The Supreme Court of South Carolina

In the Matter of Kiana Sarraf Joersz, Petitioner

Appellate Case No. 2014-002544

ORDER

The records in the office of the Clerk of the Supreme Court show that on February 8, 2012, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated November 20, 2014, Petitioner submitted her resignation from the South Carolina Bar. Further, Petitioner filed an affidavit stating she does not have any clients in South Carolina and cannot locate her certificate to practice law.

We accept Petitioner's resignation and her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

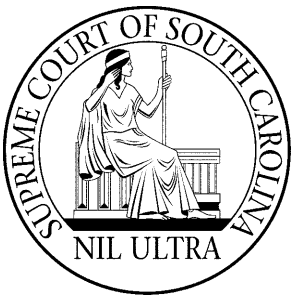
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 10, 2014



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 50
December 17, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

None

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

US SUPREME COURT - EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2014-UP-471-State v. Therron R. Richardson

2014-UP-472-State v. Joseph Bradley Loftin

2014-UP-473-State v. Marcus Daniel Allison

PETITIONS FOR REHEARING

5253-Sierra Club v. SCDHEC and Chem-Nuclear Systems, Inc.	Pending
5254-State v. Leslie Parvin	Granted in part 12/11/14
5268-Julie Tuten v. David C. Joel	Pending
5270-56 Leinbach Investors, LLC v. Magnolia Paradigm	Pending
5272-Cindy Ella Dozier v. American Red Cross	Pending
5276-State v. Dwayne Eddie Starks	Denied 12/12/14
5278-State v. Daniel D'Angelo Jackson	Pending
5279-Stephen Brock v. Town of Mt. Pleasant	Pending
5280-State v. Donna Lynn Phillips	Pending
2014-UP-270-Progressive Northern Ins. v. Stanley Medlock	Pending
2014-UP-346-State v. Jason A. Bauman	Pending
2014-UP-348-State v. Anthony Jackson	Denied 12/12/14
2014-UP-349-Galen E. Burdeshaw v. Jennifer M. Burdeshaw	Denied 12/12/14
2014-UP-366-State v. Darrell L. Birch	Pending
2014-UP-367-State v. Shondre Lamond Williams	Pending
2014-UP-381-State v. Alexander L. Hunsberger	Pending
2014-UP-382-State v. Julio Hunsberger	Pending

2014-UP-385-State v. Ralph B. Hayes	Pending
2014-UP-387-Alan Sheppard v. William O. Higgins	Pending
2014-UP-389-Plemmons v. State Farm	Pending
2014-UP-392-City of Beaufort v. Joseph C. Sun	Pending
2014-UP-393-Patrick Bowie v. Woodbine Estates, LLC	Pending
2014-UP-395-Alice Branton v. Nolan Corbitt	Pending
2014-UP-399-State v. Matthew B. Fullbright	Pending
2014-UP-400-John Doe v. City of Duncan	Pending
2014-UP-402-State v. Jody Lynn Ward	Pending
2014-UP-409-State v. Antonio Miller	Pending
2014-UP-410-State v. Dominique J. Shumate	Pending
2014-UP-411-State v. Theodore Manning	Pending
2014-UP-421-In the interest of Jameccia L., a minor under the age of 17	Pending
2014-UP-422-Johnson Koola v. Cambridge Two	Pending
2014-UP-447-State v. Carolyn Poe	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5077-Kirby L. Bishop et al. v. City of Columbia	Pending
5099-Roosevelt Simmons v. Berkeley Electric	Pending
5140-Bank of America v. Todd Draper	Pending
5152-Effie Turpin v. E. Lowther	Pending
5175-State v. Karl Ryan Lane	Pending

5176-Richard A. Hartzell v. Palmetto Collision, LLC	Pending
5201-Phillip Grimsley v. SLED	Pending
5208-Amber Johnson v. Stanley E. Alexander	Granted 12/10/14
5209-State v. Tyrone Whatley	Pending
5214-State v. Alton W. Gore, Jr.	Pending
5229-Coleen Mick-Skaggs v. William Skaggs	Pending
5230-State v. Christopher L. Johnson	Pending
5231-Centennial Casualty v. Western Surety	Pending
5232-State v. Clarence W. Jenkins	Pending
5241-Richard A. Fisher v. Shipyard Village Council	Pending
5242-Patricia Fore v. Griffco of Wampee, Inc	Pending
5243-Kerry Levi v. Northern Anderson County EMS	Pending
5244-Clifford Thompson v. State	Pending
5245-Allegro, Inc. v. Emmett Scully	Pending
5246-State v. Jason A. Johnson	Pending
5247-State v. Henry Haygood	Pending
5248-Demetrius Mack v. Leon Lott	Pending
5250-Precision Walls v. Liberty Mutual Fire Ins.	Pending
5257-State v. Jefferson Perry	Pending
5258-State v. Wayne S. Curry	Pending
5259-State v. Victor A. White	Pending

5261-State v. Roderick Pope	Pending
5264-Prakash Solanki v. Wal-Mart	Pending
5265-State v. Wayne McCombs	Pending
5266-State v. Anthony K. Blakney	Pending
5267-Steve Bagwell v. State	Pending
5271-Richard Stogsdill v. SCDHHS	Pending
5273-Jane Roe v. Daniel Bibby, Sr.	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-552-Virginia A. Miles v. Waffle House	Pending
2012-UP-577-State v. Marcus Addison	Pending
2013-UP-066-Dudley Carpenter v. Charles Measter	Pending
2013-UP-071-Maria McGaha v. Honeywell International	Pending
2013-UP-147-State v. Anthony Hackshaw	Pending
2013-UP-251-Betty Jo Floyd v. Ken Baker Used Cars	Pending
2013-UP-297-Place on the Greene v. Eva Berry	Pending
2013-UP-322-A.M. Kelly Grove v. SCDHEC	Pending
2013-UP-442-Jane AP Doe v. Omar Jaraki	Pending

2014-UP-013-Roderick Bradley v. The State	Pending
2014-UP-087-Moshtaba Vedad v. SCDOT	Pending
2014-UP-088-State v. Derringer Young	Denied 12/10/14
2014-UP-094-Thaddeus Segars v. Fidelity National	Pending
2014-UP-114-Carolyn Powell v. Ashlin Potterfield	Pending
2014-UP-117-Lemons v. McNair Law Firm	Denied 12/10/14
2014-UP-128-3 Chisolm Street v. Chisolm Street	Pending
2014-UP-132-State v. Ricky S. Bowman	Pending
2014-UP-143-State v. Jeffrey Dodd Thomas	Pending
2014-UP-167-State v. David G. Johnson	Pending
2014-UP-187-State v. Mark Peters	Pending
2014-UP-203-Helena P. Tirone v. Thomas Dailey	Pending
2014-UP-206-State v. Forrest K. Samples	Pending
2014-UP-210-State v. Steven Kranendonk	Pending
2014-UP-215-Yossi Haina v. Beach Market, LLC	Pending
2014-UP-217-State v. Douglas Bret Bishop	Denied 12/10/14
2014-UP-222-State v. James Curtis Tyner	Pending
2014-UP-224-State v. James E. Wise	Pending
2014-UP-228-State v. Taurus L. Thompson	Pending
2014-UP-234-State v. Julian Young	Pending
2014-UP-235-Rest Assured v. SCDEW	Pending

2014-UP-241-First Citizens Bank v. Charles T. Brooks, III	Pending
2014-UP-266-Mark R. Bolte v. State	Pending
2014-UP-273-Gregory Feldman v. William Casey	Pending
2014-UP-279-Jacqueline Smith v. Horry County Schools	Pending
2014-UP-282-State v. Donald M. Anderson	Pending
2014-UP-284-John Musick v. Thomas Dicks	Pending
2014-UP-288-Gayla Ramey v. Unihealth Post Acute	Pending
2014-UP-304-State v. Tawanda Allen	Pending
2014-UP-305-Tobacco Merchant v. City of Columbia Zoning	Pending
2014-UP-306-Yadkin Valley v. Oaktree Homes	Pending
2014-UP-307-Desiree Brown v. Wendell Brown (1)	Pending
2014-UP-317-Cherry Scott v. Heritage Healthcare	Pending
2014-UP-318-Linda Johnson v. Heritage Healthcare	Pending
2014-UP-323-SCDSS v. Rubi B.	Denied 12/10/14
2014-UP-332-State v. Michael Rogers	Pending
2014-UP-337-State v. Elizabeth M. Dinkins	Pending
2014-UP-343-State v. Derrick A. McIlwain	Pending

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.

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 . . . .

> 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

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.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Fayrell Furr and Karole Jensen, Respondents,

v.

Horry County Zoning Board of Appeals, Appellant.

Appellate Case No. 2013-001188

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 5284
Heard November 3, 2014 – Filed December 17, 2014

REVERSED

Emma Ruth Brittain, of Thomas & Brittain, P.A, of Myrtle Beach, for Appellant.

Gene McCain Connell, Jr., of Kelaher Connell & Connor, PC, of Surfside Beach, for Respondents.

KONDUROS, J.: The Horry County Zoning Board of Appeals (the Board) appeals the circuit court's order reversing the Board's decision finding a Mercy Care Hospice (MCH) facility could be built within the proposed area zoned Commercial Forest Agricultural (CFA). We reverse.

FACTS/PROCEDURAL BACKGROUND

MCH proposed to build a fourteen-bed hospice facility on twenty-two acres of land it owns in Horry County. The property is located immediately adjacent to a subdivision, Wildhorse, and closest to the home shared by Fayrell Furr and his wife, Karole Jensen (collectively Respondents). The area is zoned CFA. The MCH property has no direct access from the closest main road, Highway 90, necessitating that the entrance to the MCH facility be immediately inside the entrance to the subdivision.

The current zoning ordinances do not specifically permit or prohibit a hospice. However, after reviewing the matter, the Horry County Zoning Administrator determined a hospice would be a permitted use in the CFA zone as either group housing[1] or a nursing home.[2] Respondents appealed that decision to the Board.

At the appellate hearing before the Board, opponents of the MCH facility expressed concern over increased traffic in the area, and Jensen presented newspaper articles discussing Highway 90 as a dangerous road. Concerns over possible ambulance activity and helicopter transport were raised, as well as concerns over the environmental impact the facility may have. Furr argued a hospice is a hospital, a use prohibited in the CFA zone. He cited to section 44-7-130(12) of the South Carolina Code (2002), which defines "hospital" as

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[1] The Horry County Code of Ordinances defines a Permanent Overnight Resident Group Care Home as "[a] facility or dwelling unit housing persons unrelated by blood or marriage and operating as a group family household. A Group Care Home may include half-way houses; recovery homes; and homes for orphans, foster children, the elderly, battered children and women. It could also include a specialized treatment facility providing less than primary health care." Horry County, S.C., Ordinance 436.1.

[2] A Nursing Home is defined as "[a]n extended or intermediate care facility licensed or approved to provide full-time convalescent or chronic care to individuals who, by reason of advanced age, chronic illness or infirmity, are unable to care for themselves." Horry County, S.C., Ordinance 447.1

> a facility organized and administered to provide overnight medical or surgical care or nursing care of illness, injury, or infirmity and may provide obstetrical care, and in which all diagnoses, treatment, or care is administered by or under the direction of persons currently licensed to practice medicine, surgery, or osteopathy.

He further cited to subsections 44-71-20(3) and (4) of the South Carolina Code (2002), which define "hospice" and "hospice facility." The subsections provide:

> (3) "Hospice" means a centrally administered, interdisciplinary healthcare program. This program must provide a continuum of medically supervised palliative and supportive care for the terminally ill patient and the family including, but not limited to, outpatient and inpatient services provided directly or through written agreement. Inpatient services include, but are not limited to, services provided by a hospice in a licensed hospice facility.
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> . . . .
>
> (4) "Hospice facility" means an institution, place, or building in which a licensed hospice provides room, board, and appropriate hospice services on a twenty-four-hour basis to individuals requiring hospice care pursuant to the orders of a physician.

Id.

Proponents of the MCH facility argued it would not constitute a hospital based on the types of activities that would take place there. Sara Jo Faucher, director of MCH, presented an affidavit from David Levitt, a healthcare consultant, who opined the MCH facility would not be a hospital. Levitt noted hospitals offer a much more intensive level of care, requiring significantly more resources, space, and personnel, and provide sophisticated diagnostic and surgical services, as well as emergency services. Faucher also presented a letter from J.T. Pegram, president

of Pegram Associates, Inc., who was assisting with the MCH facility design, indicating the facility would be "essentially a nursing home that specializes in caring for the terminally ill." Additionally, Pegram indicated the design would be LEED (Leadership in Energy and Environmental Design) certified. Faucher also provided an anticipated traffic study indicating the MCH facility would generate thirty-four additional trips per day by vehicles into Wildhorse as opposed to the property being used for residential development, which could produce 230 additional trips per day. Faucher indicated the MCH facility would not receive helicopter delivery of patients and any ambulance activity would be conducted without sirens.

Dr. Preston Strosnider, medical director of Conway Hospital and MCH board member, testified the MCH facility would be more akin to a nursing home and would not constitute a hospital. He testified nurses and certified nursing assistants would be on staff and doctors could make rounds but not on a daily basis. Dr. Strosnider indicated a physician would be available at all times just as a physician treating a hospice patient in the patient's home would be available if needed.

The Board upheld the Zoning Administrator's decision that the MCH facility would fall within the ordinances permitting group housing or nursing homes in a CFA zone and rejected the argument the MCH facility constituted a hospital. Respondents appealed the Board's decision to the circuit court.

The circuit court reversed the decision of the Board, concluding the Board's interpretation of the zoning ordinances was incorrect as a matter of law. The circuit court indicated "the level of care, including the provision of primary medical care if needed, required in a hospice facility is greater than that of both permanent overnight resident group care homes and nursing homes." The circuit court also concluded a hospice is like a hospital because only a hospice and a hospital require physicians to supervise the care and treatment of the patients and only a hospice and hospital require a physician's order for admission.[3] Finally, the

[3] Regulation 61-78.504(A),(B), and (C) of the South Carolina Code (2012) indicate a physician shall supervise the care and treatment of the patient while receiving hospice treatment/care/services, nursing care services shall be supervised by a staff registered nurse, and minimum staffing of a hospice facility shall consist of one registered nurse and one additional direct care staff member on duty at all times.

circuit court found the proposed location was not suitable for the MCH facility because of its proximity to Wildhorse. The Board's appeal followed.

LAW/ANALYSIS

The Board contends its determination that a hospice is a permissible use in a CFA zone is a determination that should be accorded deference by the circuit court. Respondents argue the Board's decision involved its interpretation of the Horry County zoning ordinances and, therefore, constitutes a question of law which the circuit court properly reversed. We find the Board's position to be persuasive.

The Supreme Court of South Carolina has summarized the standard of review in zoning appeals as follows:

> It is a well settled proposition of zoning law that a court will not substitute its judgment for the judgment of the board. The court may not feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. None the less, the court will not set aside the board's view of the matter just to inject its own ideas into the picture of things.

Rest. Row Assocs. v. Horry Cnty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (quotation marks omitted).

"By statute, the trial court must uphold a decision by the Planning Commission unless there is no evidence to support it. This [c]ourt will uphold the trial [court]'s

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Regulation 61-17 § 605 of the South Carolina Code (2011) states a nursing home "facility shall have a medical director who is a physician who shall be responsible for implementation of policies and procedures that pertain to the care and treatment of the residents and the coordination of medical care in the facility." Regulation 61-17 § 606(A)(1) and (3) of the South Carolina Code (2011) further provide a registered nurse shall serve as full-time director of nursing, and at least one registered nurse shall be in the facility or on call.

decision unless it was based on an error of law or is not supported by the evidence." *Town of Hollywood v. Floyd*, 403 S.C. 466, 476, 744 S.E.2d 161, 166 (2013) (citation omitted). *See* S.C. Code Ann. § 6-29-840(A) (Supp. 2013) ("The findings of fact by the [zoning] board of appeals must be treated in the same manner as a finding of fact by the jury . . . ."). "In reviewing questions presented on appeal, the court must determine only whether the decision of the board is correct as a matter of law." *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 234, 642 S.E.2d 565, 567 (2007). "A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." *Id.* A zoning board's decision will be overturned if it is "arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Id.* The decisions of those charged with interpreting and applying zoning ordinances "should be given some consideration and not overruled without cogent reason therefore." *Id*. at 236, 642 S.E.2d at 568 (internal quotation marks omitted).

In *Heilker v. Zoning Board of Appeals for the City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001), Heilker argued having sidewalk sales at his furniture store was a nonconforming "use" that should be permitted to continue under new zoning ordinances. *Id*. at 403-04, 552 S.E.2d at 43-44. The Zoning Board determined the sidewalk sales were merely a "practice" attendant to Heilker's "use" of the premises as a furniture store. *Id*. at 405, 552 S.E.2d at 44. The circuit court reversed. *Id*. On review, the majority determined the inquiry of whether a proposed activity constituted "use" within the context of zoning was a question of fact and stated:

> In zoning matters, this [c]ourt is obligated to apply the extremely narrow standard of review outlined in *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000). The local zoning boards, and not the courts, are the primary entities responsible for the planning and development of our communities.
>
> A "use" in the zoning context is "the purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained." A determination by a zoning board that a

> particular purpose or activity does or does not constitute a "use" is a finding of fact.
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> In the case *sub judice*, we rule the [c]ircuit [c]ourt erred in supplanting the Zoning Board's finding of fact that Heilker's outdoor display of indoor merchandise was not a nonconforming "use."

Id. at 412, 552 S.E.2d at 48.

In this case, Horry County ordinances do not specifically permit or prohibit a hospice in a CFA zone. Therefore, the parties asked the Board to determine whether the MCH facility was more comparable to a nursing home or group housing, permitted uses, or a hospital, a prohibited use. That required a factual inquiry to discern the type of care, staffing, and activity that would be involved at the MCH facility along with consideration of the relevant ordinances. Based on that information and analysis, the Board determined the MCH facility fell within the permitted uses and approved construction in the CFA Zone. Consequently, we find the circuit court should have given deference to the Board's decision because its decision was based upon appropriate findings of fact which are supported by the record.

Levitt's affidavit opined hospitals offer a much more intensive level of care, requiring significantly more resources, space, and personnel, and provide sophisticated diagnostic and surgical services, as well as emergency services. Dr. Strosnider testified the MCH facility was more like a nursing home based on the type of care that would be provided and based on the type of staffing. Because evidence in the record supports the Board's conclusion, the circuit court's order is

REVERSED.

HUFF and SHORT, JJ., concur.