No. 376A19 **JUDICIAL DISTRICT 21**

NORTH CAROLINA SUPREME COURT

****

STATE OF NORTH CAROLINA	)	
	)	**Forsythe County**
v.	)	**15 CRS 59032**
	)	
ERVAN L. BETTS	)	

****

DEFENDANT-APPELLANT'S NEW BRIEF

****

TABLE OF CONTENTS

TABLE ON AUTHORITIES

CASES

RULES/STATUTES

MISCELLANEOUS CITES

No. 376A19 **JUDICIAL DISTRICT 21**

NORTH CAROLINA SUPREME COURT

****

STATE OF NORTH CAROLINA	)	
	)	**Forsythe County**
v.	)	**15 CRS 59032**
	)	
ERVAN L. BETTS	)	
	)	

****

CLAIMS PRESENTED

****

I. Mary Katherine Masola, M.C.'s therapist and one of the State's expert witnesses, improperly vouched for M.C.'s credibility, which probably impacted the jury's verdicts.

II. *Jamison* correctly concluded the frequent use of the words "disclose," "disclosed," and "disclosure" constituted impermissible vouching, meaning the frequent use of these terms during Mr. Betts's trial by the prosecutor, Melody Archie, Sgt. Crystal Prichard, and the State's two experts, Fulton McSwain and Mary Katherine Masola, constituted impermissible vouching, which probably impacted the jury's verdicts.

III. The COA erred when it said the domestic violence evidence was admissible under Rules 401 and 403.

IV. The COA erred when it rejected Mr. Betts's cumulative prejudice claim.

STATEMENT OF THE CASE

This case was tried at the 19 March 2018 Criminal Session of the Forsythe County Superior Court before the Honorable Stuart Albright upon a bill of indictment charging Ervan L. Betts with three counts of indecent liberties with a child (N.C.G.S. § 14-202.1). (Rpp. 5-6) Mr. Betts pled not guilty, but on 23 March 2018 a jury found him guilty as charged. (Rpp. 63-73; T5pp. 5-6)[1] For each count, Judge Albright sentenced Mr. Betts to three consecutive terms of 31 to 47 months in prison. Mr. Betts appealed. (Rp. 95)

On 3 September 2019, a divided Court of Appeals ("COA") panel issued its opinion, *State v. Betts*, No. COA18-963, 2019 N.C. App. LEXIS 723,[2] affirming Mr. Betts's convictions. The COA panel consisted of Chief Judge McGee and Judges Berger and Tyson. Judge Tyson dissented.

On September 29, 2019, due to Judge Tyson's dissent, Mr. Betts appealed under N.C.G.S. § 7A-30(2), and raised the following three claims as of right:

> 1. *Jamison* correctly concluded the frequent use of the words "disclose," "disclosed," and "disclosure" constituted impermissible vouching, meaning the frequent use of these terms during Mr. Betts's trial by the prosecutor, Melody Archie, Sgt. Crystal Prichard, and the State's two experts, Fulton McSwain, and Mary Katherine Masola, constituted

[1] The transcripts are five volumes, but they're *not* consecutively numbered. Volume 1 has 159 pages. Volume 2 has 234 pages. Volume 3 has 190 pages. Volume 4 has 148 pages. And volume 5 has 78 pages. Cites to the transcripts will be: T1p.__ for volume 1. T2p. ___ for volume 2. T3p.___ for volume 3. T4p.___ for volume 4. T5p.___ for volume 5.

[2] Ex. 1.

> impermissible vouching, which probably impacted the jury's verdicts.[3]
>
> 2. The COA erred when it said the domestic violence evidence was admissible under Rules 401 and 403.
>
> 3. The COA erred when it rejected Mr. Betts's cumulative prejudice claim.

In this same pleading, Mr. Betts petitioned this Court under N.C.G.S. § 7A-31(c), asking it to review additional claims. On February 28, 2020, the Court granted review of the following (fourth) claim:

> 4. Mary Katherine Masola, M.C.'s therapist and one of the State's expert witnesses, improperly vouched for M.C.'s credibility, which probably impacted the jury's verdicts.

JURISDICTIONAL STATEMENT

Mr. Betts appeals pursuant to N.C.G.S. § 7A-30(2) and N.C.G.S. § 7A-31(c).

STATEMENT OF FACTS

A. DSS investigates Charity Luck for child abuse

In 2013, Charity Luck gave birth to her daughter, Brooklyn. Post-natal testing revealed drugs in Brooklyn's system, prompting the Forsyth County Department of Social Services ("DSS") to investigate Luck. DSS investigator Melody Archie interviewed Luck's family members, including her 7-year-old daughter M.C. on 25 October 2013. As part of her interview, Archie asked M.C. if she'd been sexually abused

[3] *Jamison* refers to *State v. Jamison*, ___ N.C. App. ___, ___ S.E.2d ___, 2018 N.C. App. LEXIS 1168 (Dec. 4, 2018) (unpublished), *review denied*, ___ N.C. ___, 826 S.E.2d 701 (2019).

by a family member or caretaker. M.C. told Archie her mother's boyfriend, Ervan Betts, had touched her inappropriately. (T2pp. 224, 226, 227-228, 230) When Archie followed-up and asked about the inappropriate touching, M.C. denied Mr. Betts's had touched her inappropriately. (T3pp. 5-7)

On 4 November 2013, Archie interviewed M.C. again, this time at her elementary school (Speas Elementary). Archie had learned Luck was still using drugs. Thus, Archie's reason for re-interviewing M.C. was to discuss placement options, not M.C.'s prior statement regarding inappropriate touching. (T3pp. 8-9)

During the second interview, M.C. talked about Mr. Betts "disciplining her," but once Archie asked about any "inappropriate touching," M.C. claimed Mr. Betts had touched her "inappropriately" by "rubbing and poking at" her vagina while she napped. M.C. claimed when she "rolled over" – to stop the touching – Mr. Betts left the "room" and watched T.V. in the living room. M.C. didn't identify when this alleged incident occurred, but claimed she'd told Luck about the incident. This was the only inappropriate touching incident M.C. mentioned to Archie. (T3pp. 9-11, 31, 34)

Archie referred M.C. to Vantage Pointe Child Advocacy Center ("VPC"). Although the mandatory reporting guidelines required Archie to report all credible sexual abuse allegations to law enforcement within 48 hours, Archie didn't report M.C.'s allegations until 2 December 2013 – when she called Sgt. Crystal Prichard. (T3pp. 11, 33, 34)

B. M.C.'s forensic interview

On 26 November 2013, Fulton McSwain conducted M.C.'s forensic interview. McSwain videotaped (S-4) and wrote a report summarizing M.C.'s forensic interview (S-6). (T3pp. 67, 71)

McSwain initially asked M.C. if she knew why she was at VPC. M.C. said she didn't know. McSwain suggested something "bad" may've happened to her because "children sometimes visit VPC when something bad has happened to them." McSwain's statement prompted M.C. to mention alleged instances of domestic violence between her mother and Mr. Betts as well as two instances where Mr. Betts allegedly touched her inappropriately. (Rpp. 14-15)

For instance, when McSwain asked if "anything bad" had happened to her, M.C. replied, "My mom talks to this guy Ervin and one day I was joking around with him and he got really made and he slapped me on the leg really hard." Mr. Betts allegedly said, "Fuck you bitch," when he slapped her. M.C. said the incident happened "sometime" in March 2013. (Rpp. 14-15)

M.C. alleged she'd witnessed multiple domestic violence incidents. She described an alleged incident where Mr. Betts supposedly punched her mother, gave her a black eye, and forced her to go to the hospital. M.C. referenced another incident where Mr. Betts allegedly tried to break into their apartment while holding a gun. (Rpp. 15, 18)

McSwain asked if Mr. Betts had ever done anything "to her that made her feel uncomfortable." M.C. replied, "When he was spending the night, he touched me in my private area." M.C. didn't recall the date of this alleged incident, but said she was six at the time. McSwain asked M.C. to "tell him as much as she could remember about this incident." M.C. claim her mother had told her to get into bed with her and Mr. Betts. M.C. complied. Her mother, though, went to the bathroom shortly thereafter. While her mother was in the bathroom, Mr. Betts "rolled over and started touching her private area." When McSwain show M.C. with an "anatomical drawing," she said Mr. Betts "touched her vagina." (Rpp. 15-16)

M.C. claimed she had on a nightgown. McSwain asked if Mr. Betts touched her vagina on top or inside of her nightgown. M.C. claimed Mr. Betts "pulled up her nightgown then went inside of her underwear and touched her vagina." When McSwain asked how Mr. Betts "touched her vagina," M.C. claimed he rubbed it "in a circular motion." M.C. said Mr. Betts didn't digitally penetrate her vagina. (Rp. 16)

M.C. claimed she rolled over as Mr. Betts touched her vagina, which caused her to fall off the bed and strike her head on the mini-fridge next to the bed. M.C. claimed her mother exited the bathroom at this point, picked her up, consoled her, and carried her into the living room where she placed her on the couch, before returning to the bedroom. Shortly thereafter, M.C. claimed Mr. Betts exited the bedroom, walked over to her, and whispered, "If you tell anybody that I did this, I'm going to hurt you." (Rp. 16)

M.C. claimed she didn't report the touching to her mother because of Mr. Betts's threat. M.C., though, "eventually disclosed" the "sexual abuse" to her mother while they were at her Aunt Tory's house, and her mother allegedly said, "Well, I guess he did it. And life has moved on." M.C. claimed she'd also told her maternal grandmother about the touching. (Rp. 16)

When McSwain asked if Mr. Betts had inappropriately touched her more than five times, M.C. claimed Mr. Betts "kept doing it over and over again." When McSwain asked what Mr. Betts was "doing," M.C. replied, "Touching my private [area]." M.C. claimed Mr. Betts "touched her private [area]" more than once but couldn't recall the exact number of times. She also couldn't recall the last time Mr. Betts touched her inappropriately. She initially said the touching started in the summer of 2012, but later claimed she "believed" it started in January 2013 and continued until March 2013. (Rp. 17)

M.C. said Mr. Betts never "penetrated" her vagina. (Rp. 17)

M.C. also claimed the inappropriate touching "always" occurred in the bedroom. She said her mother was usually in bed with her and Mr. Betts when the touching occurred, but said Mr. Betts always waited until her mother fell asleep. M.C. claimed she always rolled toward her mother and tried waking her, but claimed her mother never woke up. After McSwain asked if Mr. Betts had "ever touched her anywhere else on her body," M.C. mentioned a living room incident where Mr. Betts "reached his hand

inside of her shirt and rubber her breasts." M.C. claimed the incident occurred on the living room couch while her mother was outside smoking a cigarette. (Rp. 17)

In the report's *Summary/Conclusion* section, McSwain opined M.C. "did not appear to display any overt signs of deception" and her "assessment was consistent with that of someone who has been sexually abused." (Rpp. 17, 18)

C. M.C.'s therapy and trauma narrative therapy

In December 2013, Mary Catherine Masola began treating M.C. for "neglect, sexual abuse, and [domestic] violence." Masola diagnosed M.C. with post-traumatic stress disorder ("PTSD") – with one of the traumatic events being Mr. Betts's sexual abuse. (T3p. 180-181) Masola used Trauma Focused Cognitive Behavioral Therapy ("TFCBT") which requires the patient to write a trauma narrative. M.C. wrote a five-page trauma narrative titled - "Erv Hurts my Family." (Rpp. 21-24)

The narrative contains five chapters, but the chapters aren't limited to the trauma caused by Mr. Betts's alleged inappropriate touching. Multiple chapters discuss several alleged incidents of domestic violence M.C. supposedly witnessed between her mother and Mr. Betts. For instance, here are the five chapter titles: Chapter One: Meet the Author! Chapter Two: What Irv Did to My Mom. Chapter Three: When Erv Touched Me. Chapter Four: When Erv Pulled out a Gun and Tried to Break Into My House. Chapter Five: When I Told. (Rpp. 21-24)

M.C. described three domestic violence incidents in her narrative. She first described an incident where she was sleeping on the living room couch when she heard a "slamming" noise coming from her mother's bedroom. She woke up and saw Mr. Betts walking out of the bedroom and out of the apartment while saying things like "you don't do anything right." She then saw her mother walk out of her bedroom crying, bloodied, and with a black eye. Her mother said, "Call the ambulance." The ambulance came and took her mother to the hospital. M.C. claimed she felt "scared" and "afraid" that night and "shaky" and "nervous" the next day. (Rpp. 21-22)

M.C. wrote about another domestic violence incident that allegedly occurred a week or so after the first inappropriate touching incident. M.C. claimed her mother told her to tell Mr. Betts "the knock-knock joke." M.C. complied and "called him a boy" as part of the joke. According to M.C., Mr. Betts got angry when she called him a boy and "slapped her leg." M.C. claimed her mother pushed Mr. Betts for slapping her and that Mr. Betts pushed her mother back, prompting M.C.'s grandmother to call the police. (Rp. 23)

Lastly, M.C. wrote about an incident where "Erv pulled out a gun and tried to break into my house." One morning her mother woke her up and told her to go to "Michael's room" because "Erv [was] outside with a gun trying to break in." M.C. claimed Michael was her mother's roommate. M.C. wrote, "I looked out my bedroom window and I saw Erv with a gun behind his back and his finger was on the trigger…. He was trying to get the door open and rattling the doorknob." M.C.'s mother called

the police and locked the door, but "Erv got in the house" and began beating on Michael's bedroom door while yelling, "Come on, I know you're in there, come out!" When the police arrived, M.C. claimed she saw "Erv pulling out of the apartment complex" and the police chasing him. When the police returned and told them they were unable to apprehend Mr. Betts, M.C. claimed she went into the bathroom, cried, and "asked God to help the police find him and put him in jail." (Rpp. 23-24)

In terms of inappropriate touching, M.C. mentioned three incidents. The first incident occurred when she was sleeping on the living room couch. She was scared and didn't want to sleep by herself, so she knocked on her mother's bedroom door and asked if she could sleep with her. Her mother said yes, so M.C. crawled into bed with her mother and Mr. Betts. M.C. was in the middle – between the two of them. Once in the middle, M.C. claimed Mr. Betts "rolled over" and "touched" M.C.'s "private part with his hand." Mr. Betts, she claimed, put his hand under the blanket and then "in [her] pants." M.C. claimed, Mr. Betts "mov[ed] his fingers around on top of my private parts. Then he took his hand out of my pants and rolled over and went back to sleep." (Rp. 22)

M.C. claimed her mother was in bed the entire time and claimed she didn't tell her mother because she thought Mr. Betts might hurt her. M.C. claimed she got out of the bed and walked into the living room. The next morning, after Mr. Betts left, her mother asked her why she'd slept on the living room couch. M.C. replied, "Erv touched me in the private part last night." M.C. claimed her mother didn't believe her, but after

she told her again, her mother believed her, called Mr. Betts, and confronted him on the phone. After the phone call, M.C. claimed, "[W]e ate breakfast and forgot about it for the day." (Rp. 22)

Three weeks after the first incident, M.C. described an incident where Mr. Betts put his hand "inside" her shirt as he helped her with her homework. After Mr. Betts left that day, M.C. claimed she'd told her mother about the touching. (Rp. 23)

M.C. described a third incident where Mr. Betts "put his hands in" her pants while she was on the living room couch and her mother was in the bathroom. When her mother exited the bathroom, Mr. Betts "rushed over to the recliner." M.C. claimed she fell asleep on the couch, but when she woke up, "Erv was acting weird" and "acting like he did something wrong." When Mr. Betts left later that day, M.C.'s mother asked her, "Where did he touch you?" M.C. replied, "On my private part." Her mother "got mad" and told M.C.'s grandmother. M.C. then went to her friend, Jennifer's, house that day and told Jennifer and Jennifer's mother "what happened." (Rp. 23)

M.C. also claimed she told her school guidance counselor, Ms. Mazzola, "about the bad things that happened to [her]." (Rp. 24)

D. Trial

On 10 November 2015, two years after M.C. reported the inappropriate touching, police arrested Mr. Betts. On 25 April 2016, the State indicted him. (Rpp. 1, 5-6).

1. M.C.'s testimony

M.C. claimed Mr. Betts didn't live with her mother and he rarely slept over. M.C. also said she didn't have a good relationship with her mother when she lived with her. (T2pp. 141, 146, 148 150)

a. Alleged domestic violence incidents

M.C. said Mr. Betts was nice at first, but claimed he became "aggressive" a few weeks after meeting him. M.C. claimed she saw Mr. Betts punch and slap her mother in the face and arms, and claimed her mother and Mr. Betts frequently argued. (T2pp. 151, 152)

When the prosecutor asked her to describe her mother's injuries from the fights, M.C. described an incident where her mother's screaming woke her up one night. M.C. claimed her mother was "bloody" and Mr. Betts was yelling at her. M.C. claimed she saw scratches and handprints on her mother's arms and legs after the fight. (T2pp. 152-153)

The prosecutor leadingly asked if she recalled an incident where Mr. Betts "tried to get into the home?" M.C. claimed her mother had woke her one morning and when "she [M.C.] opened the blinds" she saw Mr. Betts outside their apartment holding a gun and "trying to get into" the apartment by "banging on the door" and "yelling." M.C. claimed Mr. Betts broke through the front door and banged on the bedroom door. Mr. Betts left after her mother called the police. M.C. claimed this incident occurred after Mr. Betts had touched her inappropriately. (T2pp. 174-175, 212-214)

When the prosecutor asked if Mr. Betts had ever "hit" or "put his hands" on her, M.C. mentioned an incident where Mr. Betts "slapped" her leg "hard" because he didn't like how she was "joking around" with him. (T2pp. 170-171, 203)

b. Alleged inappropriate touching incidents

M.C. claimed Mr. Betts touched her inappropriately three times.

(1). First alleged incident

M.C. claimed said she was in bed with her mother and Mr. Betts wearing pajamas, *i.e.*, pants and a shirt. When her mother went to the bathroom, Mr. Betts rolled over and touched – in a "rubbing motion" – her vagina. His fingers didn't penetrate her vagina. Mr. Betts continued touching her as she tried to roll away, but she couldn't because Mr. Betts had his arm around her. M.C. claimed she eventually rolled away, got off the bed, and walked into the living room. (T2pp. 154-158, 208)

When the prosecutor leadingly asked if she recalled "falling" from the bed, M.C. replied, "I guess he was trying to stop me. And… I kind of fumbled over… the mini refrigerator in the room… I fell out of the bed and the refrigerator tipped over because I hit my head on it." M.C. claimed Mr. Betts followed her into the living room and threatened her not to tell anyone. M.C. claimed her mother didn't come out of the bathroom when she knocked over the mini-fridge or when Mr. Betts followed her into the living room and threatened her. (T2pp. 158-160, 206-208)

M.C. said Mr. Betts spent the night, but after he left the following morning, M.C. claimed she told her mother about the incident later that day when they were at her aunt and uncle's house. M.C. claimed her mother told her she "needed to move on with life." (T2p. 162)

(2). Second alleged incident

When the prosecutor asked her to describe the second incident, M.C. said, "[I]t was pretty much the same thing, but he touched me on my chest one day." M.C. claimed she was six when the breast touching incident occurred. M.C. changed her narrative, though, and said the "second time" involved Mr. Betts touching her vagina. She claimed she was in bed with her mother and Mr. Betts when Mr. Betts rolled over and "did the same thing" by "rubbing" her vagina. His fingers, again, didn't penetrate her vagina. M.C. claimed she got off the bed and walked into the living room. M.C. claimed she told no one about the second incident. (T2pp. 163-166, 208-210)

(3). Third alleged incident

M.C. claimed a third incident occurred while she was doing homework beside the coffee table. M.C. claimed, "[Mr. Betts] was sitting on the couch and I was at the coffee table sitting on the floor doing my homework, and he leaned over and put his hand in my shirt… [and] rubbed [my chest area]." M.C. claimed her mother was in the kitchen. After the incident, Mr. Betts went into the kitchen and talked with her mother. (T2pp. 166-168)

After discussing the third incident, the prosecutor asked, "Was there another time that you recall [Mr. Betts] touching you?" M.C. replied, "No." M.C. claimed she never told anyone from her elementary school, including her guidance counselor, about Mr. Betts's inappropriate touching. (T2pp. 169, 177, 203)

M.C. claimed her trauma narrative (S-1) contained "accurate statements" regarding the three inappropriate touching incidents. (T2pp. 221-222)

2. Fulton McSwain's testimony

McSwain discussed M.C.'s forensic interview, including her inappropriate touching and domestic violence allegations. Also, after trial counsel and the prosecutor redacted a few lines from McSwain's report, the trial court entered it (S-6) into evidence with no objection(s) from trial counsel. (T4p. 79)

a. Alleged domestic violence incidents

McSwain discussed a March 2013 incident M.C. mentioned where her mother told Mr. Betts to leave the apartment. This resulted in a physical altercation between her mother and Mr. Betts where Mr. Betts pushed her mother down causing her to hit her head on the counter. (T3pp. 79-80)

McSwain said M.C. told him about "additional" domestic violence incidents she allegedly witnessed. When the prosecutor asked, "And was there anything [M.C.] said about seeing her mom hurt in any way?", McSwain replied, "[M.C.] described one incident… [where] she saw her mom with a black eye. She stated her mom came

running to her and she had blood coming from everywhere." M.C. told McSwain she called the police, who took her mother to the hospital. (T3p. 81)

McSwain said M.C. "described another incident" where Mr. Betts tried to "break into" her mother's apartment and she "believed" he "had a gun[.]." M.C. claimed Mr. Betts "yank[ed]" at the "door to the point" the "chain lock broke off," forcing her and her mother to move a dresser in front of the door to prevent him from coming inside. McSwain asked M.C. how she "felt about" Mr. Betts. M.C. said her mother "needed to leave Mr. Betts… before she gets really hurt." McSwain also mentioned the "slapping" incident where Mr. Betts allegedly slapped M.C.'s leg "really hard" while saying, "Fuck you, bitch." (T3pp. 78-79, 81-82)

b. Alleged inappropriate touching incidents

McSwain said M.C. mentioned two inappropriate touching incidents.

(1). First alleged incident

During the first incident, Mr. Betts "rubbed" her vagina while she was in bed with him and her mother. When her mother went to the bathroom, Mr. Betts rolled towards her, put his hands up her nightgown and inside her underwear, and "rubbed" her vagina in a "circular motion." M.C. rolled away from Mr. Betts, but he continued rubbing her vagina, so she rolled over again, but this time she rolled off the bed, striking her head on the mini-fridge next to the bed. At this point, M.C. claimed her mother exited the bathroom, consoled her, and carried her into the living room. M.C. claimed

Mr. Betts rolled over and acted like he was asleep when her mother exited the bathroom. (T3pp. 83-90)

M.C. claimed after her mother placed her on the living room couch, Mr. Betts exited the bedroom, approached her, and threatened her. Despite the threat, M.C. claimed she told her mother about the incident at her Aunt Tori's house. M.C., though, couldn't recall when she'd told her mother. She claimed, however, when she told her mother, her mother replied, "Well, I guess he did. Life had moved on." (T3pp. 91-92)

(2). Second alleged incident

When McSwain asked if there were other times Mr. Betts touched her, M.C. claimed, "[H]e kept doing it over and over again." M.C., though, didn't know the exact number of times and couldn't give specifics about the repeated incidents. She initially claimed the first incident occurred in the summer of 2012, but then claimed they occurred between January 2013 and March 2013. (T3pp. 93-94, 155)

M.C. claimed the incidents "always occurred" in her mother's bed. Her mother, she claimed, was sometimes in bed with her and Mr. Betts, but she'd be sleeping during the incidents. M.C. claimed she routinely tried waking her mother, but her mother always remained asleep. (T3pp. 95, 164, 165)

M.C. mentioned a breast touching incident where Mr. Betts allegedly reached his hand inside her shirt and touched her breasts. This incident, M.C. claimed, occurred on the living room couch while her mother was outside smoking a cigarette. (T3pp. 96, 165)

3. Mary Katherine Masola's testimony

Masola first met with M.C. on 9 December 2013. According to Masola, "[M.C.] came to me for neglect, sexual abuse, and [domestic] violence." (T3p. 180) Masola assessed M.C. for and diagnosed her with PTSD. (T4pp. 7-8, 37-38) Masola said M.C. had "significant evidence of trauma," *i.e.*, she "had flashbacks of what happened" – she "was hyper-vigilant" – she had "difficulty sleeping" – she was "very fearful," "anxious," and "upset" – her speech was "rapid" – her eyes were "big" – and she "endorsed suicidal thoughts." (T4pp. 6-7) Masola said M.C.'s behavioral symptoms were consistent with someone who'd been sexually abused. (T4pp. 25-27)

The prosecutor introduced – over trial counsel's objection – M.C.'s trauma narrative (S-1). (T4pp. 10, 16-17, 34-36) The trial court, though, gave an instruction, limiting its use to corroborative purposes. (T4p. 39) Masola mentioned the different chapter titles in the trauma narrative. The prosecutor had Masola read Chapter 3 ("When Erv touch me") into the record. (T4pp. 39-43)

Masola said M.C. claimed Mr. Betts had touched her three times. Twice in the bedroom when her mother was present, and once on the living room couch. During the first incident, Mr. Betts placed his hand under the blanket and then put his hand down her pants and touched her vagina. During the second incident, M.C. was in the living room when Mr. Betts "reached over and put his hand inside [her] shirt." The third incident occurred while M.C. was napping on the living room couch when Mr. Betts "came over and put his hands in [her] pants and touched [her]." (T4p. 19)

Masola also discussed multiple domestic violence incidents mentioned in M.C.'s trauma narrative: "[M.C.] reported several incidents of her mom… getting a black eye, having a bloody nose, [and] having to call the ambulance." Masola also mentioned the "gun incident" where Mr. Betts allegedly broke into their apartment with a gun. According to Masola, the gun incident was the "most traumatic" incident because "[M.C.] thought she was going to die." (T4pp. 20, 22)

Toward the end of Masola's direct-examination, the prosecutor asked several questions about how *real-life trauma* can impact a child's brain development, but to answer these questions Masola had to effectively vouch for the credibility of M.C.'s sexual abuse and domestic violence allegations. Trial counsel timely objected to these improper questions. Not deterred, however, from having Masola tell jurors she believed M.C.'s sexual abuse and domestic violence allegations, the prosecutor asked Masola to opine on the credibility/believability of M.C.'s "trauma" allegations. Masola told jurors that M.C. had, *in fact*, "experienced a number of traumas," including sexual abuse and domestic violence:

> Q. And when you asked her what was most traumatic, were these the events that she relayed to you?
>
> A. Those were some of the events she -- the most traumatic was the gun.
>
> Q. And what do you mean by that?
>
> A. She described the most traumatic incident was when Erv, she said, came to the house with a gun and tried to get in the house, and she thought she was going to die.

Q. And based on your training and experience, how would thoughts or fears of death affect a child of that age?

A. Um -- for one thing, the brain, when it's presented with a trauma or an event like that, and it's chronic -- maybe chronic, the primitive brain, which is the limbic system, gets triggered, so it's -- you know, because it's either –

MS. TOOMES: Well, objection as to –

THE COURT: Sustained.

THE WITNESS: Okay.

Q. (By Ms. Chavious) How does trauma affect the brain?

A. Okay.

MS. TOOMES: Objection.

THE COURT: Sustained.

Q. (By Ms. Chavious) And there affects that trauma has on the brain?

A. Yes.

Q. And does that affect subsequent behavior?

A. Yes.

Q. In what ways?

A. A child who has experienced chronic trauma will be kind of in the alert stage all the time. It can affect behavior, how she thinks. It actually changes the brain development.

MS. TOOMES: Objection.

THE COURT: Sustained.

Q. (By Ms. Chavious) And when you make a diagnosis of post-traumatic stress disorder, are there several types of traumatic events that could lead to that diagnosis?

A. Yes.

Q. And would violence in the home be one of those?

A. Yes.

Q. And what about domestic violence or witnessing domestic violence?

A. Yes. It's one of the questions.

Q. *And what about sexual abuse?*

A. *Yes.*

Q. *Would it be fair to say that McKayla had experienced a number of traumas*?

A. *Yes.*

Q. And that was the basis of your therapy?

A. Yes.

(Tp4. pp., 19-21).

Trial counsel didn't object to the italicized Q/A.

COA OPINIONS

A. Judge Tyson's dissent

1. "Disclosure" terms claim

Judge Tyson said four State witnesses – Melody Archie, Crystal Prichard, Fulton McSwain, and Mary Katherine Masola – as well as the prosecutor repeatedly used the words "disclose," "disclosed," or "disclosure" to refer to what M.C. said about her sexual abuse allegations against Mr. Betts.[4]

Quoting from *State v. Jamison*, ___ N.C. App. ___, ___ S.E.2d ___, 2018 N.C. App. LEXIS 1168 (Dec. 4, 2018) (unpublished), *review denied*, ___ N.C. ___, 826 S.E.2d 701 (2019)), Judge Tyson said this about these terms:

> First, we note the frequent use of the terms "disclosure" and "disclose." A disclosure is "[t]he act or process of making known something that was previously unknown; *a revelation of facts*[.]" *Disclosure, Black's Law Dictionary* (9th ed. 2009). The use of this word suggests that there was *something factual to divulge, and is itself a comment on the declarant's credibility and the consequent reliability of what is being revealed.* [The] repeated use of this term len[ds] credibility to [[a] child's] testimony.

Dissent, p. 14 (quoting *State v. Jamison*, App. LEXIS 1168, at *12-13) (emphasis added by Judge Tyson).

Judge Tyson said the repeated use of these words "constitute[d] inadmissible bolstering and vouching" because these words "bolster[ed] and vouch[ed] that M.C.'s statements were 'revelations' and were accepted and treated as factually true." *Id.*, pp.

[4] Exhibit 1 lists all the instances when Melody Archie, Crystal Prichard, Fulton McSwain, Mary Katherine Masola, and the prosecutor used these terms.

15, 16. Put differently, their repeated "suggest[ed] that there was something factual to divulge, and [was] a comment on [M.C.'s] credibility and the consequent reliability of what [she'd] revealed.'" *Id.*, p. 16 (quoting *State v. Jamison*, App. LEXIS 1168, at *12-13). This, Judge Tyson said, "amounted to testimony 'to the effect that [M.C. was] believable, credible, or telling the truth[.]" *Id.*

Judge Tyson said the repeated use of these words constituted plain error.

First, Judge Tyson said outside of M.C.'s allegations, there was no other evidence of guilt, *e.g.*, no eyewitnesses or physical evidence. *Id.*, pp. 21, 22. The State's "entire" case, Judge Tyson said, "relie[d] solely" on M.C.'s "uncorroborated" inappropriate touching and domestic violence allegations. *Id.*, p. 22.

Second, Judge Tyson said the evidence strongly suggesting M.C. had a "motive" to "fabricate" her allegations. For instance, in her trauma narrative M.C. said she became angry when Mr. Betts introduced himself as her mother's boyfriend. She also described how she became angry when she saw Mr. Betts kissing her mother. M.C. wrote, "I felt mad because I started to think about my mom and dad and I was afraid that [Mr. Betts] and my mom would get married and I would have to call him dad." *Id.*, p. 22. Also, at trial M.C. testified she didn't like Mr. Betts and told her mother about her disdain for him. *Id.*, p. 23.

Third, Judge Tyson mentioned how M.C. "recounted" multiple "domestic violence" incidents, but he said "[n]one… were independently reported, corroborated or verified." *Id.*, p. 23.

Fourth, Judge Tyson said M.C.'s multiple narratives – written and oral – were "inconsistent in the number of times, manner, and places [Mr. Betts] allegedly touched her and whether M.C. had informed her mother, grandmother, aunt, friends, other family members, or teachers of the alleged incidents." *Id.*, p. 23. Judge Tyson then spent six pages discussing the inconsistencies. *Id.*, pp. 23-29.

Fifth, two of the State's witnesses who repeatedly used the terms "disclose," "disclosed," or "disclosure" were presented as "experts": Fulton McSwain and Mary Catherine Masola. According to Judge Tyson, jurors "likely" gave "significant weight" to McSwain's and Masola's repeated use of these words "[b]ased on their qualifications." *Id.*, p. 30.

Sixth, Judge Tyson said the repeated use of these terms "placed particular significance upon the witnesses' descriptions and interpretations of M.C.'s statements." *Id.*, p. 30.

In the end, Judge Tyson said, "With the absence of any corroborative witnesses, documents, or physical evidence, the witnesses' improper bolstering testimony and vouching for M.C.'s credibility was prejudicial to [Mr. Betts] and had a probable impact upon the jury's finding of guilt." *Id.*, p. 30.

2. Domestic violence and cumulative prejudice claims

After finding plain error regarding the "disclosure" claim, Judge Tyson didn't write an exhaustive analysis regarding the domestic violence evidence claim. Judge Tyson simply said, "The State's introduction of alleged domestic violence by [Mr. Betts],

without any corroborating evidence," was "prejudicial and constitutes plain error." *Id.*, p. 37. Judge Tyson addressed the cumulative prejudice claim and said the "cumulative effect" of the impermissible vouching and inadmissible domestic violence evidence prejudiced Mr. Betts, "necessitate[ing] reversal." *Id.*, p. 37.

B. The majority's opinion

1. "Disclosure" terms claim

Judge Tyson based his dissent on *Jamison*. The majority read *Jamison* differently. It said *Jamison* misinterpreted *State v. Frady*, 228 N.C. App. 682, 747 S.E.2d 164 (2013). According to the majority, *Frady* said "the term 'disclosure' merely means the content of the victim's description of abuse," it "d[id] not stand for the proposition that the use of the word 'disclosure' was error." *Majority,* p. 13. Thus, "[b]ecause *Jamison*" wasn't "controlling" or "persuasive" and it improperly "analyze[d] *Frady*," the majority "declined to follow" *Jamison's* "reasoning." *Id.*

The majority's plain error analysis also differed with Judge Tyson. Even if the repeated use of these terms constituted error, the majority said the error wasn't plain error because "[t]here was substantial evidence from which the jury could find [Mr. Betts] touched M.C. improperly." *Id.*, p. 14. The majority identified the following evidence as the "substantial" evidence:

First, M.C. "testified about two incidents of sexual assault in which [Mr. Betts] placed his hand under her clothing and rubbed her vagina, and one incident in which [Mr. Betts] placed his hand in her shirt and rubbed her chest." *Id.*, p. 13-14.

Second, M.C. "provided details and descriptions of these incidents and surrounding circumstances which the jury could consider and weigh in light of the other evidence presented." *Id.*, p. 14.

Third, the jury "observed" M.C.'s forensic interview. *Id.*

Fourth, the jury "considered" McSwain's report (S-6). *Id.*, pp. 13-14.

The majority said "that there may have been inconsistencies" in M.C.'s accounts wasn't "the issue" because the "jury had the opportunity to observe [M.C.'s] testimony and make its own independent determination about her believability and credibility[.]" *Id.*, p. 14.

2. Domestic violence and cumulative prejudice claims

The majority rejected the domestic violence claim by relying on *State v. Espinoza-Valenzuela*, 203 N.C. App. 485, 692 S.E.2d 145 (2010), which "held that incidents of domestic violence are 'probative of the victim's motivation not to immediately report crimes' in sexual assault cases." *Id.*, p. 20 (quoting *State v. Espinoza-Valenzuela*, 203 N.C. App. at 491, 692 S.E.2d at 151). The majority said the domestic violence evidence wasn't "substantially more prejudicial than probative, and [it] went directly to [M.C.'s] fear or apprehension in reporting the sexual abuse." *Id.*

The majority rejected the cumulative prejudice claim because it found each claim meritless. *Id.*, p. 21, n.2.

ARGUMENTS

I. Mary Katherine Masola, M.C.'s therapist and one of the State's expert witnesses, improperly vouched for M.C.'s credibility, which probably impacted the jury's verdicts

A. Standard of review

The COA never addressed the Masola claim.[5] Thus, the Court's review is one of first impression, meaning its standard of review is *de novo*. Even if the COA had ruled on the Masola claim, the Court's review would be *de novo*. *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994). An error constitutes plain error if it probably impacted the jury's verdicts. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

B. Introduction

This is a classic "he said, she said" case. M.C. claimed Mr. Betts touched her inappropriately on three occasions. Mr. Betts denied these allegations. These cases are difficult to deliberate and decide, especially when, like here, the State presents no physical evidence to corroborate the child's allegations. Thus, it's imperative the trial court prohibit jurors from hearing or considering inadmissible evidence, especially testimony that unfairly bolsters the child's credibility.

[5] Counsel has no idea why neither the majority nor dissent addressed the Masola claim.

M.C.'s therapist and one of the State's experts, Katherine Masola, told jurors she'd talked extensively with M.C. regarding her sexual abuse and domestic violence. Curious at how Masola perceived M.C.'s allegations, the prosecutor asked her if she believed M.C. "had," in fact, "experienced a number of traumas," including sexual abuse. Masola replied, "Yes," and said she treated M.C. because she'd, in fact, suffered sexual abuse and domestic violence. (T4p. 21)

Masola's testimony constituted impermissible vouching. Masola not only made a sexual abuse diagnosis in the absence of any physical evidence suggesting there was abuse, she effectively told jurors she found M.C.'s sexual abuse allegations credible and truthful because she believed M.C. had, in fact, "*experienced* a number of traumas," including sexual abuse. No other interpretation of her testimony is reasonable.

Moreover, although trial counsel didn't object, Masola's impermissible vouchering constituted plain error. By diagnosing sexual abuse based solely on her conversations with M.C. and telling jurors she found M.C.'s allegations credible and truthful, Masola unfairly impacted the jury's credibility assessment of M.C. What better way to boost M.C.'s credibility than to have an experienced child abuse expert, who'd interviewed M.C. extensively, tell jurors she found M.C.'s allegations so credible and truthful that she diagnosed sexual abuse absent any physical evidence to support or corroborate this diagnosis. And the fact Masola testified as an expert, *i.e.*, someone jurors generally find more credible than fact witnesses, drives home the plain error argument even more.

Like a doctor using a defibrillator to bring back a patient from the brink of death, Masola's improper, *sleight of hand* vouching revived the State's case that – up until that point – was going nowhere for several reasons, not the least of which was M.C.'s inability to keep her allegations consistent. Masola's impermissible vouching, therefore, had a probable impact on the jury's verdicts.

C. The case law

The "jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial – determination of the truth." *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986). Thus, it's "fundamental to a fair trial" that a witness's credibility "be determined by the jury." *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995). To protect the jury's truth- and credibility-determining provinces, witnesses may not vouch for the accuser's credibility. *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd*, 363 N.C. 826, 689 S.E.2d 858-859 (2010). This rule applies to experts, *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988); *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598, *aff'd* 356 N.C. 428, 571 S.E.2d 584 (2002), and fact witnesses. *State v. Freeland*, 316 N.C. 13, 16-17, 340 S.E.2d 35, 36-37 (1986).

Expert testimony is permitted so long as the expert's opinions are (1) relevant, (2) reliable, (3) helpful to the jury, and (4) based on an adequate scientific foundation. *State v. McGrady*, 368 N.C. 880, 884-887, 787 S.E.2d 1, 6-7 (2016). Experts, more

importantly, can't opine that they find the accuser credible. *State v. Heath*, 316 N.C. 337, 341 S.E.2d 565 (1986).

These two strands of law lead to a third strand focusing on child sex cases: If there's no physical evidence corroborating the child's sexual abuse allegations, the State can't introduce an expert who tells jurors, despite the absence of physical evidence, she still believes the child's allegations and believes the child was, in fact, sexually abused by the defendant, and grounds her belief/finding on nothing more than the child's statements to her or another person, *e.g.*, social worker, nurse, law enforcement officer, regarding said allegations. *State v. Towe*, 366 N.C. 56, 61-64, 732 S.E.2d 564, 567-569 (2012); *State v. Stancil*, 355 N.C. 266, 266-267, 559 S.E.2d 788, 789 (2002); *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987); *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179, *aff'd per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001); *State v. Bates*, 140 N.C. App. 743, 538 S.E.2d 597 (2000); *State v. Parker*, 111 N.C. App. 359, 432 S.E.2d 705 (1993).[6]

The key factor in this third stand is the "helpful to the jury" factor. "[I]n determining whether expert medical opinion is to be admitted into evidence the inquiry should be… whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position

[6] *See also State v. Delsanto*, 172 N.C. App. 42, 48, 615 S.E.2d 870, 874 (2005); *State v. Ewell*, 168 N.C. App. 98, 606 S.E.2d 914 (2005); *State v. Bush*, 164 N.C. App. 252, 595 S.E.2d 715 (2004); *State v. Couser*, 163 N.C. App. 727, 594 S.E.2d 420 (2004); *State v. O'Connor*, 150 N.C. App. 710, 712, 564 S.E.2d 296, 297 (2002); *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 90 (1997).

to have an opinion on the subject than is the trier of fact." *State v. Trent*, 320 N.C. at 614, 359 S.E.2d at 465 (citation omitted).

In *Towes*, the defendant was charged with and convicted of three counts of first-degree sexual assault with a child and two other sexual offenses. The defendant was the child's father. *State v. Towe*, 366 N.C. at 56-57, 732 S.E.2d at 564-565. At trial, the child testified, but her testimony was – in multiple places – inconsistent with her pre-trial statements. *Id.* at 63, 732 S.E.2d at 568. After accusing her father, Dr. Everett examined the child, but the exam produced no physical evidence indicative of sexual abuse. *Id.* at 59, 732 S.E.2d at 566.

Despite the absence of physical evidence, Dr. Everett told jurors she still believed the child had, in fact, been sexually abused by her father. Dr. Everett did this in a *sleight of hand* way eerily similar to how Masola did it at Mr. Betts's trial. Dr. Everett told jurors that 70 to 75 percent of children who've been sexually abused "have no abnormal findings" during their medical exams, meaning their "exams are… completely normal[.]" *Id.* at 60, 732 S.E.2d at 566. With this foundation laid, the prosecutor and Dr. Everett had this exchange:

> Q And that's the category that you would place [the child] in; is that correct?
>
> A Yes, correct.

Id.

Dr. Everett, consequently, told jurors she believed the child had, in fact, been sexually abused even though the child's medical exam produced no physical evidence indicative of sexual abuse. The defendant's attorney didn't object to Dr. Everett's testimony. On direct appeal, the defendant argued Dr. Everett's testimony constituted impermissible vouching and it had a probable impact on the jury's verdicts. The Court of Appeals agreed and granted a new trial. This Court granted the State's petition and affirmed the new trial grant.

This Court easily concluded Dr. Everett's challenged testimony constituted impermissible vouching. *Id.* at 62, 732 S.E.2d at 568. Moreover, despite the fact the claim had to be reviewed for plain error, the Court said the following facts established plain error:

First, the Court recognized the State's case "turned on" the child's "credibility." *Id.* at 63, 732 S.E.2d at 568. This was significant to the Court because the "record indicate[d] that the [child's] recitations of defendant's actions were not entirely consistent." *Id.* at 63, 732 S.E.2d at 568. The Court said it couldn't "overlook these discrepancies in the record when evaluating the probable impact of Dr. Everett's testimony on the jury's verdict." *Id.*

Second, when the State called Dr. Everett as an expert witness, the State rejected the defendant's offer to stipulate to her expertise in pediatrics and to qualify her as a child sexual abuse expert. After rejecting the stipulation, the prosecutor presented substantial evidence regarding Dr. Everett's education, training, and experience,

including the fact she'd examined over 5,000 children for sexual abuse, she'd testified in over 100 court proceedings, and courts had repeatedly accepted her as a child sexual abuse expert. *Id.* at 63-64, 732 S.E.2d at 568-569.

Based on the prosecutor's efforts to present Dr. Everett as an "extraordinarily well-versed and experienced" child sexual abuse expert, the Court said this about how Dr. Everett's experience and improper vouching testimony probably impacted the jury's verdicts:

> In light of Dr. Everett's unquestioned stature in the fields of pediatric medicine and child sexual abuse, and her expert opinion that, even absent physical symptoms, the victim had been sexually abused, we are satisfied that Dr. Everett's testimony stilled any doubts the jury might have had about the victim's credibility or defendant's culpability, and thus had a probable impact on the jury's finding that defendant is guilty.

Id. at 64, 732 S.E.2d at 569.

This Court, consequently, found plain error.

Trent is also on point. In *Trent*, the defendant was convicted of first-degree rape and taking indecent liberties with a child. At trial, the child testified to specific instances of sexual abuse between her and the defendant. The defendant testified and denied the allegations. The State also introduced Dr. Markello as an expert in medicine and pediatrics. Dr. Markello interviewed and examined the child regarding her sexual abuse allegations. Dr. Markello's exam produced no physical evidence of sexual abuse, but

he still made a "diagnosis" of "sexual abuse" based only on the child's statements to him.

This Court said Dr. Markello's "diagnosis" should've been excluded: "Given the limited basis recited by Dr. Markello for his diagnosis, there is nothing in the record to support a conclusion that *he was in a better position than the jury* to determine whether the victim was sexually abused." *State v. Trent*, 320 N.C. at 614, 359 S.E.2d at 465 (emphasis added).

Although *Trent* is a harmless error case, this Court's prejudice analysis is still probative. The Court found prejudice for the following reasons:

First, the "central contest in the… case was over credibility." *Id.* at 615, 359 S.E.2d at 466.

Second, the child didn't immediately report the alleged sexual abuse. *Id.*

Third, the child had a motive to fabricate her allegations because there "was considerable evidence of conflict in the family arising out of resentment over defendant's second marriage." *Id.*

Fourth, before the child's accusations, the "defendant had an excellent reputation in the community." *Id.*

While *Towe* and *Trent* are controlling, numerous other COA cases are instructive. For instance, *State v. Ryan*, 223 N.C. App. 325, 734 S.E.2d 598 (2012) said this about plain error review when the State's case hinges solely on the accuser's allegations:

> Notably, a review of relevant case law reveals that where the evidence is fairly evenly divided, or where the evidence consists largely of the child victim's testimony and testimony by corroborating witnesses with minimal physical evidence, especially where the defendant has put on rebuttal evidence, [improper vouching by an expert] is generally found to be prejudicial, even on plain error review, since the expert's opinion on the victim's credibility likely swayed the jury's decision in favor of finding the defendant guilty of a sexual assault charge.

Id. at 337, 734 S.E.2d at 606.

D. Masola's testimony constituted impermissible vouching that had a probable impact on the jury's verdicts

1. Masola's testimony constituted impermissible vouching

There's no question Masola's challenged testimony constitutes impermissible vouching. The State presented no physical evidence proving or corroborating M.C.'s sexual abuse allegations. Thus, no matter what Masola thought of M.C.'s sexual abuse allegations based on her extensive therapy with her, Masola couldn't tell jurors she believed M.C.'s allegations or that she made a sexual abuse diagnosis based on her in-depth discussions with M.C. Yet, this is exactly what Masola did when she told jurors M.C. had, in fact, suffered numerous traumas, including sexual abuse.

Before Masola gave her challenged testimony, she and the prosecutor were discussing her PTSD diagnosis and what types of traumas were associated with or could lead to a PTSD diagnosis. Masola clearly told jurors sexual abuse and domestic violence were two types of traumas that could lead to PTSD. Masola then told jurors M.C. had, in fact, suffered these two types of traumas. Notably, the only time M.C. mentioned

sexual abuse or domestic violence to Masola was when she discussed Mr. Betts and how he supposedly touched her inappropriately and committed various acts of domestic violence against her mother.

Consequently, when Masola told jurors M.C. had, in fact, suffered sexual abuse and domestic violence, jurors knew or had to know who committed the sexual abuse and domestic violence. Thus, like the *sleight of hand* vouching committed in *Towe*, Masola told jurors she believed M.C.'s sexual abuse allegations, despite the fact there was no physical evidence indicative of sexual abuse. This constituted impermissible vouching.

2. Masola's improper vouching probably impacted the jury's verdicts

a. The case turned on M.C.'s credibility

Like *Towe*, this case turned on M.C.'s credibility because the State presented no physical or eyewitness evidence to prove or corroborate M.C.'s allegations. M.C., moreover, couldn't keep her stories straight.

First, when Archie interviewed M.C. on 25 October 2013, M.C. mentioned – in passing – an alleged inappropriate touching incident. When Archie re-interviewed her on 4 November 2013, M.C. mentioned a "bedroom" incident where Mr. Betts rubbed and poked at her vagina. In this narrative, though, she never mentioned falling out of the bed and hitting her head on the mini-fridge beside her mother's bed. Likewise, she never mentioned her mother carrying her into the living room and placing her on the

couch or Mr. Betts threatening her once on the couch. M.C. told Archie she got off the bed herself, walked into the living room, and watched T.V. after the incident.

Second, M.C.'s narrative expanded to multiple incidents when she spoke to Fulton McSwain. Regarding the "bedroom" incident, M.C. said her mother told her *she had to* sleep with her and Mr. Betts. When her mother went to the bathroom, Mr. Betts placed his hand up her *nightgown* and into her underwear and rubbed her vagina. Significantly, when she rolled away from Mr. Betts, M.C. claimed she fell off the bed and hit her head on the mini-fridge beside the bed, which caused her mother to exit the bathroom and ask what was going on. M.C. claimed her mother carried her to the living room, placed her on the couch, and returned to the bedroom. Moments later, though, M.C. claimed Mr. Betts exited the bedroom, walked up to her, and threatened her. M.C. claimed she her mom about the incident at her aunt Tory's house, but M.C. never said it was the day after the alleged incident. Also, after telling her mother about the incident, she claimed her mother dismissed her allegation and didn't call and confront Mr. Betts.

Third, M.C.'s "bedroom" narrative changed again when she met with Masola and wrote her trauma narrative. In this version, M.C. *asked* her mother if she could sleep with her. M.C. claimed she had on pajamas – *not a nightgown*. M.C. claimed Mr. Betts rubbed her vagina again, but this time *her mother never left the bed* and went to the bathroom. M.C. claimed her mother was asleep when Mr. Betts touched her. Likewise, M.C. claimed she got off the bed *unscathed*, *walked into the living room*, and watched T.V.

on the couch. Furthermore, when she told her mother the *next day*, she claimed *her mother immediately called Mr. Betts* and confronted him about the incident.

Fifth, at trial M.C. mentioned two "bedroom" incidents. During the first incident she had on pajamas – not a *nightgown*. Likewise, when she initially described this incident, she claimed she quickly "got out of the bed" and "went into the living room." She never mentioned hitting her head on the mini-fridge. Realizing M.C.'s trial narrative differed from her forensic interview narrative, the prosecutor leadingly asked, "Do you recall if you *fell* getting out of the bed?" M.C. – unsurprisingly – tweaked her narrative and said, "I guess he was trying to stop me. And… I kind of fumbled over and… fell out of the bed and the refrigerator tipped over because I hit my head on it." (T2pp. 158-159)

M.C., though, still claimed she walked from the bedroom to the living room, meaning *her mother didn't exit the bathroom, console her, and carry her to the living room couch*. Furthermore, when she told her mother the next day about the incident *at her aunt's house*, M.C. never mentioned her mother calling Mr. Betts and confronting him.

Sixth, trial represented the first time M.C. mentioned a second "bedroom" incident. She mentioned one "bedroom" incident and one "living room" incident to McSwain, while she mentioned one "bedroom" incident and two "living room" incidents to Masola.

Seventh, at trial M.C. discussed two incidents where Mr. Betts allegedly touched her vagina and one incident where he allegedly touched her breasts. After discussing these three incidents, the prosecutor asked, "Was there another time that you recall [Mr. Betts] touching you?" M.C. replied, "No." (T2p. 169) In her trauma narrative, however, M.C. mentioned *one* incident where Mr. Betts allegedly touched her vagina and *two* incidents where he allegedly touched her breasts. Moreover, when the prosecutor and trial counsel asked M.C. about her trauma narrative, M.C. claimed it contained "accurate statements" regarding Mr. Betts's inappropriate touching. (T2pp. 221-222)

Eighth, at trial M.C. said she never told her teachers or guidance counselor about Mr. Betts's inappropriate touching. (T2pp. 177, 203) In her trauma narrative, however, she claimed she'd told her guidance counselor. (Rp. 24)

Ninth, during M.C.'s forensic interview, she initially said the incidents occurred during the summer of 2012, but toward the end of the interview she claimed the incidents occurred between January 2013 and March 2013. (T3p. 155; T4p. 123; S-4)

Besides these inconsistences, there are other factors impacting M.C.'s credibility. For instance, despite M.C.'s testimony that she told her mother, grandmother, her friend Jennifer, and her guidance counselor about the inappropriate touching, the State presented none of these witnesses to corroborate her testimony. Next, M.C. repeatedly admitted she didn't like Mr. Betts, which gave her a strong motive to fabricate her allegations. Also, M.C. reported her sexual abuse allegations to the DSS, McSwain, and

the WSPD in November and December 2013, yet the WSPD didn't issue a warrant for Mr. Betts's arrest until 10 November 2015 – nearly two years later. (Rpp. 1-2)

b. As in *Towe*, the prosecutor spent considerable time having Masola testify about her child sexual abuse experience

Testimony "emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect." *Ake v. Oklahoma*, 470 U.S. 68, 81 n.7 (1985). This Court recognized this reality in *Towe* when it discussed the prosecutor's blatant attempt to make Dr. Everett appear to be the child abuse whisper, *i.e.*, a well-credentialed expert who could diagnosis sexual abuse without a shred of physical evidence. *State v. Towe*, 366 N.C. at 64, 732 S.E.2d at 569.

Here, before the prosecutor asked Masola one question regarding M.C., she had Masola discuss her extensive child sexual abuse experience. Masola said she's been a child therapist since 1972, a licensed clinical social worker for the DSS since 2004, and her specialty was performing "comprehensive clinical assessments" of children she believed had been physically and/or sexually abused to determine if they exhibited symptoms of – or in fact suffered from – PTSD. (T3pp. 173-176)

Masola also told jurors she'd worked more than 1,000 cases involving child sexual abuse, that she'd testified as an expert "hundreds of times," and that over her forty year career she'd attended countless continuing education courses on treating trauma victims, particularly child sexual abuse victims. Based on this experience, jurors

heard the prosecutor ask the trial court to declare Masola an expert "in sexual abuse and pediatric counseling." The trial court obliged. (T3pp. 177-179)

Outside of M.C.'s testimony, Masola's testimony consumed the largest number transcript pages – 104 pages. (T3pp. 173-190; T4pp. 5-77) And during these 104 pages, Masola described her therapy with M.C., making it apparent to jurors Masola spent considerable time with M.C. Masola also told jurors how she'd diagnosed M.C. with PTSD, that she based her diagnosis on the fact *she believed* M.C. had "experienced a number of traumas," namely sexual abuse and domestic violence, and that the "basis of [M.C.'s] therapy" was to address the traumas she'd "experienced." (T4pp. 20-22)

3. Although the COA majority didn't address the Masola claim, the majority's comment about the strength of the State's evidence is wrong

Contrary to the majority's characterization of the State's case, the State didn't present substantial evidence supporting M.C.'s allegations. The State's case hinged on M.C., yet M.C.'s statements and testimony were riddled with significant and numerous inconsistencies.

Also, while the majority didn't address the Masola claim, it rejected Mr. Betts's other plain error challenges by claiming – or better yet, *assuming* – jurors mustn't have given much weight to M.C.'s inconsistencies because they "had the opportunity to observe [M.C.'s] testimony and make [their] *own independent determination* about her believability and credibility[.]" *Majority*, p. 14 (emphasis added). The majority is wrong.

There's nothing "independent" about the jury's assessment of M.C.'s credibility and believability, and that's the *crux* of the Masola claim. By telling jurors she found M.C.'s allegations credible and truthful, and that she believed M.C. had, in fact, "experienced" sexual abuse, Masola usurped the jury's function of determining credibility and irreparably tainted this critical jury function. In short, Masola's testimony "stilled any doubts the jury might have had about [M.C.'s] credibility or [Mr. Betts's] culpability, and thus had a probable impact on the jury's finding that [Mr. Betts] is guilty." *State v. Towe*, 366 N.C. at 64, 732 S.E.2d at 569.

Mr. Betts, therefore, is entitled to a new trial.

II. *Jamison* correctly concluded the frequent use of the words "disclose," "disclosed," and "disclosure" constituted impermissible vouching, meaning the frequent use of these terms during Mr. Betts's trial by the prosecutor, Melody Archie, Sgt. Crystal Prichard, and the State's two experts, Fulton McSwain and Mary Katherine Masola, constituted impermissible vouching, which probably impacted the jury's verdicts

A. Standard of review

The COA addressed this claim, making the Court's review *de novo*. *State v. Brooks*, 337 N.C. at 149, 446 S.E.2d at 590.

B. The State's repeated use of the words "disclose," "disclosed," and "disclosure" constituted impermissible vouching

Exhibit 2 lists all the times the prosecutor, Melody Archie, Sgt. Crystal Prichard, Fulton McSwain, and Mary Katherine Masola used the terms "disclose," "disclosed,", and "disclosure" when discussing M.C. statements. The frequent use of these terms constituted impermissible vouching because they lent credibility to M.C.'s testimony and allegations.

Mr. Betts's argument is premised on *State v. Jamison*, No. COA18-292, 2018 N.C. App. LEXIS 1168 (Dec. 4, 2018). In *Jamison*, the defendant raised a plain error improper vouching claim regarding, among other things, the frequent use of the terms "disclosure" and "disclose" by the prosecutor and Brenna Fairley, the child forensic specialist who interviewed the child and testified as an expert for the State at trial.

The COA "note[d]" the "frequent use of the terms 'disclosure' and 'disclose'" and said it rendered Fairley's testimony "inadmissible." The COA focused on the definition of "disclosure," which, the COA said, is "[t]he act or process of making

known something that was previously unknown; a revelation of facts[.]" *Id.* at *12-13 (quoting *Disclosure*, BLACK'S LAW DICTIONARY (9th ed. 2009)). "Disclosure," the COA added, "suggest[ed]" to jurors "there was something factual to divulge," meaning jurors could've reasonably interpreted, and likely did interpret, Fairley's frequent use of these terms to mean she was "comment[ing] on" the child's "credibility and the consequent reliability" of the child's allegations. Thus, "Fairley's repeated use of ['disclosure'] lent credibility to [the child's] testimony." *Id.* at *13.

Jamison's holding is correct and commonsensical.

First, *Jamison* starts with a fundamental presumption critical to our criminal jury system: jurors rely on the plain meaning of the words witnesses use while testifying. *State v. Withers*, 2 N.C. App. 201, 203, 162 S.E.2d 638, 640 (1968) ("Jurors are… presumed to understand the meaning of English words as they are ordinarily used."). Consequently, if a witness, prosecutor, or both, repeatedly uses the words "disclose," "disclosed," and "disclosure," jurors will rely on the plain meaning of these terms when determining the weight and impact of the witness's testimony.

Second, *Jamison* is premised on another fundamental presumption of the criminal jury system: jurors don't weigh words and testimony in a vacuum. Weight and significance are dependent on the witness's role in the State's narrative. In a child sexual abuse case, for instance, jurors will pay close attention to the prosecutor's questions as well as the testimony of those witnesses who interviewed, treated, or counseled the child. Thus, if the prosecutor and those witnesses who interviewed or treated the child,

repeatedly use the same word – "disclosed" – or a derivative of this word, when describing the child's statements about what the defendant allegedly did, jurors will note the repetition, the definition of "disclosed," and the role/significance of these witnesses, and then use these facts when determining M.C.'s credibility.

Third, *Jamison* combines the first two presumptions to lead to a reasonable and foreseeable holding: if jurors rely on a word's plain meaning, and the expert who interviewed the child repeatedly uses the words "disclose" and "disclosure" when describing how the child told her (the expert) about the alleged abuse, it's reasonable to presume jurors will find the child's testimony and allegations more credible simply because the expert repeatedly used a word that plainly means the child's allegations had a factual or evidentiary basis.

C. To understand the impact caused by the frequent use of the word "disclosed," the Court need only consider the other words these witnesses could've used to describe M.C.'s statements

These witnesses could've used the word "*mentioned*": *When I interviewed M.C., she "mentioned" Mr. Betts had touched her inappropriately three different times.* The word "mentioned," though, suggests a lack of detail regarding the thing "mentioned," thus casting doubt on the very thing "mentioned."

These witnesses could've used the word "said": *When I interviewed M.C., she "said" Mr. Betts had touched her inappropriately three different times.* Like the word "mentioned," the word "said" is a non-descript way of describing and asserting something without prove.

These witnesses could've used the word "alleged": *When I interviewed M.C., she "alleged" Mr. Betts touched her inappropriately three different times.* The word "alleged" is defined as "*to assert without proof.*" Thus, it's fair less incriminating than the word "disclosed."

These witnesses could've used the word "claimed": *When I interviewed M.C., she "claimed" Mr. Betts touched her inappropriately three different times.* The word "claimed" suffers from the same problem as "alleged," because it means to "state or assert something *typically without providing evidence or proof.*"

These witnesses could've used the phrase "told me": *When I interviewed M.C., she "told me" Mr. Betts had touched her inappropriately three different times.* "Told me," like "mentioned" or "said," lacks detail. It's also like "claimed" and "alleged" because it's an assertion without prove.

That there were so many other verbs to use to describe M.C.'s statements, ones that didn't plainly suggest M.C.'s allegations were factual and therefore true, speaks volumes. Despite the cornucopia of options, the State's key witnesses nearly always used the word "disclosed" – or a derivative of it. That these State witnesses repeatedly used the same word or a derivative of it is, statistically speaking, amazing, unless, of course, there was a concerted effort by the prosecutor and these witnesses to use the words "disclose," "disclosed," and "disclosure." Mr. Betts believes the latter (*i.e.*, concerted effort) is far more likely than the former (*i.e.*, these witnesses randomly – without coordination and planning – used the same words repeatedly).

The statistics also defeat the majority's holding that there's "nothing about [the] use of the term 'disclose,' standing alone, that conveys believability or credibility." *Majority*, p. 13. The prosecutor and these witnesses wouldn't have repeatedly used the word "disclosed" or a derivative of it if these words didn't "convey[] believability and credibility." They did – and this explains *why* the prosecutor and her witnesses repeatedly used these words.

Furthermore, in footnote 1 of its opinion, the majority argued that because the word "disclose" is synonymous with "admit, divulge, reveal, tell, communicate, bring to light, and make known" this claim lacked merit because the State's witnesses also used these terms when discussing M.C.'s statements. *Majority*, p. 12, n.1. As the dissent rightly acknowledged, this is a misleading argument because "quot[ing] a thesaurus… only provides similar words and *not definitions*," meaning the majority refused to "us[e] a dictionary" to "defin[e] 'disclose' or 'disclsoure[.]'" *Dissent,* p. 16.

And the definition of "synonym" confirms this point: "having the same *or nearly the same* meaning[.]"[7] As documented above, there are many words similar to the word "disclosed," but when these words are used in the same sentence – as counsel did above – it's obvious these similar words would've conveyed something slightly, yet substantially, different to jurors, and would've been less impactful and incriminatory as

[7] https://dictionary.cambridge.org/us/dictionary/english/synonymous.

the word "disclosed." This is so because the "*definition*" of "disclosed" suggests to the fact-finder that M.C.'s allegations were based in fact and therefore truthful.

Again, the Court must start and end with this presumption: "Jurors are… presumed to understand the meaning of English words as they are ordinarily used." *State v. Withers*, 2 N.C. App. at 203, 162 S.E.2d at 640. Consequently, if the State's witnesses repeatedly used the words "disclose," "disclosed," and "disclosure," the Court's analysis must start and end with the plain meaning of these words – not with their synonyms as the majority incorrectly held.

D. The majority misread *Jamison* and *Frady*

The majority rejected *Jamison* because it misconstrued not only *Jamison*, but also *State v. Frady*, 228 N.C. App. 682, 747 S.E.2d 164 (2013), the case *Jamison* used to support its holding that Fairley's testimony constituted impermissible vouching. *Jamison*, like *Frady*, wasn't about prohibiting the use of the word "disclose," which is how the majority interpreted *Jamison's* reliance on *Frady*. *Jamison*, like *Frady*, was about the *sleight of hand techniques* prosecutors and child sexual abuse experts use to *improperly* convey to jurors that the expert finds the child and her allegations credible and truthful.

Many – if not most – of these experts know they can't explicitly vouch for the child's credibility. Consequently, based on the crafty questioning in *Jamison*, *Frady*, Mr. Betts's case, and numerous other overturned child sexual abuse convictions, it's not surprising or unforeseeable that prosecutors and child abuse experts work together to find creative ways to tell jurors – indirectly – that the expert finds the child and her

allegations credible and truthful, even if there's no physical evidence corroborating the abuse allegations. This type of complicity in child sexual abuse cases is common for an obvious reason: the great majority of medical exams produce no physical evidence of sexual abuse.

Accordingly, because prosecutors can't refer to impactful, objective, and corroborative physical evidence to bolster the child's credibility, they're forced to find other ways to establish the child's credibility, which is far from easy because children don't have a great working memory, are very impressionable, and easily manipulated. At the end of the day, though, if prosecutors want a conviction, they must prove to jurors the child is credible. And it's the desire for credibility, and ultimately convictions, that drives prosecutors to push the line when it comes to having their witnesses and experts vouch for the child's credibility – be it directly or indirectly.

What better way to establish the child's credibility than to have the child's therapist or an experienced child sexual abuse expert tell jurors the child and her allegations are credible and truthful. Prosecutors and experts, though, generally aren't this direct because they know explicitly vouching for the child's credibility is a quick and easy way to have the defendant's conviction(s) reversed – should he be convicted. Thus, they generally use indirect – or what counsel calls *sleight of hand* – vouching techniques, which is what happened in *Frady*, *Jamison*, and here.

For instance, another way to indirectly vouch for the child's credibility it to have an expert diagnosis sexual abuse in the absence of physical evidence indicative of sexual abuse. With the sexual abuse diagnosis, jurors will quickly infer the expert had to have based their diagnosis on nothing more than the child's allegations, meaning the expert's diagnosis *is code for*: "Although there's no physical evidence of sexual abuse, I still believe the child's allegations, meaning I believe the defendant sexually abused the child."

Frady, *Jamison*, and like cases, including Mr. Betts's case, involve indirect or *sleight of hand* vouching.

1. *Frady*

In *Frady*, the defendant was convicted of first-degree sexual offense with a child and taking indecent liberties with a child. At trial, the State presented "no physical evidence indicating [the child] was sexually abused." *State v. Frady*, 228 N.C. App. at 686, 747 S.E.2d at 167. The defendant testified and denied touching or doing anything to the child. Based on the defendant's testimony, which the State claimed put the child's credibility at issue, the State called Dr. Cindy Brown to rehabilitate the child's credibility in an indirect, sleight of hand way.

Dr. Brown was part of the "maltreatment team" that interviewed and examined the child. Dr. Brown, though, didn't "personally examine" or "interview" the child. Despite these facts, the prosecutor asked these questions during the State's rebuttal:

> Q. Did you form an opinion as to whether [the child's] disclosure was consistent with sexual abuse?
>
> DEFENDANT: Objection. Move to strike. Motion for retrial.
>
> THE COURT: Overruled. Overruled. Overruled.
>
> A. Yes.
>
> Q. And what was your opinion?
>
> A. Our report reads that her disclosure is consistent with sexual abuse.
>
> Q. And what did you base your opinion on?
>
> A. The consistency of her statements over time, the fact that she could give sensory details of the event which include describing being made wet and the tickling sensation… [a]nd her knowledge of the sexual act that is beyond her developmental level.

Id. at 684, 747 S.E.2d at 166.

Frady focused on Dr. Brown's statement where she said the child's "disclosure" was "consistent with sexual abuse." *Frady* said, "The alleged 'disclosure' was [the child's] description of the abuse." *Id.* at 685, 747 S.E.2d at 167. *Frady* then said:

> While Dr. Brown did not diagnose [the child] as having been sexually abused, *she essentially expressed her opinion that [the child] is credible*. We see no appreciable difference between this statement and a statement that [the child] is believable.

Id. (emphasis added).

Yes, the prosecutor used the word "disclosure" in her question, but the word "disclosure" isn't the driving point behind *Frady*, it's the fact the prosecutor asked Dr. Brown a question the prosecutor knew required her to – at the very least – indirectly vouch for the child's credibility: "Did you form an opinion as to whether [the child's] disclosure was consistent with sexual abuse?" That the prosecutor asked this sleight of hand question on rebuttal, where the State's objective was to rehab the child's credibility, made the prosecutor's question all the more improper because it was painfully obvious what the prosecutor wanted the jurors to hear – and why she wanted them to hear it, *i.e.*, jurors would interpret Dr. Brown's "opinion" this way: "Even if there's no physical evidence corroborating the child's accusations, I still find the child's allegations credible, meaning I think the defendant sexually abused the child."

2. *Jamison*

Jamison simply picked up where *Frady* left off regarding sleight of hand vouching. Fairley (the expert in *Jamison*), like Dr. Brown, didn't explicitly vouch for the child's credibility. Instead, Fairley and the prosecutor had an extended discussion where both repeatedly used the words "disclosed" or "disclosure" when describing how the child discussed her allegations against the defendant. Moreover, Fairley spoke at length about the "barriers" that prevented children from "disclosing" sexual abuse. As Fairley put it, "It's rather impressive that she disclosed in spite of those barriers… [and] there could have been more experiences that she still had not felt safe to tell at the time of her forensic interview." *State v. Jamison*, 2018 N.C. App. LEXIS, at *11.

Jamison, however, made clear the repeated use of the words "disclosed" and "disclosure" represented only one example of Fairley's sleight of hand vouching. Her other sleight of hand vouching occurred when she opined the child hadn't been coached to falsely accuse the defendant. Fairley based this opinion on the following:

> The way that she articulated some of her experiences were just very age appropriate. She also was able to provide really specific details about different instances that just – she wouldn't have been able to do if she hadn't lived those experiences herself.

Id. at *11-12.

Jamison said Fairley's testimony was "similar to that held inadmissible in [*Frady*]." *Id.* at *12. For instance, her comment that it was "rather impressive" the child "disclosed in spite of" the "barriers," created "the impression that [the child's] revelations… [were] more believable because she overcame barriers to her disclosure." *Id.* at *13. Likewise, her comments that the child was "very forthcoming," gave "age appropriate" responses, and provided "really specific details" about the alleged abuse were also improper because they "enhanced" the child's "credibility" and didn't "provide… information" jurors couldn't have determined themselves "based on their own observations." *Id.* at *13-14.

3. Mr. Betts's case

Jamison and *Frady* drive home Mr. Betts's improper vouching claim. Both deal with sleight of hand vouching where the prosecutor and her expert used certain code words or phrases that made it easy for jurors to infer at least two things: (1) the State's

expert finds the child credible and (2) her allegations truthful. Although Archie, Prichard, McSwain, and Masola didn't explicitly vouch for M.C.'s credibility, each repeatedly used the words "disclose," "disclosed," and "disclosure" for one purpose: to convey to jurors they found M.C. credible and her allegations truthful. Thus, they indirectly vouched for M.C.'s credibility by repeatedly conveying to jurors M.C.'s allegations had a factual or evidentiary foundation and therefore must be true.

Moreover, Masola's discussion about the "difficulties" of "disclosure" is eerily like Fairley's improper testimony regarding the "barriers" to "disclosure":

> Q. And are you, through the course of your employment as a therapist, familiar with the disclosure patterns of children?
>
> A. Yes.
>
> Q. And specifically as it relates to sexual abuse?
>
> A. Yes.
>
> Q. And can you tell the members of the jury about that.
>
> A. Typically, a child has a really difficult time saying exactly what happened, especially in the beginning. It's embarrassing to talk about their private parts, especially using the right words for it.
>
> And it, a lot of times, comes in stages, you know. They tell a little bit. And then more and more, as time goes on, as they feel comfortable with the person they're talking to.
>
> Q. What, if any, affect would it have on a child's ability to disclose if the perpetrator was inside of the home?

> A. Usually – well, the child could be very afraid to tell because they're afraid they might get hurt or that their family will break up. I mean, there's lots of different… reasons children don't disclose.
>
> Q. And what, if any, affect would family support have on that or lack thereof?
>
> A. If the child did not feel supported by her parent, her mother or… other people in the family, she would just shut down.

(T4pp. 26-27)

Ditto regarding McSwain's testimony regarding the "process" of "disclosure" and the "factors" that impact a child's willingness to disclose:

> Q. Are you familiar with the ways in which children disclose sexual abuse?
>
> A. Yes, ma'am.
>
> Q. And is disclosure an event or is it a process?
>
> A. Disclosure of abuse is a process.
>
> Q. And can you describe that?
>
> A. Yes. When a child talks about being abused or decides to make that decision to tell that he or she has been abused, it doesn't necessarily just happen overnight. It's not a single event.
>
> Sometimes, it takes time for the child to tell what happened to him or her. They may tell at different stages. It may be a partial disclosure, and then they come back and later tell the full story, so it's not an event that just happens. It's something that – it's a process that happens over time.

> Q. What types of factors, based on your training and experience, can affect how or when a child discloses?
>
> A. There are a number of different factors that affect when a child discloses. Some of those factors could be the child's age, the relationship of the alleged offender to the child; whether or not the child is fearful of the offender or fearful of the consequences of telling what happened to him or her; family support. Those are some of the dynamics that could potentially affect whether or not a child tells right away.

(T3pp. 121-122)

Like Fairley's improper "overcoming barriers to disclose" testimony, Masola's "really difficult time to disclose" testimony and Fulton's "discovery is a process" testimony "[gave] the impression" M.C.'s "revelations… [were] more believable" because she had to "overcome" a difficult process before discussing the abuse with Masola and McSwain. *State v. Jamison*, 2018 N.C. App. LEXIS, at *13. In the end, as the dissent correctly held, the repeated use of the term "disclosed" or its derivatives constituted impermissible vouching because it conveyed to jurors M.C. "was believable, credible, and telling the truth[.]" *Dissent*, p. 16.

E. The improper vouching probably impacted the jury's verdicts

Mr. Betts incorporates his plain error argument from the Masola claim, *supra*, pp. 36-42, as if fully plead herein. The case turned on M.C.'s credibility, M.C.'s narratives changed repeatedly, and the improper vouching, particularly by two experts, probably suppressed or minimized the doubt created by M.C.'s numerous inconsistencies, meaning the improper vouching probably impacted the jury's verdicts.

III. The COA erred when it said the domestic violence evidence was admissible under Rules 401 and 403

A. Standard of review

The COA adjudicated this claim, so the Court's review is *de novo*.

B. Introduction

Mr. Betts's jury was tasked with determining whether the State met its burden regarding the charged offenses. It wasn't tasked with determining whether Mr. Betts committed acts of domestic violence. However, one glance at the State's case and one is left with the impression Mr. Betts was also on trial for domestic violence. Put differently, the State presented far more domestic violence evidence than evidence of Mr. Betts's alleged inappropriate touching.

The domestic violence evidence, however, had little – if anything – to do with the charged offenses. The State, therefore, could've presented its case without the domestic violence evidence. Thus, the domestic violence evidence should've been excluded under Rule 401 because it was irrelevant.

Even if this evidence had minimal relevance, it should've been excluded under Rule 403. Whatever probative value it had was substantially outweighed by the danger of unfair prejudice. The prejudice is evident. The jury probably based its verdicts, at least in part, on the belief Mr. Betts was a "bad guy" who needed to be taken off the streets irrespective of whether the State met its burden regarding the charged offenses.

C. The domestic violence evidence

The *Statement of Facts* thoroughly identifies and discusses the substantial domestic violence evidence presented by the State. McSwain's report (S-6) and M.C.'s trauma narrative (S-1) mentioned and described – in graphic detail – several alleged instances of domestic violence between M.C.'s mother and Mr. Betts. At trial, M.C., McSwain, and Masola mimicked the domestic violence allegations described in S-6 and S-1. During closing arguments, the prosecutor repeatedly mentioned the domestic violence allegations. (T4pp. 97, 101, 102, 106-107). The domestic violence incident where Mr. Betts allegedly broke into M.C.'s apartment while armed was particularly damning because S-1, S-6, M.C., McSwain, Masola, and the prosecutor each discussed this alleged incident ad nauseum.

D. The case law

N.C. R. Evid. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Irrelevant evidence is inadmissible. N.C. R. Evid. 402

N.C. R. Evid. 403 guards against the admission of relevant, yet prejudicial evidence if "its probative value is substantially outweighed by the danger of unfair prejudice[.]" "Unfair prejudice" means "an undue tendency" to decide an issue based on emotion, not facts. *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986).

While the trial court needn't make specific findings, it must engage in some sort of review to determine whether the evidence's prejudicial impact substantially outweighs its probative value, and this process must be apparent from the record. *State v. Mabry*, 184 N.C. App. 259, 266, 646 S.E.2d 559, 564 (2007).

E. The majority's finding that the prejudice from the domestic violence evidence didn't substantially outweigh its probative value is wrong

The majority rejected the domestic violence claim by relying on *State v. Espinoza-Valenzuela*, 203 N.C. App. 485, 692 S.E.2d 145 (2010), which "held that incidents of domestic violence are 'probative of the victim's motivation not to immediately report crimes' in sexual assault cases." *Majority,* p. 20 (quoting *State v. Espinoza-Valenzuela*, 203 N.C. App. at 491, 692 S.E.2d at 151). The majority said the domestic violence evidence wasn't "substantially more prejudicial than probative" because it "went directly to [M.C.'s] fear or apprehension in reporting the sexual abuse." *Id.* The majority erred.

First, *Espinoza-Valenzuela* is an outlier and, from counsel's research, the first and only North Carolina case to hold that 404(b) domestic violence evidence can be used to explain why a child didn't timely report alleged sexual abuse. If another court had ruled similarly before or after *Espinoza-Valenzuela*, the *Espinoza-Valenzuela* panel would've cited these cases in its opinion, and the State would've cited these cases in its COA and PDR briefs.

Second, even if *Espinoza-Valenzuela* is correct, the trial court didn't conduct a Rule 403 analysis to determine if the domestic violence evidence was even necessary – given the fact the State introduced M.C.'s PTSD diagnosis to explain why she didn't timely report the alleged abuse. The domestic violence evidence, therefore, was cumulative to the PTSD diagnosis regarding the delayed reporting issue.

M.C.'s PTSD diagnosis, furthermore, was based on the sexual abuse *and* domestic violence she "experienced." Consequently, the State could've introduced the PSTD diagnosis (based on the sexual abuse) and used it to explain M.C.'s delayed reporting, without having to introduce the minimally probative, yet significantly prejudicial, domestic violence evidence.

F. The Rule 403 error probably impacted the jury's verdicts

The domestic violence evidence, particularly the allegation where Mr. Betts wielded a firearm and tried to break into M.C.'s home, had a probable impact on the jury's verdicts. Jurors probably viewed Mr. Betts as a "bad man" who needed to be off the streets and used this "bad man" narrative as a reason to convict, irrespective of whether the State met its burden regarding the charged counts.

IV. The COA erred by rejecting Mr. Betts's cumulative prejudice claim

A. Standard of review

The COA adjudicated this claim, so the Court's review is *de novo*.

B. The various errors during Mr. Betts's trial deprived him of a fair trial

"Cumulative errors lead to reversal when 'taken as a whole' they 'deprived [the] defendant of his due process right to a fair trial free from prejudicial error.'" *State v. Wilkerson*, 363 N.C. 382, 426, 683 S.E.2d 174, 201 (2009). Here, because each error probably impacted the jury's verdicts, the cumulative prejudice caused by these errors rendered Mr. Betts's trial fundamentally unfair.

First, jurors heard an expert – Masola – tell them she found M.C. and her allegations credible and truthful. According to Masola, M.C. had "experienced" sexual abuse and domestic violence. Masola's impermissible vouching probably impacted the jury's verdicts.

Second, jurors heard several State witnesses, including the prosecutor and her two experts, repeatedly use the words "disclose," "disclosed," and "disclosure" when describing how M.C. initially told them of the alleged inappropriate touching. The plain meaning of "disclosed" suggests that which is told or mentioned has a factual or evidentiary basis. Thus, these witnesses repeatedly told jurors M.C.'s allegations were based in fact, *i.e.*, truthful, which constituted improper vouching that probably impacted the jury's verdicts.

Third, jurors heard substantial domestic violence evidence that had minimal, if any, relevance regarding the charged offenses. Even if minimally relevant, the prejudice this evidence inflicted substantially outweighed its limited relevance. The inadmissible domestic violence evidence probably impacted the jury's verdicts.

Consequently, the cumulative impact of these errors rendered Mr. Betts's trial fundamentally unfair.

CONCLUSION

WHEREFORE, based on the foregoing facts and authorities, Mr. Betts respectfully requests the Court to reverse the COA's ruling and grant him a new trial.

Respectfully submitted this the 14th day of March, 2020.

/s/Craig M. Cooley
COOLEY LAW OFFICE
5000 Centre Greenway, Ste. 500
Cary, NC 27513
craig.m.cooley@gmail.com

CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28(J)(2)

Counsel certifies that this brief isn't in compliance with N.C. R. App. P. 28(j)(2) because it contains more than 8,750 words in the body of the brief. Counsel, therefore, filed a motion requesting the Court's permission to exceed the word limit.

CERTIFICATE OF SERVICE

On 14 March 2020, counsel served a copy of this brief on the State of North Carolina by emailing a PDF copy of the brief to Catherine F. Jordan, Special Deputy Attorney General at cjordan@ncdoj.gov.