would be anything longer than two or three months. (R. p. 195, lines 24-25). He elaborated that some disclosures occur within minutes, while others occur after two or three months or after twenty years. (R. p. 196, lines 1-3). He agreed with defense counsel that a disclosure that occurred within a few minutes would not be a delayed disclosure. (R. p. 196, lines 4-8). When defense counsel asked him to classify a three-year delay, the expert testified "that would be a fairly long delayed disclosure."[3] (R. p. 196, lines 13-14).

In response, on re-direct, the solicitor asked whether, in his opinion, the length of the delay in a disclosure would erode the credibility of the disclosure. (R. p. 197, lines 21-23). Defense counsel objected but did not state any particular grounds. (R. p. 196,

[3] The victim in this case disclosed the abuse by Appellant approximately three years after it ended. (See R. p. 89-95; p. 104-111).

lines 24). The judge overruled the objection. (R. p. 196, line 25). The expert then testified as follows:

> No, I really doesn't. People disclose at different times. Different things, again, triggers and things like that, can come up that cause people more symptoms, so – and the other part of PTSD, the symptoms come up and PTSD occurs at different times when the trauma gets reenacted in some way and starts to overtake the person.
>
> PTSD is really the body's efforts to try and cope with the trauma that's occurred, and then the body isn't coping anymore. And so what happens is that's when you see these more outlandish types of behaviors. So you might have someone who doesn't show symptoms of sexual abuse for a year, six months, eighteen months, and then, all of a sudden, something triggers them and reminds them of the abuse and helps to reenact it in some way, and then they start to act out and do those things.
>
> So that's why you have disclosures that occur at different times as well, so I never see it as a credibility or non-credibility thing. I think when you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure. (R. p. 197, lines 1-22).

Issue Preservation

Appellant now argues the trial judge erred by permitting the above-quoted testimony of the expert. Initially, the State submits that this issue is not preserved for review. In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). An appellant is limited to the arguments he makes at trial. See, e.g., State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000).

Here, Appellant stated no specific grounds for his objection to the expert's testimony, and the judge did not rule on any specific grounds. Therefore, the issue is not preserved for appellate review. See, e.g., State v. Patterson, 324 S.C. at 17-18, 482 S.E.2d at 765-66 (a general objection which fails to specify the particular ground on which the objection is based is insufficient to preserve a question for review; a trial judge does not err by overruling a general objection); State v. Hess, 279 S.C. 14, 19, 301 S.E.2d 547, 550 (1983) (general objection to evidence did not bring the specific error to the trial court's attention; therefore, the issue raised on appeal was not preserved for review); State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (an objection must be made with sufficient specificity to inform the judge of the point being urged); see also State v. McLaughlin, 307 S.C. 19, 413 S.E.2d 819 (1992) (failure to request a more explicit ruling constitutes a waiver of any objection to a trial court's general ruling regarding admissibility); compare State v. Foster, 354 S.C. 614, 621, 582 S.E.2d 426, 429 (2003) (issue was sufficiently preserved for review where counsel objected *and added that* he was objecting because the statement would "add to" the witness's credibility).

Discussion

Assuming the issue was preserved, the trial judge did not err in allowing the solicitor to elicit the testimony in question because Appellant opened the door to this testimony via his cross-examination of the expert. Defense counsel spent much of her cross-examination asking about the length of delay in disclosures, the clear implication being that the longer a victim waited to disclose sexual abuse, the less credible the victim. (See R. p. 195-96). The solicitor had a right to respond since defense counsel's suggestion was misleading to the jury. As the expert explained, delays in the disclosure

of sexual abuse are extremely common for a variety of reasons.[4] (See R. p. 170-71). See also John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45-46 (2010) ("Psychological research demonstrates that delayed reporting is common among sexually abused children.) (citations omitted). Laypersons such as jurors may not understand this, and, without correction of defense counsel's suggestion, there was a danger that the jurors would be improperly misled into concluding that a lengthy delay in the disclosure of sexual abuse renders the disclosure not credible. See State v. Myers, 359 N.W.2d 604, 609-610 (Minn. 1984) (The nature, however, of the sexual abuse of children places lay jurors at a disadvantage. . . If the victim of a burglary failed to report the crime promptly, a jury would have good reason to doubt that person's credibility. A young child subjected to sexual abuse, however, may for some time be either unaware or uncertain of the criminality of the abuser's conduct. . . [U]ncertainty becomes confusion when an abuser who fulfills a caring-parenting role in the child's life tells the child that what seems wrong to the child is, in fact, all right. Because of the child's confusion, shame, guilt, and fear, disclosure of the abuse is often long delayed.").

Because Appellant himself opened the door to the challenged testimony, he cannot now complain about it on appeal. See State v. White, 361 S.C. 407, 415-16, 605 S.E.2d 540, 544 (2004) (defendant opened the door to testimony about the victim's credibility where counsel cross-examined the expert witness regarding whether she had cases in which she did not believe the alleged victim); State v. O'Neal, 210 S.C. 305, 312,

[4] Although not challenged at trial or on appeal, the State submits that the expert's general testimony regarding delayed disclosure, and regarding other behavioral science evidence pertaining to sexual abuse victims, was proper. See State v. Schumpert, 312 S.C. 502, 505, 435 S.E.2d 859, 861-62 (1993); State v. White, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999); see also State v. Kennedy, 320 N.C. 20, 31-32, 357 S.E.2d 359, 366-67 (1987); Westbrooks v. State, 309 Ga.App. 398, 401-402, 710 S.E.2d 594, 597-98 (Ga.App. 2011); State v. Cardany, 35 Conn.App. 728, 732, 646 A.2d 291, 294 (Conn. App. 1994).

42 S.E.2d 523, 526 (1947) (holding a defendant may not complain of admission of evidence when he introduced the same kind of evidence on cross-examination); State v. Beam, 336 S.C. 45, 53, 518 S.E.2d 297, 301 (Ct.App.1999) ("Beam cannot complain about the admission of evidence where he opened the door to the evidence."); see also State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984); State v. Harvey, 253 S.C. 328, 339, 170 S.E.2d 657, 662-63 (1969); State v. Smith, 220 S.C. 224, 67 S.E.2d 82, 90-91 (1951).

In any event, Appellant was not prejudiced by the testimony in question because the expert did not ever testify, or even suggest, that he believed the particular victim in this case and thus he did not improperly vouch for the victim's credibility.[5] See State v. Douglas, 380 S.C. 499, 503-504, 671 S.E.2d 606, 609 (2009); State v. Hill, 394 S.C 280, 295, 715 S.E.2d 368, 376-77 (Ct. App. 2011). Accordingly, there was no reversible error.

III. Assuming the issue was preserved for review, the trial judge properly allowed the victim to refresh his recollection using a transcript from the previous trial and Appellant was not prejudiced.

Relevant Facts

During a pre-trial Lyle hearing, the solicitor asked the victim whether there was ever any "oral contact" between himself and Appellant. (R. p. 26, lines 19-20). The victim stated that he could not remember.[6] (R. p. 26, line 21). The solicitor inquired whether the victim remembered testifying at a previous hearing, and the victim said he did. (R. p. 26, lines 22-24). The victim then testified that seeing a transcript of the previous hearing would refresh his recollection as to what occurred. (R. p. 26, line 25 –

[5] As mentioned previously, the jurors were thoroughly instructed that they should not accord extra weight to an expert's testimony simply because of his or her qualification as an expert. (See R. p. 181-82; p. 215, line 17 – p. 216, line 15).

[6] Notably, more than thirteen years had passed since the abuse began. (See R. p. 104-108).

p. 27, line 2). At that point the solicitor requested permission to approach the witness to hand him a copy of the transcript, and Appellant's counsel objected, stating as follows:

> Objection, Your Honor. I object to the form which you are showing him the transcript. I believe that he is – I don't think he can read it over and then testify. So that would then just remind him of the things that he's not testifying to now, which would then go back to our underlying issue of which we are trying to separate out this trial from. (R. p. 27, lines 5-11).

The solicitor responded:

> Well, Your Honor, if I may, I think she's objecting to the very procedure by which you refresh your witness's recollection. I asked him if he recalled whether any oral conduct occurred and he said he didn't remember, so I asked him if he testified previously and if looking at a transcript of that would refresh his recollection, and essentially he said yes. (R. p. 27, lines 12-18).

The trial judge noted that, usually, a witness refreshes his or her recollection under Rule 612, SCRE, by using a writing they previously made or a statement they previously gave and adopted. (See R. p. 27, line 19 – p. 28, line 1). He stated that he had never seen a prior trial transcript used to refresh a witness's recollection but noted that "I don't suppose there is anything to stop [the witness] from looking at a prior transcript to refresh his memory at that point anyway." (R. p. 28, lines 4-23). Defense counsel stated "[b]ut then if he didn't remember, I don't understand why we're trying to refresh his recollection when we had a problem with the tenor of the prior case. (R. p. 29, lines 6-9). The solicitor asked the judge whether it would help to have the victim refresh his recollection using "one of the many other different statements" he gave indicating that oral sex occurred. (R. p. 30, lines 9-11).

The judge pointed out that, since the victim was currently testifying in a pre-trial hearing outside the presence of the jury, if he refreshed his recollection at this point and then testified before the jury the next day without having to refresh his recollection, it would appear to the jury that his memory was better than, in fact, it was. (See R. p. 29,

lines 10-23). The judge stated it would hamper the defense to not be allowed to cross-examine the witness regarding the circumstances of refreshing his memory, and stated that "there ought to be some mechanism out of fairness, if nothing else, that [Appellant] gets to come in and say, yesterday afternoon we had a hearing and you testified today that you remember having oral sex, but yesterday your memory wasn't quite so clear, was it?" (See R. p. 29, line 19 – p. 31, line 5). The judge ruled that "as long as the defense gets the opportunity to talk about how his memory of this incident was not so clear before he had it refreshed," the victim could refresh his memory. (See R. p. 31, line 24 – p. 32, line 6). The judge then stated that he would allow the witness to go ahead and look at the transcript, which he would deem a "writing." (R. p. 32, lines 7-8; see also p. 32-33).

Appellant's counsel again objected to providing the victim with the transcript to refresh his recollection, stating that she disagreed and that she believed "it's more for me to impeach him with at the trial than it is for this type of hearing." (R. p. 33, line 24 – p. 34, line 2). The judge stated that counsel's objections were noted on the record. (R. p. 34, lines 3-4). Thereafter, the victim refreshed his memory with the trial transcript and subsequently testified that he recalled that Appellant had required him to "suck [Appellant's] penis" and that Appellant had sucked the victim's penis. (R. p. 34, lines 9-20). Later in the pre-trial hearing, following a motion by Appellant to exclude the victim's testimony because he had no vivid recollection of what happened to him and because he has been "unable to remove himself from the influences" of others, the trial judge reiterated that counsel would have "free reign" on cross-examination of the victim and would "get about as much leeway as you want." (R. p. 62, line 15 – p. 63, line 24).

During trial, the victim gave testimony similar to that given in the pre-trial hearing, and Appellant's counsel cross-examined him about having to refresh his memory

at the pre-trial hearing. (See R. p. 108-110; p. 113, lines 9-21). On re-direct, the victim testified that the transcript with which he had refreshed his memory contained his own words and that no one told him to say it was Appellant who abused him. (R. p. 114, lines 1-9). Following the testimony of several other witnesses, Appellant's counsel stated as follows:

> And I also need to put something on the record that I wanted to bring out and reinforce that I had made objections in limine, motions in limine, objecting to the testimony of [the victim's two siblings, the victim's aunt, and the victim], and I wanted to be sure that that was an ongoing objection. While I may not have mentioned at the time they were coming in, I wanted to make sure the record was preserved that I did object. I do want a continuing objection to their testimony. . . And if that would be part of the record, I would appreciate it.[7] (R. p. 141, line 21 – p. 142, line 7).

The judge indicated he was noting her objections for the record. (See R. p. 142, lines 5-8).

Issue Preservation

Appellant now argues that the trial court erred in permitting the victim to refresh his recollection using a transcript from Appellant's previous trial because the victim's prior testimony was "improper and formed the basis for the first trial court's grant of a new trial." However, this argument is not preserved for appellate review because Appellant never made this specific argument below to the trial judge. Appellant's counsel's objection was, apparently, that she did not believe the State should be allowed to refresh the witness's recollection if he could not remember the events, and that she felt refreshing recollection was a tool for her to use to impeach the witness rather than for the State to use. (See R. p. 27, lines 5-11; p. 29, lines 6-9; p. 33, line 24 – p. 34, line 2).

[7] Presumably, defense counsel was renewing her objections to the Lyle testimony that was ruled admissible in the pre-trial hearing (see R. p. 14-18; p. 39-40); to the victim's testimony (see R. p. 62-63); and to the victim's aunt's testimony (see R. p. 64-66).

Appellant never argued below that the victim should not be permitted to refresh his memory with the prior trial transcript because the prior testimony was "tainted by in-trial coaching." (Brief of Appellant, p. 16). Because Appellant never argued this ground below, the parties never discussed it below and the trial judge never addressed it.

For all of these reasons, the issue Appellant raises on appeal is not preserved for appellate review. See, e.g., State v. Tucker, 319 S.C. 425, 427-28, 462 S.E.2d 263, 264-65 (1995) (a party may not argue one ground below and then argue different ground on appeal); State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (for an objection to be preserved for appellate review, the objection must be made with sufficient specificity to inform the circuit court judge of the point being urged); State v. Bennett, 328 S.C. 251, 260, 493 S.E.2d 845, 849 (1997) (an objection that is too vague will not preserve an issue for appellate review); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. at 422, 526 S.E.2d at 725 (preservation requirements are meant to enable the lower court to rule properly after it considered *all relevant facts, law, and arguments*) (emphasis added); Atl. Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (the appellate court should follow longstanding precedent and resolve an issue on preservation grounds when it is clearly unpreserved).

The Trial Judge Did Not Abuse His Discretion

Even assuming the issue was preserved for appellate review, the trial judge did not err in allowing the victim to refresh his recollection using the transcript from Appellant's previous trial. Rule 612, SCRE indicates, in pertinent part, that a witness may use "a writing" to refresh his memory for the purpose of testifying, either while testifying or before testifying. See Rule 612, SCRE. "[A] witness may refresh his memory from notes taken by counsel or other persons at a former trial, or from his own

testimony at a previous trial, or from a copy of the same." State v. Dean, 72 S.C. 74, 51 S.E. 54 (1905). It is not required that the refreshing material be made by the witness himself because it is *the recollection of the witness*, not the memorandum, that is in evidence. State v. Broome, 268 S.C. 99, 103, 232 S.E.2d 324, 325 n1 (1977).

In this case, the solicitor asked the victim whether there was ever any oral contact between himself and Appellant, and the victim stated that he could not remember.[8] (R. p. 26, lines 19-21). The solicitor inquired whether the victim remembered testifying at a previous hearing, and the victim said he did. (R. p. 26, lines 22-24). The victim testified that seeing a transcript of the previous hearing would refresh his recollection as to what occurred. (R. p. 26, line 25 – p. 27, line 2). The victim then refreshed his memory with the trial transcript and subsequently testified that he now remembered that Appellant had required him to "suck [Appellant's] penis" and that Appellant had sucked the victim's penis. (R. p. 34, lines 9-20).

Since the victim testified from his **own** - albeit refreshed - recollection, there is no merit to Appellant's claims that a "taint" from the alleged coaching at the previous trial was "imported" into this trial.[9] Moreover, if Appellant believed that the victim's testimony in the current trial was not the product of his own memory or was the result of coaching, the appropriate remedy was cross-examination. See, e.g., Geders v. United States, 425 U.S. 80, 89-91 (1976); U.S. v. Rhynes, 218 F.3d 310, 320 (4th Cir. 2000);

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[8] As mentioned previously, more than thirteen years had passed since the abuse began. (See R. p. 104-108).

[9] Moreover, accuracy of the writing used to refresh is not required. See Rule 612, SCRE, see also U.S. v. Carey, 589 F.3d 187, 191 (5th Cir. 2009) (the admissibility of testimony accompanied by a Rule 612 refreshment does not depend upon the source of the writing, the identity of the writing's author, or the truth of the writing's contents, since it is hornbook law that any writing may be used to refresh the recollection of a witness) (citations omitted). Indeed, any kind of stimulus can produce a flash of recognition in the witness. See 1 McCormick On Evid. § 9 (7th ed.) (noting that most courts today adhere to the "classical" view that any memorandum or object may be used as a stimulus to present memory without restriction as to authorship, guarantee of correctness, or time of making) (citations omitted).

State v. McCormick, 298 N.C. 788, 259 S.E.2d 880 (1979); State v. Osborn, 241 Neb. 424, 490 N.W.2d 160 (1992); State v. Rodriguez, 244 Neb. 707, 710-11, 509 N.W.2d 1, 3-4 (Neb. 1993); State v. Edwards, 420 So. 2d 663 (La. 1982); State v. Schoolcraft, 183 W.Va. 579, 396 S.E.2d 760 (1990) (all supporting the proposition that whether a witness has been coached is a matter bearing upon the witness's credibility and that the question of coaching is for the jury). Indeed, the judge stated he would permit defense counsel "free reign" on cross-examination and stated she would "get about as much leeway as you want." (R. p. 62, line 15 – p. 63, line 24). Counsel did cross-examine the victim regarding his need to refresh his recollection, and could have cross-examined him further, i.e., explored the issue of the alleged coaching by his aunt at the previous trial, had she desired to do so.[10] (See R. p. 113, lines 9-21; see p. 63, lines 10-21). In sum, since the victim testified from his own recollection and memory, and since the trial judge allowed Appellant to cross-examine the witness regarding the relevant issues, there was no error or abuse of discretion on the part of the trial judge. Compare the reasoning of State v. Sadowski, 329 Wis.2d 269, 789 N.W.2d 753 (Wis.App. 2010) (unpublished decision), a factually similar case addressing almost the same legal issue.

Appellant was not Prejudiced

In any event, Appellant was not prejudiced as a result of the trial judge allowing the solicitor to impeach the victim using his prior trial testimony. As the solicitor pointed out, the victim had given "many other different statements," at least one of which was given June 5, 2003 - well before Appellant's first trial in November 2004 - reporting the same version of events and, specifically, indicating that oral sex occurred between

[10] Notably, in the previous trial, the victim stated that the testimony he was giving was his own despite any actions on the part of his aunt and despite any pre-trial discussions he had with his aunt. See State v. Smith, 383 S.C. 159, 162, 679 S.E.2d 176, 178 (2009). Additionally, in the current trial, the victim again affirmed that no one told him to say it was Appellant who abused him. (R. p. 114, lines 7-9).

himself and Appellant. (See R. p. 30, lines 9-11; p. 43-48; see also p. 81-83; p. 160-61). The solicitor could have just as easily provided the witness with any one of those statements to refresh his memory - as she offered to do during the pre-trial hearing (R. p. 30, lines 9-11) - and the result would have been the same. Accordingly, Appellant was not prejudiced even assuming the trial judge committed error. See, e.g., State v. White, 371 S.C. 439, 447, 639 S.E.2d 160, 164 (Ct. App. 2006) (a trial court should only be reversed when an error is prejudicial). Additionally, considering the evidence against Appellant, any error could not reasonably have affected the outcome of trial. (See R. p. 79-130; p. 142-150; p. 178-98). See State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (an error is harmless if it could not reasonably have affected the result of the trial); State v. Elders, 386 S.C. 474, 486-87, 688 S.E.2d 857, 864 (Ct. App. 2010) (even though admitting certain evidence was error, the error was harmless in light of the overwhelming evidence of the defendant's guilt). Accordingly, there was no reversible error on this ground.

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

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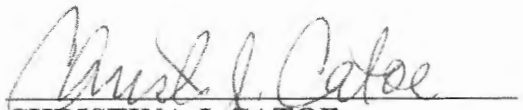

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ATTORNEYS FOR RESPONDENT

May 9, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Roger M. Young, Sr., Circuit Court Judge
Appellate Case No. 2011-200306

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ARTHUR SMITH,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.

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THE STATE OF SOUTH CAROLINA,

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v.

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AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Breen R. Stevens**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **9th** day of **May, 2013.**

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SWORN to before me this 9th day of May, 2013.

Lauren Meara

Notary Public for South Carolina.
My Commission Expires: 9/25/19

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Arthur Smith, Appellant.

Appellate Case No. 2011-200306

Appeal From Beaufort County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 5283
Heard February 4, 2014 – Filed December 17, 2014

AFFIRMED

Breen Richard Stevens, of Orangeburg, and Appellate Defender Benjamin John Tripp, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Christina J. Catoe Bigelow, both of Columbia, for Respondent.

SHORT, J.: Arthur Smith appeals his conviction for criminal sexual conduct with a minor in the first degree. He contends the trial court erred in: (1) admitting testimony of the forensic interviewer regarding Smith's identity; (2) allowing the State's expert to testify regarding the relationship between the length of delay in disclosure of sexual abuse and the credibility of the disclosure; and (3) permitting the victim to refresh his recollection by reading his testimony from Smith's previous trial. We affirm.

I. The First Trial

Smith was first tried for this crime in November 2004. After the jury found Smith guilty, the trial court granted him a new trial "on the ground he was denied a fair trial, because the testimony of the victim . . . was corrupted . . . by the coaching of [his] aunt." *State v. Smith*, 372 S.C. 404, 406, 642 S.E.2d 627, 628-29 (Ct. App. 2007), *vacated on other grounds*, 383 S.C. 159, 679 S.E.2d 176 (2009). This court affirmed. *Id.* at 406, 642 S.E.2d at 629. On writ of certiorari, the supreme court agreed the trial judge did not abuse his discretion or commit an error of law and remanded the case for a new trial. *Id.*

II. The Second Trial

The second trial began on September 19, 2011. The State presented evidence that in approximately 1997, when the victim was five years old, his family moved from Buffalo, New York, to Bluffton, in Beaufort County. The parents separated in 1999. Mrs. Smith retained primary custody of the children, and Smith had generous visitation. The alleged sexual assaults occurred while the victim visited his father during this period of separation. The victim, who was nineteen at the time of the second trial, was six years old when Smith began abusing him and eight when the abuse ended.

The victim testified that on "[m]ore than three" occasions during 1999 and 2000, his father "would make me do things to him and do things to me." He testified his father "would suck my penis and stick his penis in my butt. . . . He made me suck his penis too and try to put my penis in his butt also." On cross-examination, the victim admitted he did not "have a good recall of everything that happened in 2000," and that in a pretrial hearing the previous day he "didn't remember . . . that there was oral sex until [he] read a transcript" from the first trial to refresh his memory.

The victim's two siblings[1] testified Smith also sexually abused them. The victim's brother testified that "multiple times" while the family was living in Buffalo, Smith performed oral and anal sex on him and forced him to reciprocate. This abuse occurred when the brother was between the ages of six and eight. The brother

[1] The victim is the middle of three children with an older brother and a younger sister. In 2001, the brother was eleven, the victim was eight, and the sister was seven.

> So, you might have someone who doesn't show symptoms of sexual abuse for a year, six months, eighteen months, and then all of a sudden, something triggers them and reminds them of the abuse . . . .
>
> So that's why you have disclosures that occur at different times as well, so I never see it as a credibility or non-credibility thing. I think when you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure.

The jury convicted Smith, and the court sentenced him to thirty years of imprisonment. This appeal follows.

III. STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Thus, on review, the appellate court is limited to determining whether the trial court abused its discretion. *Id.* at 6, 545 S.E.2d at 829. A trial court abuses its discretion when its ruling is unsupported by the evidence or controlled by an error of law. *State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002). "In general, rulings on the admissibility of evidence are within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion resulting in prejudice to the complaining party." *State v. Halcomb*, 382 S.C. 432, 443, 676 S.E.2d 149, 154 (Ct. App. 2009).

IV. LAW/ANALYSIS

A. The Forensic Interviewer

Smith argues the trial court erred in overruling his objection to Twitty's testimony that identified Smith as the perpetrator after previously limiting the testimony to time and place. We find no reversible error.

In a criminal sexual conduct case, the testimony of a witness regarding a victim's out-of-court statement is governed by the South Carolina Rules of Evidence, which provide that a statement is not hearsay if:

> The declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . (D) consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident.

Rule 801(d)(1), SCRE. This corroborative testimony is limited to the time and place of the alleged assault and cannot include details regarding the assault. *Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629, 632 (2010). "Among the details which must be excluded under the rule is the identity of the alleged perpetrator." *State v. Jeffcoat*, 350 S.C. 392, 396, 565 S.E.2d 321, 323 (Ct. App. 2002).

The trial court limited Twitty's testimony to time and place after she disclosed that the victim had reported "he had to suck his dad's penis." The trial court sustained the objection and gave a curative instruction to the jury. Smith did not object to the curative instruction and has accordingly waived any objection. *See State v. Wilson*, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010) ("[A]s the law assumes a curative instruction will remedy an error, failure to accept such a charge when offered, or failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review."); *State v. White*, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) (stating a curative charge is generally deemed to cure an allegation of error).

However, when Twitty identified the perpetrator by testifying the victim reported he was about six or seven years old "when his dad started to do these things to him," the trial court overruled Smith's objection to Twitty's testimony. We agree with Smith this constituted error because it went beyond time and place. However, we find the testimony was cumulative to other testimony; thus, it was not reversible error.

Florencio testified without objection that the aunt and the victim reported to him that the victim had been sexually assaulted by his father. Thus, Smith was previously identified as the perpetrator without objection, rendering Twitty's testimony harmless because it was cumulative. *See State v. Jennings*, 394 S.C. 473, 478-79, 716 S.E.2d 91, 93-94 (2011) (distinguishing between harmlessness of improperly admitted hearsay merely cumulative to other evidence and prejudice of improper corroboration testimony that is merely cumulative to the victim's

testified Smith threatened to hurt Mrs. Smith if he told anyone about the abuse. The victim's sister testified Smith abused her after the family moved to Bluffton. She testified that on "countless" occasions when she was six and seven years old, Smith forced her to perform oral sex on him and would "touch" her vagina and "butt" with his hands. She also testified Smith told her not to tell anybody.

Beginning in November 2001, the victim and his two siblings lived in the custody of their aunt and her husband. Soon after moving in with the aunt, the victim exhibited poor behavior, began counseling, and was placed in a SOAP[2] program.

The victim first reported his father's sexual assaults to his aunt in January 2002, but no one reported the crimes to law enforcement until May 2003. The victim testified he did not tell anyone earlier because "[Smith] told me that he would kill me or break my bones if I told anybody" and "I was scared." The victim's brother and sister also did not disclose to anyone that their father had abused them. The victim's aunt admitted she learned in January 2002 that Smith sexually abused the victim, but she did not disclose this to anyone until May 2003. She explained her delay in disclosure was because, "We were still working on taking care of [the victim's] health issues."

Andres Florencio, a criminal investigator for the Beaufort County Sheriff's Office (BCSO), testified the BCSO used forensic interviewers from Hope Cottage, a children's advocacy center, to interview child victims of crime. Florencio testified without objection that in May 2003, the victim and his aunt came to the BCSO and reported that the victim's father sexually assaulted the victim in 1999 and 2000.

Kendra McIlvee Twitty, a forensic interviewer and counselor at Hope Cottage, explained in detail the techniques and procedures a forensic interviewer uses to interview a child, and testified the victim disclosed he had been abused. She testified, "[The victim] disclosed that he had to suck his dad's penis . . . ." Smith's counsel immediately objected, and the trial court sustained the objection on the basis that any testimony quoting the victim's statements must be limited to "the time and place" of the incident. Twitty then testified, "When I asked about time frame, he said that it happened since he was, like, six or seven years old, ... I'm not exactly sure of the number, but he said it had been happening for a number of years." As to place, the forensic interviewer testified the victim told her "it happened in South Carolina in a trailer and they would be in his dad's bedroom."

---

[2] SOAP is the acronym for a Sex Offender and Addiction Program, which specializes in children who act out in a sexual manner.

The trial court overruled Smith's objection to this last statement. Immediately thereafter, the assistant solicitor showed the forensic interviewer a copy of her report to "refresh your recollection as to the time frame of the abuse." She then testified, "I had written [the victim] reported that he was about six or seven years old when his dad started to do these things to him." The trial court overruled Smith's immediate objection to this statement.

The State's final witness was Tod Lynch-Stanley, a licensed clinical social worker and director of Family Reconstructions and SOAP, a private practice in Georgia. The trial court found Lynch-Stanley qualified as an expert in sexual deviancy. Lynch-Stanley explained he began treating the victim sometime after 2000. When Lynch-Stanley began treatment, the victim had not revealed he was sexually abused.

The State asked Lynch-Stanley to explain "a little bit about what is delayed disclosure in a sexual abuse setting. Lynch-Stanley explained there are "many reasons for [delayed disclosure]." On cross-examination, Smith's counsel asked, "What did you mean by a long period of delayed disclosure?" Lynch-Stanley answered, "I would say a long disclosure in general might be anything longer than two or three months. . . . Some disclosures occur after two or three months. Some occur after two years or 20 years." Counsel asked, "What about three years?" Lynch-Stanley replied, "That would be a fairly long delayed disclosure." The following dialogue occurred at the beginning of the State's redirect examination:

> Q: Does the length of the delay in the disclosure have any -- in your opinion, does it erode the credibility of the disclosure?
>
> Smith: Objection, Your Honor.
>
> Court: Overruled.
>
> A: No, it really doesn't. People disclose at different times. Different things, . . . triggers and things like that, can come up that cause people more symptoms, . . . the symptoms come up . . . and . . . occur[] at different times . . . .

testimony); *State v. Schumpert*, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (finding where a counselor's testimony exceeded the time and place limitation by stating the defendant's name during testimony, any error was harmless because two other witnesses testified without objection in the same manner).

B. Expert Testimony Regarding the Length of Delay in Disclosure

Smith next argues the trial court erred in permitting Lynch-Stanley to testify regarding the relationship between the length of delay of disclosure of sexual abuse and the credibility of such disclosure, maintaining the testimony bolstered the victim's testimony. We find no reversible error.

"The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (citing *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). Therefore, a witness may not give an opinion on whether he or she believes another witness is telling the truth or comment on another witness' veracity. *State v. Kromah*, 401 S.C. 340, 358-59, 737 S.E.2d 490, 499-500 (2013). This rule applies to experts, prohibiting them from commenting on the credibility of child witnesses in sexual abuse cases. *See Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 ("For an expert to comment on the veracity of a child's accusations of sexual abuse is improper.").

In both *Kromah* and *Jennings*, our supreme court found improper bolstering in the admission of expert evidence indicating a child witness gave a "compelling" indication of abuse. *See Kromah*, 401 S.C. at 359, 737 S.E.2d at 500 (finding expert testimony about a compelling finding of child abuse was inappropriate); *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 (finding error in the admission of a forensic interviewer's written reports that concluded each of three child victims had provided a compelling disclosure of abuse); *see also State v. Dawkins*, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989) (noting treating psychiatrist's indication he believed victim's allegations concerning symptoms were genuine was improper); *State v. Taylor*, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) (stating it is improper "when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth"), *cert. denied*, Aug. 21, 2014.

However, our supreme court has found an expert did not vouch for a victim's veracity where the expert never stated she believed the victim and gave no other indication concerning the victim's truthfulness. *See State v. Douglas*, 380 S.C. 499, 503-04, 671 S.E.2d 606, 609 (2009) (concluding a forensic interviewer did

not vouch for the victim's veracity where she never stated she believed the victim and gave no other indication concerning the victim's veracity). This court has likewise found no improper bolstering where the expert did not address the veracity of the victim. *See State v. Hill*, 394 S.C. 280, 295, 715 S.E.2d 368, 376-77 (Ct. App. 2011) (finding the expert did not vouch for the victim's truthfulness where the expert testified only that he saw the types of details in the victim's interview that he would look for in determining whether a child had been coached).

In this case, we likewise find no improper vouching because Lynch-Stanley gave no indication of his belief of the victim's truthfulness. During direct examination, Lynch-Stanley explained a lengthy delay in a victim's disclosure of sexual abuse is consistent with, if not necessitated by, the trauma the victim has suffered. When sexual abuse occurs, particularly if the victim is a child, the victim may not be able to immediately disclose the abuse for numerous reasons, including the victim's feelings of shame over what happened and the victim's fear of or intimidation by the perpetrator. We find this was an appropriately general explanation of the medical or scientific reasons a child might not immediately disclose sexual trauma.

During cross-examination, Smith's counsel questioned Lynch-Stanley regarding his specialization of treating symptoms of victims and questioning whether typical symptoms of sexual abuse could arise from other triggers. Counsel next questioned Lynch-Stanley as follows:

> Counsel: The delayed disclosure that you spoke of, isn't it true that there are - when you spoke about delayed disclosure, you spoke of a long period. What did you mean by a long period of delayed disclosure?
>
> Lynch-Stanley: [I]t's somewhat relative in terms of what long disclosure is. I would say a long disclosure in general might be anything longer than two or three months. . . . [S]ome disclosures occur within minutes. Some disclosures occur after two or three months. Some occur after two years or 20 years.
>
> . . .
>
> Counsel: What about three years?

> Lynch-Stanley: That would be a fairly long delayed disclosure.

On redirect examination, the State asked, "Does the length of the delay in the disclosure have any - in your opinion, does it erode the credibility of the disclosure? Lynch-Stanley testified, "No, it really doesn't."

We recognize the State's question was inappropriate because it invited vouching by Lynch-Stanley. We also recognize Lynch-Stanley's initial response, standing alone, would constitute vouching for the victim's credibility. Lynch-Stanley continued his response, however, by stressing that credibility and delayed reporting are unrelated. He qualified his initial response, "I never see it as a credibility or non-credibility thing. I think when you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure."

Despite the State's inappropriate question, we find no reversible error. In conjunction with Lynch-Stanley's direct and cross-examination testimony, we find the redirect testimony did not improperly bolster the victim because Lynch-Stanley qualified his initial response and never gave an opinion regarding whether the victim was telling the truth. *See State v. Douglas*, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009) ("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."). Accordingly, we find no reversible error.

C. Refreshing Recollection Using Previous Trial Transcript

Smith lastly argues the trial court erred in allowing the victim to refresh his recollection at the pretrial hearing with the trial transcript from the previous trial, which was tainted by coaching. We disagree.

In a pretrial hearing, the victim testified Smith anally molested him and forced him to perform anal sex on Smith. The victim could not remember if there was any oral contact. The State wanted to allow the victim to refresh his memory by reviewing a transcript from the previous trial. Smith objected, stating,

> I object to the form which you are showing him the transcript. . . . I don't think he can read it over and then testify. So that would then just remind him of the things

> that he's not testifying to now, which would then go back to our underlying issue of which we are trying to separate out this trial from.

Smith also argued the transcript from the previous trial could be used to impeach the victim, but not to refresh his memory. Smith maintained it could not be used to "refresh his recollection when [there was] a problem with the tenor of the prior case." The State argued Smith was objecting "to the very procedure by which you refresh [a] witness's recollection."

The trial court ruled the victim could review the transcript at the *in limine* hearing to refresh his recollection. Out of "fairness," the court ruled Smith could impeach the victim by cross-examining him during his testimony before the jury on his inability to remember if there was any oral contact during the *in limine* hearing. During cross-examination, Smith impeached the victim regarding his lack of memory at the pretrial hearing of the oral molestation and his need to have his memory refreshed.

"[T]he trial court has discretion to allow or refuse examination by an adverse party of writings used by a witness prior to trial to refresh his or her memory." *State v. Hughes*, 346 S.C. 339, 342, 552 S.E.2d 35, 36 (Ct. App. 2001) (citing Rule 612, SCRE). "'[A] witness may refresh his memory from notes taken by counsel or other persons at a former trial, or from his own testimony at a previous trial, or from a copy of the same.'" *State v. Dean*, 72 S.C. 74, 81, 51 S.E. 524, 526 (1905) (quoting 2 *Elliott on Evidence* § 866); *see U.S. v. Thompson*, 708 F.2d 1294, 1299 (8th Cir. 1983) (finding no error in permitting a witness to refresh memory with the transcript from an earlier trial where the transcript was available to the defendant, and the defendant was given the right to cross-examine the witness); *Sullivan v. State*, 386 S.W.3d 507, 521 (Ark. 2012) (finding no abuse of discretion by the trial judge in allowing an eleven-year-old witness to refresh her memory by reviewing the trial transcript of her testimony given five years earlier at the trial of the appellant's co-defendant); *State v. Smith*, 231 S.E.2d 663, 670-672 (N.C. 1977) (finding no abuse of discretion by the trial judge who denied defendant's request to strike the entire testimony of a witness who refreshed her memory prior to trial by reviewing the transcript of her testimony at a previous trial).

In this case, the trial court permitted Smith great latitude on cross-examination, stating he would "get about as much leeway as [he] want[ed]." Smith impeached the victim by cross-examining him regarding his need to refresh his recollection at the *in limine* hearing. We find no abuse of discretion by the trial court in

permitting the victim to refresh his recollection by reviewing the transcript from the previous trial.

V. CONCLUSION

Based on the foregoing, Smith's conviction is

AFFIRMED.

FEW, C.J., concurs.

GEATHERS, J., concurs in part and dissents in part in a separate opinion.

GEATHERS, J., concurring in part, dissenting in part:
I agree with the majority that there was no reversible error in overruling Smith's objection to the testimony that identified him as the perpetrator. However, I respectfully dissent from the remainder of the majority's opinion for the following reasons: (1) the State elicited a response from an expert in this case that amounted to an improper comment on the victim's credibility; and (2) it was a fundamental error of law to allow the victim to refresh his memory with the coached testimony from the first trial that prompted the grant of a new trial.

I. Improper Bolstering and Vouching

In this case, there was a three-year delay in disclosure from the time the victim was first allegedly abused to the time of disclosing the abuse. On cross-examination, Smith's counsel asked Tod Lynch-Stanley, the State's forensic interviewer, whether a three-year delay in disclosure would be considered a short or long delay in disclosure. Lynch-Stanley responded, "That would be a fairly long delayed disclosure." Immediately on redirect, the State then asked Lynch-Stanley, "Does the length of the delay in the disclosure have any - in your opinion, does it erode the credibility of the disclosure?" Smith objected, but the trial court overruled the objection. Lynch-Stanley then responded, "[I]t really doesn't [erode the credibility]" and "[W]hen you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure."

By coaxing a response from Lynch-Stanley that inherently implicated the credibility of the victim's three-year delay in disclosure, the State was able to present a comment on the victim's veracity—a comment that has been expressly prohibited by our supreme court in *State v. Jennings*. *See* 394 S.C. 473, 480, 716

S.E.2d 91, 94 (2011) (holding that it is improper for an expert "to comment on the veracity of a child's accusations of sexual abuse" (citations omitted)); *id.* at 480, 716 S.E.2d at 94–95 (noting there was no physical evidence presented, finding the victims' credibility was the most critical determination of the case, and holding the error in the admission of evidence that vouched for the victims' veracity was not harmless); *see also State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) (holding "even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others"); *State v. Whitner*, 399 S.C. 547, 559, 732 S.E.2d 861, 867 (2012) (stating it is improper "to have the forensic interviewer, improperly imbued with the imprimatur of an expert witness, invade the province of the jury by vouching for the credibility of the alleged victim"); *Smith v. State*, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (finding the forensic interviewer's opinion testimony improperly bolstered the victim's credibility); *State v. Dawkins*, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (finding it was error to allow an expert to offer an opinion as to whether the victim's allegations were "genuine," although trial court's curative instruction rendered error harmless); *State v. Taylor*, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) ("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." (quoting *State v. Douglas*, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009))); *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) ("[W]itnesses are generally not allowed to testify whether another witness is telling the truth."); *State v. Hill*, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011) (stating "it is improper for a witness to give testimony as to his or her opinion about the credibility of a child victim in a sexual abuse matter" (citations omitted)); *State v. Dempsey*, 340 S.C. 565, 569–71, 532 S.E.2d 306, 308–10 (Ct. App. 2000) (finding an expert improperly vouched for the victim's credibility by testifying that children, in general, are being truthful when they disclose that they have been sexually abused).

Although Lynch-Stanley did not explicitly say, "The victim is credible," the State's question and Lynch-Stanley's response necessarily suggested the victim's three-year delay in disclosure should not erode the credibility of the disclosure. Furthermore, I disagree with the majority that Lynch-Stanley's clarification—that delayed disclosure was not a "credibility or non-credibility thing"—alleviated the initial comment's impact on the victim's veracity. Unlike in *Dawkins*, where the trial court gave a curative instruction to mitigate the improper comment's prejudicial influence, no such instruction was given here. *See* 297 S.C. at 393–94,

377 S.E.2d at 302. Accordingly, I find that this question and answer "invade[d] the province of the jury by vouching for the credibility of the alleged victim." *Whitner*, 399 S.C. at 559, 732 S.E.2d at 867. Based on the prior holdings of our appellate courts, this testimony was impermissible and, therefore, the trial court erred by not excluding this portion of Lynch-Stanley's testimony.

II. Refreshing Memory and Tainted Testimony

As to the victim refreshing his memory with the coached testimony from the prior trial transcript, the prejudicial admission of this tainted testimony in the first trial was the precise reason for granting the retrial. Such "refreshing" effectively resurrected the victim's coached testimony. On appeal from the first trial, our supreme court found the trial court's grant of a new trial was proper based on the admission of the tainted testimony that was the direct product of "the clearly improper 'coaching' by [an aunt] of the minor victim." *State v. Smith*, 383 S.C. 159, 168, 679 S.E.2d 176, 181 (2009). Our supreme court went on to explain that, "[b]ecause [the victim] was the key witness in the prosecution's case, we cannot disregard the trial [court's] conclusion concerning the prejudicial impact on [Smith's] right to a fair trial." *Id.* (citing *Sharp v. Commonwealth of Ky.*, 849 S.W.2d 542, 546–47 (Ky. 1993)); *Sharp*, 849 S.W.2d at 546–47 (stating the coaching of a child witness by a family friend was "so egregious and inimical to the concept of a fair trial" that it could not be "disregarded in the name of trial court discretion").

Because the coached testimony in the first instance had such a "prejudicial impact on [Smith's] right to a fair trial," *Smith*, 383 S.C. at 168, 679 S.E.2d at 181, I believe the reintroduction of this tainted testimony under the guise of refreshing the victim's memory is a fundamental error of law. *See generally Harrison v. United States*, 392 U.S. 219, 220–22 (1968) (noting inadmissible evidence from the first trial should be excluded on retrial and should not be used for any other purpose (citation omitted)); *State v. McCreven*, 284 P.3d 793, 809 (Wash. Ct. App. 2012) ("It should not be necessary for us to state that an attorney, including a prosecutor, may not 'coach' a witness, i.e., urge a witness to create testimony, under the guise of refreshing the witness's recollection . . . ."); *People v. Spencer*, 641 N.Y.S.2d 910, 912 (N.Y. App. Div. 1996) (finding the trial court erred in the retrial by allowing the testimony from the first trial that had been obtained in an improper manner); *State v. Little*, 358 P.2d 120, 122 (Wash. 1961) (addressing the criteria for the use of a writing to refresh a witness's recollection and acknowledging that the trial court should "be satisfied that the witness is not being coached-that the witness is using the notes to aid, and not to supplant, his own

memory"); *People v. Duncan*, 527 N.E.2d 1060, 1062 (Ill. App. Ct. 1988) (finding ineffective assistance of counsel from first trial "colored the entire proceeding" and, therefore, the defendant's prior tainted testimony could not be readmitted in the second trial in the State's case in chief).

Based on the foregoing reasons, I would reverse.

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The South Carolina Court of Appeals

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June 30, 2015

The Honorable Jerri Ann Roseneau
PO Box 1128
Beaufort SC 29901-1128

REMITTITUR

Re: The State v. Arthur Smith
Lower Court Case No. 2003GS0701756
Appellate Case No. 2011-200306

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Breen Richard Stevens, Esquire
Benjamin John Tripp, Esquire
Christina Catoe Bigelow, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Roger M. Young, Circuit Court Judge

Opinion No. 5283 (S.C. Ct. App. filed 12/17/2014)

03-GS-07-1756

THE STATE,

RESPONDENT,

V.

ARTHUR SMITH,

PETITIONER,

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

BENJAMIN JOHN TRIPP
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ATTORNEY FOR PETITIONER.

INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 23, 2015.

QUESTION PRESENTED

Whether the State's expert witness improperly commented on the credibility of the alleged victim of sexual abuse where he testified, "No, [the delayed disclosure] really doesn't [erode the victim's credibility]"; where he further testified, "I never see it as a credibility or non-credibility thing"; and where he finally testified that when assessing credibility, a person should primarily consider factors other than the length of disclosure.

STATEMENT OF THE CASE

On September 25, 2003, the Beaufort County Grand Jury indicted Petitioner Arthur Smith for first degree criminal sexual conduct with a minor. R. 235-236. On September 19, 2011, Petitioner proceeded to trial before The Honorable Roger M. Young, Sr., and a jury. Gail Lovell represented Petitioner and James Bannon represented the State. R. 1; R. 68.[1]

The State alleged that in 1999 and 2000, Petitioner forced his son, then around nine years old, to perform various sexual acts on him. R. 3, lines 21-24; R. 75, line 16—R. 77, line 15. In presenting its case, the State called Tod Lynch-Stanley as an expert in sexual deviancy. R. 178, lines 19-20; R. 181, lines 12 – 14. The purpose of his testimony was to explain how he observed symptoms in Petitioner's son that were indicative of suffering sexual abuse. He testified that Petitioner's son was acting out sexually, lying, stealing, setting fires, and spreading feces in school bathrooms. R. 182, line 24—R. 183, line 17. Lynch-Stanley then testified that such behavior can stem from experiencing poor sexual boundaries, whether viewing pornography, observing live sexual activity, or suffering molestation or more serious sexual abuse. R. 184, line 8—R. 186, line 5. He also testified that Petitioner's son exhibited symptoms of post-traumatic stress disorder, and these along with his acting out behaviors were consistent with suffering sexual abuse. R. 186, line 3—R. 187, line 4.

Counsel for then State asked Lynch-Stanley to explain delayed disclosure. He responded, "[T]here's many reasons for that," and he specifically discussed intimidation, shame, and confusion. He also testified that "typically the longer there is in the delay of disclosure, typically it's more

[1] Petitioner had previously attended a mistrial under the same indictment. The mistrial occurred because the previous trial judge determined that Petitioner's son's aunt improperly coached Petitioner's son prior to his trial testimony and during his trial testimony using body language and other non-verbal signals. *State v. Smith*, 383 S.C. 159, 679 S.E.2d 176 (2009).

extensive abuse. . . . [Y]ou can't say that in every single case, but by and large, that would be the way that I would look at that or treat that." R. 189, line 5—R. 192, line 10. On redirect examination, counsel for the State asked Lynch-Stanley, "Does the length of the delay in the disclosure have any—in your opinion, does it erode the credibility of the disclosure?" Petitioner objected, and the trial judge overruled the objection. Lynch-Stanley answered, "No, it really doesn't. People disclose at different times. . . . I never see it as a credibility or non-credibility thing. I think when you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure." R. 196, lines 21-23; R. 197, lines 1-22. Finally, Lynch-Staley testified that three years would be a fairly long delay in disclosing sexual abuse. R. 196, lines 4-14.

At the conclusion of trial, the jury found Petitioner guilty, and the trial judge sentenced him to thirty years' incarceration. R. 220, lines 10-19; R. 232, line 3—R. 233, line 19. The South Carolina Court of Appeals affirmed in a published opinion in which Judge Geathers concurred in part and dissented in part. *State v. Smith*, Op. No. 5283 (S.C. Ct. App. filed Dec. 17, 2014); App. 1-14.

ARGUMENT

LYNCH-STANLEY'S IMPROPERLY COMMENTED ON THE ALLEGED VICTIM'S CREDIBILITY BECAUSE HE IN ESSENCE TOLD THE JURORS THAT IN DECIDING WHETHER TO BELIEVE HIS ALLEGATIONS, THEY SHOULD CONSIDER HEAVILY THE ALLEGED VICTIM'S ACTING OUT AND PTSD BEHAVIORS AND NOT HIS SIGNIFICANTLY DELAYED DISCLOSURE.

"The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). "For an expert to comment on the veracity of a child's accusations of sexual abuse is improper." *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). This Court has elucidated a number of types of statements that fall within this prohibition. *See generally State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). This

Court has prohibited statements that directly or indirectly telling the jury how to weigh particular factors bearing on a witness's credibility. *See Jennings,* 394 S.C. at 480, 716 S.E.2d at 94 (2011) (statements that alleged victims "provided details consistent with the background information received from their mother, the police report, and the other children" could only be interpreted to mean forensic interviewer believed the children); *Kromah*, 401 S.C. at 360, 737 S.E.2d at 500 (forensic interviewer may not give opinion that a child's behavior indicated the child was telling the truth); *id.* at 359 n.6, 737 S.E.2d at 500 n.6 (citing *Seward v. State*, 76 P.3d 805, 814 (Wyo. 2003) ("[A] forensic interviewer's testimony about her use of 'truthfulness criteria' and her assessment of the victim's credibility based on the content of the victim's interview responses was testimony that 'directly vouched for the victim's credibility.'"); *Smith v. State*, 386 S.C. 562, 564, 689 S.E.2d 629, 631 (2010) (improper bolstering for forensic interviewer to state alleged victim "had no reason 'not to be truthful'").

One important factor bearing on witness credibility that is particularly important in cases of sexual misconduct is whether the witness has been inconsistent in making the accusation. *See, e.g.*, Rule 801(d)(1), SCRE (addressing the use of a witness's prior statement to rebut a charge against her of recent fabrication and setting forth special rules when the witness is an alleged victim of criminal sexual conduct); *State v. Lee*, 360 S.C. 530, 538, 602 S.E.2d 113, 118 (Ct. App. 2004), *aff'd*, 375 S.C. 394, 653 S.E.2d 259 (2007) (finding substantial, actual prejudice from defense counsel's inability to refute delayed disclosure evidence presented by the State through its expert witness).

In this case, Lynch-Stanley's testimony amounted to telling the jurors in in deciding whether to believe Petitioner's son's allegations, they should consider heavily Petitioner's son's acting out and PTSD symptoms and not his significantly delayed disclosure. Lynch-Staley testified that

Petitioner's son's acting out in certain ways and showing signs of PTSD was consistent with suffering sexual abuse. On the other hand, Petitioner's son's delayed disclosure was a type of inconsistency in his allegations insofar as he reasonably had prior opportunities to make the allegations but did not. Counsel for the State properly asked Lynch-Stanley to explain the latter factor and its possible causes. However, by asking thereafter whether the length of the delay in the disclosure eroded the Petitioner's son's credibility, counsel for the State essentially asked Lynch-Stanley to instruct the jury how to weigh this factor against the behavioral factors he had described—a determination that was supposed to be solely within the province of the jury.

Naturally, Lynch-Stanley's response to this question was also improper. He stated, "No, [the delayed disclosure] really doesn't [erode credibility]. People disclose at different times. . . . I never see it as a credibility or non-credibility thing." Thus, he flatly told the jury not to consider seriously the delayed disclosure in assessing Petitioner's son's credibility.

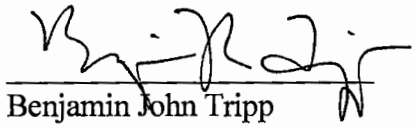
The majority opinion from the Court of Appeals concluded that Lynch-Stanley's testimony on redirect examination was not an improper "because Lynch-Stanley qualified his initial [improper] response and never gave an opinion regarding whether the victim was telling the truth." Specifically, the majority believed his statement that "I never see it as a credibility or non-credibility thing. I think when you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure" cured the impropriety by "stressing that credibility and delayed reporting are unrelated." However, as explained above, delayed disclosure and credibility are related insofar as the delayed disclosure evidence was relevant, admissible evidence bearing on Petitioner's son's credibility. Thus, as Judge Geathers alluded to in his dissent, the majority's conclusion is erroneous because stressing that credibility and delayed reporting are unrelated still in effect told the jury that the evidence of delayed disclosure was not a worthwhile factor in this case.

Overall, Lynch-Stanley's response readily told the jurors that considerations of shame, intimidation, and confusion accounted for Petitioner's son's delayed disclosure and that the delay was not a factor to seriously consider in determining his credibility: "*No, it really doesn't* [matter]. People disclose at different times [for these other reasons]. . . . *I never* see it as a credibility or non-credibility thing. I think when you're looking at credibility, *you're looking for other types of things*, [such as acting out and symptoms of PTSD], but not necessarily the length of disclosure" (emphasis added). Thus, even though, as the Court of Appeals noted, Lynch-Stanley never gave a direct opinion on whether Petitioner's son was telling the truth, he told the jury how to weigh the factors bearing on the witness's credibility, and the testimony was therefore improper.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court grant his petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER.

This 20th day of February, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County
Roger M. Young, Circuit Court Judge

Opinion No. 5283 (S.C. Ct. App. filed 12/17/2014)
03-GS-07-1756

THE STATE,

RESPONDENT,

V.

ARTHUR SMITH,

PETITIONER,

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Christina Catoe Bigelow, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the S.C. Court of Appeals, this 20th day of February, 2015.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of February, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
The Honorable Roger M. Young, Circuit Court Judge

Opinion No. 5283 (S.C. Ct. App. filed Dec. 17, 2014)
Appellate Case No. 2015-000316

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ARTHUR SMITH,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

INDEX

ISSUE PRESENTED

The issue raised on appeal was not preserved for appellate review where counsel made a general objection stating no grounds; where the judge overruled the objection without stating any grounds; and where the grounds for the objection were not apparent from the context and were never placed on the record at any subsequent point. Regardless, the Court of Appeals properly concluded there was no reversible error with respect to the expert's re-direct testimony where his testimony as a whole explained why delayed disclosure and credibility are generally unrelated and where he never vouched for the credibility of this particular victim. Finally, even if the Court of Appeals erred in its analysis, Petitioner's conviction still should be affirmed where Petitioner opened the door to the expert's discussion regarding the relationship between delayed disclosure and credibility via his cross-examination of the expert.

STATEMENT OF THE CASE

Petitioner was indicted in Beaufort County in September 2003 for criminal sexual conduct with a minor in the first degree. He proceeded to trial on November 15-16, 2004, before the Honorable Jackson V. Gregory and the jury found him guilty. Judge Gregory sentenced Petitioner to twenty years. Petitioner subsequently moved for a new trial. A hearing on Petitioner's motion for new trial was held on November 17, 2004. In a written order dated April 19, 2005, Judge Gregory granted Petitioner's motion, and the State appealed. On June 22, 2009, the South Carolina Supreme Court affirmed the trial judge's grant of a new trial.

Petitioner was tried again before the Honorable Roger C. Young, Sr., and a jury on September 19-21, 2011. The jury found Petitioner guilty and Judge Young sentenced Petitioner to thirty years. A timely notice of appeal was served and filed.

On December 17, 2014, the South Carolina Court of Appeals affirmed Petitioner's convictions. See State v. Smith, 411 S.C. 161, 767 S.E.2d 212 (Ct. App. 2014). Petitioner's request for rehearing was denied on January 23, 2015. Petitioner timely submitted a Petition for Writ of Certiorari, and this Return follows.

ARGUMENT

The issue raised on appeal was not preserved for appellate review where counsel made a general objection stating no grounds; where the judge overruled the objection without stating any grounds; and where the grounds for the objection were not apparent from the context and were never placed on the record at any subsequent point. Regardless, the Court of Appeals properly concluded there was no reversible error with respect to the expert's re-direct testimony where his testimony as a whole explained why delayed disclosure and credibility are generally unrelated and where he never vouched for the credibility of this particular victim. Finally, even if the Court of Appeals erred in its analysis, Petitioner's conviction still should be affirmed where Petitioner opened the door to the expert's discussion regarding the relationship between delayed disclosure and credibility via his cross-examination of the expert.

Background Facts

After the victim and his parents moved from Buffalo, New York to Beaufort County, South Carolina, the victim's parents separated and the victim lived primarily with his biological mother. (R. p. 106-107). The victim visited his biological father, Petitioner, at his house from time to time. (R. p. 107). During these visits, beginning around when the victim was six years old, Petitioner would perform oral and anal sex on the victim. (R. p. 108). He would also make the victim perform oral sex on him and make him try to perform anal sex. (R. p. 109-110). The sexual abuse always occurred in Petitioner's house, specifically in Petitioner's bedroom, when the two of them were alone. (R. p. 108, lines 18-22). Petitioner threatened to kill the victim or break his bones if he told anyone what was happening. (R. p. 110, lines 20-24). The victim stated that the abuse continued for about two years. (R. p. 110, lines 2-5). He testified that the sexual abuse made him feel "terrible" and "angry" and that it hurt. (R. p. 109, lines 11-20). Because he was scared, the victim did not tell anyone about the abuse until after he stopped having contact with Petitioner. (R. p. 110-11).

The victim's aunt obtained custody of the victim and his two siblings in November 2001. (R. p. 91). At the time, the victim was "acting out" and exhibiting behavior that was

"concerning." (R. p. 92). Specifically, the victim fondled other children, was physically aggressive, and destroyed property. (R. p. 92-93). The victim was sent to two different counseling centers because of these behaviors. (R. p. 93-94). One of the victim's counselors testified that it appeared that the victim had been sexually abused and that he was suffering from symptoms of post-traumatic stress disorder. (R. p. 186-88). The victim's aunt learned, in January 2002, that the victim had been sexually abused. (R. p. 95). After allowing the victim to spend more time in counseling trying to deal with his health issues, she took the victim, in May 2003, to file a police report regarding the sexual abuse. (R. p. 94-95). The victim had a forensic interview shortly thereafter and disclosed that he had been sexually abused in his biological father's bedroom and that it began around age six or seven. (R. p. 148-49).

The victim's brother testified that Petitioner also sexually abused him beginning around age six. (R. p. 118-19). The abuse involved oral and anal sex either in Petitioner's bedroom or his bedroom, and Petitioner threatened to hurt his mother if he told anyone about the abuse. (R. p. 119; p. 122-23). Additionally, the victim's sister testified that Petitioner sexually abused her when she was six and seven years old. (R. p. 126-27). She testified that Petitioner made her touch his penis with her hand and her mouth, and he would touch her vagina and her "butt." (R. p. 127). The abuse mainly occurred in Petitioner's bedroom. Petitioner told her that she should not tell anyone about the abuse. (R. p. 128).

Following trial, Petitioner was convicted of criminal sexual conduct with a minor in the first degree and was sentenced to thirty years. (R. p. 220; p. 233).

Facts Relevant to the Issue on Appeal

Tod Lynch-Stanley was qualified as an expert in sexual deviancy over the objection of the defense. (See R. p. 178-81). The judge immediately instructed the jurors that they were not required to accord extra weight to an expert's opinion and that they could give an expert's testimony as much weight as they felt it deserved.[2] (R. p. 181-82). Thereafter, the expert testified that he began treating the victim several years ago for "sexual acting out behavior" and other "aggressive behavior." (R. p. 182-83). He testified that in the course of treating the victim, he learned that the victim made a disclosure of sexual abuse. (R. p. 183, lines 18-21). He also testified without objection that it appeared to him that the victim had been sexually abused. (R. p. 186, lines 1-5). However, he stated that his focus was on treating the symptoms the victim was experiencing rather than "trying to uncover sexual abuse." (R. p. 186, lines 7-9). The expert further testified that the victim appeared to have symptoms of post-traumatic stress disorder. (R. p. 186, lines 11-17). He then discussed the phenomenon of "delayed disclosure" and testified that delayed disclosure is typically caused by shame, intimidation, and fear of the consequences of telling someone about the abuse. (See R. p. 189-91). He also testified that generally, the longer the delay, the more extensive the abuse. (R. p. 191, lines 15-19). He indicated that the length of delay is correlated with the degree of shame, which could be heightened by the fact that the abuser was a family member. (R. p. 192, lines 5-15).

On cross-examination, defense counsel inquired about delayed disclosure and asked what a "long period of delayed disclosure" would be. (R. p. 195, lines 13-16). The expert testified that a long delayed disclosure would be anything longer than two or three months. (R. p. 195, lines 24-25). He elaborated that some disclosures occur within

[2] The judge elaborated on this instruction in the final jury charge. (See R. p. 215, line 17 – p. 216, line 15).

minutes, while others occur after two or three months or after twenty years. (R. p. 196, lines 1-3). He agreed with defense counsel that a disclosure that occurred within a few minutes would not be a delayed disclosure. (R. p. 196, lines 4-8). When defense counsel asked him to classify a three-year delay,[3] the expert testified "that would be a fairly long delayed disclosure." (R. p. 196, lines 13-14). Defense counsel's clear implication was that the longer the delay in reporting allegations of abuse, the less credible the victim.

In response, on redirect, the solicitor asked whether, in his opinion, the length of the delay in a disclosure would erode the credibility of the disclosure. (R. p. 197, lines 21-23). Defense counsel objected but did not state any particular grounds. (R. p. 196, line 24). The judge overruled the objection without referencing any grounds. (R. p. 196, line 25). The expert then testified as follows:

> No, I really doesn't. People disclose at different times. Different things, again, triggers and things like that, can come up that cause people more symptoms, so – and the other part of PTSD, the symptoms come up and PTSD occurs at different times when the trauma gets reenacted in some way and starts to overtake the person.
>
> PTSD is really the body's efforts to try and cope with the trauma that's occurred, and then the body isn't coping anymore. And so what happens is that's when you see these more outlandish types of behaviors. So you might have someone who doesn't show symptoms of sexual abuse for a year, six months, eighteen months, and then, all of a sudden, something triggers them and reminds them of the abuse and helps to reenact it in some way, and then they start to act out and do those things.
>
> So that's why you have disclosures that occur at different times as well, so I never see it as a credibility or non-credibility thing. I think when you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure. (R. p. 197, lines 1-22).

Issue Preservation

Petitioner now argues the expert improperly commented on the victim's credibility because he "in essence told the jurors that in deciding whether to believe his allegations,

[3] The victim in this case disclosed the abuse by Petitioner approximately three years after it ended. (See R. p. 89-95; p. 104-111).

they should consider heavily the victim's alleged acting out and PTSD behaviors and not his significantly delayed disclosure."[4] (Petition for Writ of Certiorari, p. 5). Initially, this issue was not properly preserved for appellate review because Petitioner's counsel failed to state any specific grounds for his objection to the expert's testimony and the trial judge did not rule on any specific grounds. (R. p. 196, lines 24-25). See, e.g., State v. Patterson, 324 S.C. 5, 17-18, 482 S.E.2d 760, 765-66 (1997) (a general objection which fails to specify the particular ground on which the objection is based is insufficient to preserve a question for review; a trial judge does not err by overruling a general objection); State v. Hess, 279 S.C. 14, 19, 301 S.E.2d 547, 550 (1983) (general objection to evidence did not bring the specific error to the trial court's attention; therefore, the issue raised on appeal was not preserved for review); State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (an objection must be made with sufficient specificity to inform the judge of the point being urged); see also State v. McLaughlin, 307 S.C. 19, 413 S.E.2d 819 (1992) (failure to request a more explicit ruling constitutes a waiver of any objection to a trial court's general ruling regarding admissibility); compare State v. Foster, 354 S.C. 614, 621, 582 S.E.2d 426, 429 (2003) (issue was sufficiently preserved for review where counsel objected *and added that* he was objecting because the statement would "add to" the witness's credibility).

The words "vouching" and/or "bolstering" do not appear at all in the record in conjunction with this expert's testimony, and no case law referencing vouching or bolstering was cited by defense counsel. (See R. p. 178-98). Counsel's objection could

[4] Note that Petitioner's argument has been broadened to include a contention not raised in the argument to the Court of Appeals or in the Petition for Rehearing: that the expert told the jurors "they should consider heavily the alleged victim's acting out and PTSD behaviors." (Petition for Writ of Certiorari, p. 5; Final Brief of Appellant, p. 13-14; Petition for Rehearing, p. 1-2). See Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.").

have just as easily been based upon relevance under Rule 401 or undue prejudice under Rule 403. This Court cannot speculate or assume that the objection was based on improper vouching simply because this is a child sex abuse case. Accordingly, this issue was not preserved for appellate review, and the Court of Appeals should not have reached the merits.

Discussion

Even if the issue was somehow preserved, the Court of Appeals properly concluded there was no reversible error in this case. Initially, in the State's view, there exists a fundamental flaw in Petitioner's argument: Petitioner argues that the expert's testimony "improperly commented on the victim's credibility" while simultaneously acknowledging that the expert clearly stated that "credibility and delayed reporting are unrelated." (See Petition for Writ of Certiorari, p. 5 & p. 7). It would seem that the expert could not possibly be commenting on the particular victim's credibility under these circumstances.

Regardless, looking at the expert's testimony as a whole, including his direct and cross-examination testimony, the expert's redirect testimony did not improperly bolster the victim's credibility where the expert qualified his initial response and never gave an opinion regarding whether or not the victim was telling the truth.

The statements the Court of Appeal found to be most problematic are as follows:

> The solicitor: "Does the length of the delay in the disclosure have any – in your opinion, does it erode the credibility of the disclosure?"
>
> Expert: "No, it really doesn't."

The problem was that the phrasing of the State's question could have been misinterpreted to invite vouching regarding this particular victim's credibility. Likewise, the expert's response, standing alone, could have been construed as vouching for this particular victim's credibility. However, the expert continued his response by stating that

generally people disclose sexual abuse at different times for different reasons, and he went on to explain how post-traumatic stress disorder could generally play into this process. (R. p. p. 197). His response, as a whole, properly conveyed that - in general - the length of delay in a person's disclosure is not necessarily related to credibility, a fact about which the jury might have been confused in light of defense counsel's insinuations on cross-examination.[5] See supra, p. 9-10. Considering the totality of the expert's testimony - including the fact that the expert never gave an opinion that the victim in this case was telling the truth - the expert did not improperly bolster the victim's credibility. See State v. Douglas, 380 S.C. 499, 503-504, 671 S.E.2d 606, 609 (2009).

Even if this Court were to find that the Court of Appeals wrongly analyzed the issue, it was still proper for the trial judge to allow the solicitor to elicit the re-direct testimony where Petitioner opened the door to this testimony via his cross-examination of the expert. Defense counsel spent much of her cross-examination asking about the length of delay in disclosures, clearly trying to suggest to the jury that a lengthy period of time between the reporting of allegations and the time frame in which the allegations occurred lessened the credibility of the person making the allegations. (See R. p. 195-96). The solicitor had a right to directly respond since defense counsel's suggestion was misleading to the jury. As the expert explained, delays in the disclosure of sexual abuse are extremely common for a variety of reasons. (See R. p. 170-71). See State v. Brown, 411 S.C. 332, 768 S.E.2d 246, 252-54 (Ct. App. 2015) (upholding admission of general expert testimony about the prevalence of delayed disclosure); see also John E. B. Meyers, Expert Testimony

[5] Notably, the jury was thoroughly instructed that it should not accord extra weight to an expert's testimony simply because of his or her qualification as an expert (R. p. 181-82; p. 215, line 17 – p. 216, line 15), and defense counsel was still free to argue that the jury should discount the expert's testimony and consider the victim's delayed disclosure when evaluating his credibility. (See R. p. 202-203).

in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45-46 (2010) ("Psychological research demonstrates that delayed reporting is common among sexually abused children." (citations omitted)). Laypersons such as jurors would not likely understand how sexual abuse crimes - and juvenile sexual abuse crimes in particular - are fundamentally different from many other crimes, and, without correction of defense counsel's suggestion, there was a danger that the jurors would be improperly misled into concluding that a lengthy delay in the disclosure of sexual abuse alone renders the disclosure not credible. See State v. Myers, 359 N.W.2d 604, 609-610 (Minn. 1984) ("The nature, however, of the sexual abuse of children places lay jurors at a disadvantage. . . . If the victim of a burglary failed to report the crime promptly, a jury would have good reason to doubt that person's credibility. A young child subjected to sexual abuse, however, may for some time be either unaware or uncertain of the criminality of the abuser's conduct. . . [U]ncertainty becomes confusion when an abuser who fulfills a caring-parenting role in the child's life tells the child that what seems wrong to the child is, in fact, all right. Because of the child's confusion, shame, guilt, and fear, disclosure of the abuse is often long delayed.").

Because Petitioner himself opened the door to the challenged testimony, he cannot now complain about it on appeal. See State v. White, 361 S.C. 407, 415-16, 605 S.E.2d 540, 544 (2004) (defendant opened the door to testimony about the victim's credibility where counsel cross-examined the expert witness regarding whether she had cases in which she did not believe the alleged victim); State v. O'Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (holding a defendant may not complain of admission of evidence when he introduced the same kind of evidence on cross-examination); State v. Beam, 336 S.C. 45, 53, 518 S.E.2d 297, 301 (Ct. App.1999) ("Beam cannot complain about the

admission of evidence where he opened the door to the evidence."); see also State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984); State v. Harvey, 253 S.C. 328, 339, 170 S.E.2d 657, 662-63 (1969); State v. Smith, 220 S.C. 224, 67 S.E.2d 82, 90-91 (1951). Therefore, even if this Court were to conclude the testimony specifically referencing "credibility" would be improper under normal circumstances, it was not improper in the context of this case where it was in direct response to defense counsel's cross-examination. Accordingly, Petitioner is not entitled to reversal of his conviction.

CONCLUSION

For the reasons discussed above, Respondent requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Attorney General

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Assistant Attorney General

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March 27, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
The Honorable Roger M. Young, Circuit Court Judge

Opinion No. 5283 (S.C. Ct. App. filed Dec. 17, 2014)
Appellate Case No. 2015-000316

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ARTHUR SMITH,

PETITIONER.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the State's **Return to Petition for Writ of Certiorari** in the above-referenced matter has been served upon **Benjamin John Tripp,** South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **27th** day of **March, 2015.**

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The Supreme Court of South Carolina

The State, Respondent,

v.

Arthur Smith, Petitioner.

Appellate Case No. 2015-000316
Lower Court Case No. 2003-GS-07-01756

ORDER

This matter is before the Court on a petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Smith*, 411 S.C. 161, 767 S.E.2d 212 (Ct. App. 2014). The petition is denied.

C.J.
FOR THE COURT

Columbia, South Carolina

June 17, 2015

cc:
The Honorable Jenny Abbott Kitchings
The Honorable Jerri Ann Roseneau
Benjamin John Tripp, Esquire
Alan McCrory Wilson, Esquire
Christina Catoe Bigelow, Esquire

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The South Carolina Court of Appeals

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June 30, 2015

The Honorable Jerri Ann Roseneau
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REMITTITUR

Re: The State v. Arthur Smith
Lower Court Case No. 2003GS0701756
Appellate Case No. 2011-200306

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Breen Richard Stevens, Esquire
Benjamin John Tripp, Esquire
Christina Catoe Bigelow, Esquire