TABLE OF APPENDICES

APPENDIX A

FOURTH DIVISION
DOYLE, P. J.,
COOMER and MARKLE, JJ.

October 22, 2019

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A19A0816. MYERS v. THE STATE.

MARKLE, Judge.

Following a jury trial, Joshua Myers was convicted of aggravated sexual battery (OCGA § 16-6-22.2), and two counts of child molestation (OCGA § 16-6-4 (a)). On appeal from the denial of his motion for new trial, as amended, he (1) challenges the sufficiency of the evidence supporting his aggravated sexual battery conviction; (2) contends that his trial counsel rendered ineffective assistance; and (3) asserts that the trial court erred by (a) admitting similar transaction evidence of prior acts of child molestation, (b) failing to merge the aggravated sexual battery and child molestation counts, and (c) refusing to charge the jury on a lesser included offense. For the reasons that follow, we affirm.

Viewed in the light most favorable to the verdict, *Jackson v. Virginia*, 443 U. S. 307 (99 SCt 2781, 61 LE2d 560) (1979), the evidence shows that Myers lived with his wife and stepdaughter in the basement of a home owned by his wife's parents. In January 2015, Myers's then-five-year-old stepdaughter told her grandmother that Myers made her rub his privates until "the white stuff came out" in exchange for toys, ice cream, and other inducements.[1] Shortly thereafter, the victim made the same outcry to her mother and her aunt, indicating that the sexual abuse had occurred multiple times.

Later that same night, the victim was taken to the police station for a forensic interview with a detective, to whom she made the same outcry. She also told the detective that Myers had touched her vagina, both on the outside and inside with his finger, on more than one occasion.[2]

After the interview, the victim met with a nurse for a sexual assault examination. She told the nurse that Myers had touched her vagina and that "it was

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[1] The grandmother recorded a portion of the outcry on her cell phone, and the recording was admitted at trial and published to the jury.

[2] The interview was recorded, and the video was admitted at trial and published to the jury.

sharp and hurt a lot." She also indicated to the nurse that Myers made her rub his penis with her hand, but denied having seen him ejaculate. The nurse testified that the results of the physical examination were consistent with the victim's allegations of sexual abuse.

The victim testified at trial, but was reluctant to talk about the specific allegations. She stated, however, that she remembered speaking with a police officer when she was five and that she told him the truth. Myers did not testify.

At the conclusion of the trial, the jury convicted Myers on all counts. The trial court imposed a sentence of life imprisonment on Count 1 (aggravated sexual battery); twenty years to serve ten years in confinement on Count 2 (child molestation), consecutive to Count 1; and twenty years to serve ten years in confinement on Count 3 (child molestation), concurrent to Count 2.

Myers filed a motion for new trial, as amended, asserting, as is relevant to this appeal, that (1) the evidence presented at trial was insufficient to support his convictions, (2) trial counsel was ineffective for failing to object to the grandmother's bolstering testimony, and (3) the trial court erred by admitting evidence of prior acts of child molestation. The trial court denied the motion, and this appeal followed.

1. Myers first contends that there was insufficient evidence to support his conviction for aggravated sexual battery, arguing that the State failed to prove the essential element of lack of consent.[3] We disagree.

"On appeal the evidence must be viewed in the light most favorable to support the verdict, and [Myers] no longer enjoys a presumption of innocence; moreover, an appellate court determines evidence sufficiency and does not weigh the evidence or determine witness credibility." (Citations omitted.) *Short v. State*, 234 Ga. App. 633, 634 (1) (507 SE2d 514) (1998). "The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Citation omitted.) *Taylor v. State*, 266 Ga. App. 818, 819 (598 SE2d 122) (2004).

Pursuant to OCGA § 16-6-22.2 (b), "[a] person commits the offense of aggravated sexual battery when he or she intentionally penetrates with a foreign object the sexual organ . . . of another person without the consent of that person."

Under Georgia law, the victim's age, alone, is insufficient to prove lack of consent for a sexual battery offense. *Watson v. State*, 297 Ga. 718, 720 (2), (777 SE2d

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[3] Myers does not challenge the sufficiency of the evidence with regard to the essential element of penetration, pursuant to OCGA § 16-6-22.2(b), nor does he challenge the sufficiency of the evidence for his child molestation convictions.

677) (2015); see also *Croft v. State*, 348 Ga. App. 21, 27 (3) (819 SE2d 550) (2018) (recognizing lack of consent as an essential element of aggravated sexual battery despite victim's young age). However, "[l]ack of consent may be proved by means other than an unambiguous verbal statement to the accused." *Chester v. State*, 328 Ga. App. 888, 889 (1) (763 SE2d 272) (2014). And the question of whether a victim consented to the sexual contact is for the jury. Id.

Here, the evidence showed that the sexual abuse occurred in the basement. The victim's mother testified that the victim was reluctant to go down to the basement when the mother was about to go to work and leave her alone with Myers. In addition, the evidence established that the victim was told to, and believed that she had to, listen to Myers. And there was evidence that she was enticed with toys and other inducements, and that the penetration hurt her. Thus, there was evidence, in addition to the victim's young age, from which the jury could infer that she did not consent to Myers's acts.[4] Cf. *Moon v. State*, 335 Ga. App. 642, 645 (1) (a) (782 SE2d

[4] To the extent that Myers relies on *Watson* and its progeny to support his position, those cases are distinguishable in that they involved a trial court's misstatement of the law regarding consent in its jury charges. *Watson*, 297 Ga. at 721 (2) ("Insofar as the jury instruction suggested that an underage victim is not capable of consenting to the contact constituting sexual battery, the instruction was misleading and thus erroneous."); *Duncan v. State*, 342 Ga. App. 530, 541 (6) (804 SE2d 156) (2017) ("Because the erroneous jury instruction here effectively relieved

699) (2016) (evidence that victim was forced to touch defendant, along with threats to victim's mother, sufficient to show lack of consent regardless of victim's age).

Accordingly, we conclude that there was sufficient evidence of the victim's lack of consent to support the aggravated sexual battery conviction.

2. Myers next contends that he received ineffective assistance of counsel based on trial counsel's failure to object to the grandmother's improper bolstering testimony. We disagree.

> In order to succeed on his claim of ineffective assistance, [Myers] must prove both that his trial counsel's performance was deficient and that there is a reasonable probability that the trial result would have been different if not for the deficient performance. *Strickland v. Washington*, 466 U.S. 668 (104 SCt 2052, 80 LE2d 674) (1984). If [Myers] fails to meet his burden of proving either prong of the *Strickland* test, the reviewing court does not have to examine the other prong. In reviewing the trial court's decision, we accept the trial court's factual findings and credibility determinations unless clearly erroneous, but we independently apply the legal principles to the facts.

Moore v. State, 319 Ga. App. 696, 700 (2) (738 SE2d 140) (2013).

During direct examination, the prosecutor asked the victim's grandmother to explain what the victim had told her. The grandmother recounted the outcry for the

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the State of its burden to prove an essential element of the crime of aggravated sexual battery, the instruction cannot be said to have been harmless.") (punctuation omitted). Here, there was no such issue, nor does Myers challenge the trial court's jury instructions in this regard.

jury, and then made the unsolicited statement: "Well, I knew a five-year-old couldn't make that up. I mean, it just wasn't possible." Myers contends that the grandmother's comment on the victim's credibility was improper bolstering, and that his trial counsel was ineffective for failing to object to it.

Under Georgia law, it is for the jury to determine credibility, and a witness may not testify to the truth or falsity of another witness's statement. *Strickland v. State*, 311 Ga. App. 400, 403 (2) (a) (715 SE2d 798) (2011); *Damerow v. State*, 310 Ga. App. 530, 535 (4) (a) (i) (714 SE2d 82) (2011); see also OCGA § 24-6-620. "What is forbidden is opinion testimony that directly addresses the credibility of the victim, i.e., 'I believe the victim; I think the victim is telling the truth.'" (Citation and punctuation omitted.) *Wright v. State*, 327 Ga. App. 658, 661 (2) (a) (760 SE2d 661) (2014).

Here, however, the grandmother was not directly addressing the victim's credibility, but that of five-year-olds in general. See id. The State established that the grandmother worked in the school system for twenty-three years and went through annual training to handle child abuse cases at the school. Viewed in this context, as

the trial court correctly found,[5] the grandmother's statement was made solely to explain her decision to let the victim speak uninterrupted and to record the outcry on her phone. Therefore, this testimony was not bolstering, and Myers's trial counsel was not deficient for failing to object to it. See id. at 661-662 (2) (a).

Myers reliance on *Gaston v. State*, 317 Ga. App. 645 (731 SE2d 79) (2012), is misplaced. Unlike the grandmother's unsolicited statement here, in *Gaston*, the father of the victim was twice asked by the prosecutor if he believed the victim's outcry, to which he responded in the affirmative. Id. at 647 (1). We found that this testimony was improper bolstering. Id. at 648 (1) ("Testimony that another witness believes the victim impermissibly bolsters the credibility of the victim.") (citation omitted). Here, to the contrary, the grandmother did not specifically state that she believed the victim, or otherwise comment on the victim's veracity.[6]

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[5] The trial court also found that Myers failed to show that he was prejudiced by the grandmother's testimony.

[6] Other cases Myers relies on are similarly distinguished. See *Word v. State*, 308 Ga. App. 639 (708 SE2d 623) (2011) (trial counsel's performance deficient for failing to object to police officer's testimony that he believed victim, and testimony likely affected verdict); *Walker v. State*, 296 Ga. App. 531, 534-535 (1) (b) (675 SE2d 270) (2009) (impermissible bolstering where aunt of victim testified "I'm like now this child is telling me the truth.").

Moreover, even if we were to find that Myers's trial counsel was deficient in this respect, which we do not, Myers cannot show that he suffered prejudice because of it. "Where the bolstering testimony is not the only evidence linking the defendant to the crime, it is highly probable that the admission of such evidence did not contribute to the jury's verdict." (Citation and punctuation omitted.) *Thomas v. State*, 318 Ga. App. 849, 854 (4) (a) (734 SE2d 823) (2012)

Here, the jury was able to view the detective's interview of the victim and could judge her credibility for themselves. In addition, a total of five witnesses recounted what the victim had told them regarding Myers's acts with sufficient consistency. To the extent that there were any conflicts in the evidence, it was for the jury to resolve. *Thompson v. State*, 304 Ga. 146, 148 (2) (816 SE2d 646) (2018). And Myers's trial counsel was able to cross-examine the victim to test her credibility. In light of this evidence, it is improbable that the grandmother's statement affected the outcome of the trial. See *Damerow*, 310 Ga. App. at 536-537 (4) (a) (i). Myers has thus failed to meet his burden on his claim of ineffective assistance of counsel.

3. Myers contends that the trial court erred in admitting evidence of prior acts of child molestation without conducting the required analysis under OCGA § 24-4-403 ("Rule 403"). We discern no error.

Prior to trial, the trial court heard argument on the State's motions under OCGA §§ 24-4-404 (b) and 24-4-414 to admit the testimony of two of Myers's nephews who would testify that Myers molested them when they were children.[7] The trial court denied the State's motions as to one of the witnesses, but granted it as to the other, and that witness was called and testified at trial as to Myers's prior acts.

OCGA § 24-4-414 (a) provides: "In a criminal proceeding in which the accused is accused of an offense of child molestation, evidence of the accused's commission of another offense of child molestation shall be admissible and may be considered for its bearing on any matter to which it is relevant."

> Even so, evidence that is admissible under [OCGA § 24-4-414 (a)] may be excluded if the trial court concludes that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The determination as to whether to exclude evidence for any of these reasons calls for a common sense assessment of all the circumstances surrounding the previous offense, including prosecutorial need, overall similarity between the previous act

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[7] In its order on the motion for new trial, the trial court addressed the admission of the prior acts evidence only with respect to OCGA § 24-4-414. For this reason, we limit our analysis to that section. Moreover, we have recognized that evidence admitted pursuant to OCGA § 24-4-414 "is not subject to the limitations of OCGA § 24-4-404 (b), but, instead, may be considered for its bearing on any matter to which it is relevant, including whether the evidence demonstrates that the defendant had a propensity to commit certain sexual offenses." (Citations and punctuation omitted.) *State v. McPherson*, 341 Ga. App. 871, 873 (800 SE2d 389) (2017).

> and the charged offense, as well as temporal remoteness. Indeed, exclusion of otherwise probative and relevant evidence under OCGA § 24-4-403 is an extraordinary remedy which should be used only sparingly. Ultimately, a trial court's decision on whether to admit evidence under one of these statutes will be overturned only where there is a clear abuse of discretion.

(Citations and punctuation omitted.) *State v. McPherson*, 341 Ga. App. 871, 874-875 (800 SE2d 389) (2017).

Here, Myers asserts that the testimony was improperly admitted because the trial court did not explicitly reference the weight it gave to certain factors in its consideration of the Rule 403 balancing test. Although the trial court's order is silent as to Rule 403, during the motion hearing, the State argued the probative value of the nephew's testimony, including the similarity of the acts Myers committed.[8] And Myers's trial counsel argued the prejudicial effect of the similar transaction evidence,

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[8] We note that the trial court, in its order on the amended motion for new trial, corrected the record by expressly finding that the prejudicial effect of the similar transaction evidence was not a bar to its admission at trial. Contrary to Myers's assertion that the record is insufficient to enable our review of this issue, the order on the motion for new trial, as well as the parties' initial argument on the admission of the prior acts evidence, provide sufficient grounds for our review. To the extent that Myers contends the prosecutor made an admission in judicio that the prejudicial effect of the prior acts evidence substantially outweighed its probative value, a review of the entire transcript reveals what appears to be a misstatement on the part of the prosecutor. Moreover, it was for the trial court to carry out the Rule 403 balancing. See *Williams v. State*, 328 Ga. App. 876, 879 (1) (763 SE2d 261) (2014).

including the remoteness in time of the prior acts. The trial court thus considered, and implicitly rejected, his argument that the prejudicial effect outweighed the probative value of the evidence. See *Chase v. State*, 337 Ga. App. 449, 455 (3) (a) (787 SE2d 802) (2016); *Dixon v. State*, 350 Ga. App. 211, 213-215 (1) (828 SE2d 427) (2019).

On this record, the trial court did not abuse its discretion by admitting the nephew's testimony of Myers's prior acts of child molestation.

4. Myers next argues that the trial court erred by failing to merge the aggravated sexual battery and child molestation convictions for sentencing purposes.[9] We disagree.

OCGA § 16-1-7 (a) provides:

> When the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if: (1) One crime is included in the other; or (2) The crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.

We review merger issues de novo. *Womac v. State*, 302 Ga. 681, 684 (3) (808 SE2d 709) (2017).

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[9] Although Myers did not raise this issue before the trial court, he has not waived this argument on appeal. See *Rudisail v. State*, 265 Ga. App. 293, 295 (2) (593 SE2d 747) (2004).

> To determine whether two crimes merge, we must apply the "required evidence" test embraced in *Drinkard v. Walker*, 281 Ga. 211 (636 SE2d 530) (2006), which instructs that where the same act or transaction constitutes the violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. If so, then two offenses exist, and one is not included in the other.

(Citations and punctuation omitted.) Id.

As set forth in the indictment, each offense occurred between October 1, 2013 and January 18, 2015. Count one charged Myers with aggravated sexual battery for penetrating the victim's vagina with his finger, without her consent. Count two charged him with child molestation, for making the victim rub and touch his penis with her hand. And count three charged Myers with child molestation for rubbing the victim's vagina with his finger.

Each count alleges a separate act that "requires proof of a fact which the other does not." *Womac*, 302 Ga. at 684 (3). Count one alleges that Myers penetrated the victim without her consent, whereas count two and three do not. Also, the acts alleged in the two child molestation counts differ significantly. Therefore, the offenses did not merge as a matter of fact, and the trial court did not err by sentencing Myers on each individual count. See *Carver v. State*, 331 Ga. App. 120, 122 (4) (769 SE2d 722) (2015) (offenses did not merge where "the language of the indictment . . . based each

count on different conduct.") (citation omitted); *Aaron v. State*, 275 Ga. App. 269, 270 (2) (620 SE2d 499) (2005); compare *Hudson v. State,* 309 Ga. App. 580, 582 (2) (711 SE2d 95) (2011) (aggravated sexual battery and child molestation counts merged where "description of defendant's conduct constituting the offense were identical" in the indictment).

Myers points to *Castaneda v. State*, 315 Ga. App. 723 (727 SE2d 543) (2012) for support, but we are not persuaded. There, we found that the aggravated sexual battery and child molestation counts merged because they were based on conduct that occurred at the same time. Id. at 724 (2). Here, however, the indictment did not allege, nor did the evidence show, an isolated event at which time the victim was both fondled and penetrated. Rather, the victim stated during her interview with the detective that Myers touched her vagina on the outside "sometimes" and on the inside "sometimes." And both the nurse and the detective testified that the victim indicated that the sexual abuse occurred multiple times. Myers's reliance on *Castaneda* is thus misplaced, and the trial court's sentence was correct in this matter.

5. Finally, Myers argues that the trial court erred by failing to charge the jury on sexual battery as a lesser included offense of aggravated sexual battery and child molestation. We disagree.

> It is true that a trial court must charge a jury on a lesser included offense if any evidence—even slight evidence—supports the charge. But a charge request must be apt, a correct statement of law, and precisely adjusted to some theory in the case. If the evidence shows either the completed offense as indicted or no offense at all, the trial court should not instruct the jury on a lesser grade of the crime.

(Citations and punctuation omitted.) *Smith v. State*, 310 Ga. App. 392, 395 (2) (713 SE2d 452) (2011).

a. aggravated sexual battery

As noted above, penetration is an essential element of aggravated sexual battery pursuant to OCGA § 16-6-22.2 (b), but is not an essential element of sexual battery as defined in OCGA § 16-6-22.1 (b) ("A person commits the offense of sexual battery when he or she intentionally makes physical contact with the intimate parts of the body of another person without the consent of that person.").

Myers submitted a written request to charge the jury on sexual battery as a lesser included offense of aggravated sexual battery based on the evidence that Myers touched her vagina both on the inside and the outside. The trial court refused to give the charge.

As addressed above, there was sufficient evidence that Myers penetrated the victim's vagina with his finger. Thus, there was evidence from which the jury could

find that Myers committed aggravated sexual battery or no offense at all. See *Smith*, 310 Ga. App. at 395 (2). The trial court therefore did not err in refusing to charge the jury on sexual battery. Id.

Moreover, Myers's defense at trial was not based on a lesser included offense, but rather was intended to show inconsistencies in the victim's outcries to the other witnesses in an effort to establish that he was not the perpetrator. In this light, the trial court was correct in its refusal to charge the jury on the lesser included offense. See *Smith*, 310 Ga. App. at 395 (2).

b. child molestation

Similarly, because Myers's defense strategy did not rely on a lesser included offense with respect to the child molestation counts, the trial court correctly refused to charge the jury on sexual battery. See *Smith*, 310 Ga. App. at 395 (2); *Walker v. State*, 279 Ga. App. 749, 752 (3) (a) (632 SE2d 482) (2006) (trial court did not err in refusing to charge sexual battery as lesser included offense of child molestation where defense strategy was to show victim fabricated the assault).

For all the reasons above, the trial court properly denied the amended motion for new trial, and we affirm.

Judgment affirmed. Doyle, P. J., and Coomer, J., concur.

APPENDIX B

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	*	
	*	
	*	
v.	*	INDICTMENT NO. 15-B-01359-4
	*	
JOSHUA DAVID MYERS,	*	
Defendant	*	

ORDER DENYING MOTION FOR NEW TRIAL

This matter came before the Court on Defendant's Amended Motion for New Trial. The Court conducted a hearing on this matter on March 9, 2018. The State of Georgia was represented by Assistant District Attorney Lee F. Tittsworth. The Defendant and his appellate counsel, Frances C. Kuo, were also present. The Court has considered the Motion, evidence presented at the hearing, argument of counsel, all matters of record, and the applicable and controlling law. For the reasons discussed herein, the motion for new trial is **DENIED**.

1.

In his original motion for new trial, filed October 28, 2016, Defendant alleges that the evidence at trial was insufficient to support his conviction. *Motion for New Trial, October 28, 2016, Enumeration 1.* After considering the evidence adduced at trial and construing it to support the verdict, the Court finds the evidence was sufficient to enable a rational trier of fact to find Defendant guilty beyond a reasonable doubt of the offenses of Aggravated Sexual Battery and two (2) counts of Child Molestation. Jackson v. Virginia, 443 U.S. 307 (1979). With regard to this ground, the motion is **DENIED**.

2.

Defendant's original motion also alleges that the Court should grant him a new trial pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21. *Motion for New Trial, October 28, 2016, Enumerations 2 through 3.* The Court has exercised its jurisdiction sit as the thirteenth juror and finds that the weight of the evidence does not preponderate against the verdict. Further, the verdict was not contrary to the principles of justice and equity. Avelo v. State, 288 Ga. 437 (2011). Therefore, with regard to these grounds set out in O.C.G.A. §§ 5-5-20 and 5-5-21, the motion is **DENIED**.

3.

In his first Amended Motion for New Trial, Defendant alleges that the trial court committed plain error by failing to conduct the balancing test of O.C.G.A. § 24-4-403 when the Court admitted evidence pursuant to O.C.G.A. § 24-4-414. *Defendant's Amended Motion for New Trial, February 26, 2018, Enumeration 1.* For plain error to occur, (1) there must be an error or defect that was not intentionally relinquished, (2) the error must be clear or obvious, rather than subject to reasonable dispute, (3) the error must affect the defendant's substantial rights, i.e. affected the outcome of the proceeding, and (4) if the first prongs are satisfied, the court has the discretion to remedy the error, which ought to occur only when the error seriously affects the fairness, integrity, and public reputation of the judicial proceeding. State v. Kelly, 290 Ga. 29, 33 (2011). "Satisfying all four prongs of this standard 'is difficult, as it should be.'" Id. quoting Puckett v. United States, 556 U.S. 129, 135 (2009). The Georgia Supreme Court characterizes this analysis as "the bar for plain error is a high one." Brewner v. State, 302 Ga. 6, 12 (2017).

At the hearing to admit the evidence, the State argued the high probative value of the prior child molestation. (Trial Transcript, page 16, August 15, 2016).[1] Conversely, the defense argued the prejudice that Defendant would suffer should lead to the O.C.G.A. § 24-4-414 evidence's exclusion. (MT. - 19, Aug. 15, 2016). By admitting the evidence, the Court implicitly found that the danger of unfair prejudiced did not substantially outweigh the probative value. Chase v. State, 337 Ga. App. 449, 455 (2016). To the extent that the finding was formerly implicit, the Court now explicitly finds that the O.C.G.A. § 24-4-414 evidence in the case at bar is not subject to exclusion under O.C.G.A. § 24-4-403. Accordingly, there is no clear or obvious error. If there were error, the Court finds that it did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings and would decline to exercise its discretion to remedy the error. With regard to this ground, the motion is **DENIED**.

4.

Defendant alleges that the trial court committed plain error when it allowed the State to present victim A.S.'s statements to various witnesses. *Defendant's Amended Motion for New Trial, February 26, 2018, Enumeration 3.* O.C.G.A. § 24-8-802 provides that when hearsay is presented without objection, "hearsay evidence shall be legal evidence and admissible." Thus, there is no clear or obvious error with regard to A.S.'s statements.

Considering the plain error standard, the Court finds that the alleged error was intentionally relinquished. When asked about the admission of the Child Hearsay Statements, trial counsel stated, "so long as the witness is here to testify, I don't think we're going to have an issue with that." (T. - 14, Aug. 15, 2016). The relinquishing of the alleged error was consistent with trial counsel's strategy to show inconsistencies in the victim's statements. See, *infra*, Section 7.

[1] Hereinafter (T. - , Aug. 15, 2016)

Moreover, the statements were made by A.S. when she was five (5) years old and described sexual abuse. A.S. testified at trial. The Child Hearsay Statute "is a legislatively-created exception to the general rule prohibiting such hearsay evidence and provides that, so long as certain conditions are met, a statement made by a child describing any act of sexual conduct is admissible by the person to whom the statement was made." Laster v. State, 340 Ga. App. 96, 98 (2017). The statements were not inadmissible hearsay and were not obligated to meet the requirements of prior consistent statements or prior inconsistent statements. Because "the Child Hearsay Statute actually contemplates testimony from both the child and those witnessing the child's later reaction," the law does not consider the evidence objectionably cumulative. Ledford v. State, 313 Ga. App. 389, 391-392 (2011). See also Leggett v. State, 331 Ga. App. 343, 347 (2015).

The Court properly admitted these statements under any standard; there was no clear or obvious error. If there were error, it was intentionally relinquished by trial counsel. If there had been error, it would not be such that would seriously affect the fairness, integrity, and public reputation of the judicial proceeding and the Court would decline to exercise its discretion to remedy the error. With regard to this ground, the motion is **DENIED**.

5.

Defendant alleges the State violated his Sixth Amendment right to confront the witnesses when the State presented A.S.'s statements to various witnesses. *Defendant's Amended Motion for New Trial, February 26, 2018, Enumeration 4.* A.S. testified in the case at bar, Defendant was given an opportunity to cross-examine A.S., and did, in fact, subject A. S. to cross-examination. (Trial Transcript, pages 473 through 479).[2] "The right of confrontation is satisfied if the witness testifies at trial and is subject to cross-examination." Reynolds v. State,

[2] Hereinafter (T. -).

257 Ga. 725, 726 (1988). On cross-examination, trial counsel challenged the victim's memory, her confidence in her memory, and whether she had been coached. (T. - 473-479). See Rivers v. State, 296 Ga. 396, 404 (2015), citing United States v. Owens, 484 U.S. 554, 559 (1988) (*Sixth Amendment* right to confrontation is satisfied if a defendant is given an opportunity to cross-examine a forgetful witness about "[her] bias, [her] lack of care and attentiveness, [her] poor eyesight, and even . . . the very fact that [s]he has a bad memory."). With regard to this ground, the motion is **DENIED**.

6.

Defendant alleges that that the trial court committed plain error when it admitted State's Exhibit 9, a video and audio recording of the law enforcement interview with victim A.S. Defendant claims this was improper hearsay, a violation of the Confrontation Clause, and the needless presentation of cumulative evidence. *Defendant's Second Amended Motion for New Trial, March 9, 2018, Enumeration 6.* As held *supra*, Section 4, statements by A.S. were properly admitted under the Child Hearsay Statute. Such statements are not obligated to meet the requirements of prior consistent or prior inconsistent statements. Further, the Child Hearsay Statute contemplates the testimony from the child and those witnessing the child's later reaction. Ledford, 313 Ga. App. at 391-392. This testimony was not objectionably cumulative. As held, *supra*, Section 5, the child victim testified at trial and was cross-examined; Defendant's right to confront the witness against him was satisfied. Rivers, 26 Ga. at 404. With regard to this ground, the motion is **DENIED**.

7.

In various enumerations, Defendant alleges that he received ineffective assistance of counsel. Under Strickland v. Washington, 466 U.S. 668, (1984), a two-part test exists for determining whether a Defendant's trial counsel was

ineffective. The first prong of the test is whether the attorney's representation in specified instances fell below an objective standard of reasonableness. The second prong of the test is whether, but for trial counsel's unprofessional conduct, there is a reasonable probability that the outcome of the trial would have been different. "The decisions on which witnesses to call, whether and how to conduct cross examinations, what jurors to accept or strike, what trial motions should be made, and all other strategies and tactical decisions are the exclusive province of the lawyer after consultation with his client." Cheesman v. State, 230 Ga. App. 525 (1998). "In every criminal case, there is a strong presumption that trial counsel provided effective representation for the Appellant." Flanigan v. State, 269 Ga. 160, 162 (1998).

Trial counsel is an experienced attorney, having practiced for twenty-seven (27) years, tried roughly one-hundred (100) criminal jury trials, and has been found qualified to represent clients charged with any crime by the Gwinnett Indigent Defense Governing Committee. (Motion Transcript, page 5 and 28 through 29, March 9, 2018).[3] Trial counsel's work is approximately three-quarters (3/4) criminal practice. (MNT. - 28). At trial, counsel argued that Defendant did not committed the charged offenses, that there was a lack of physical evidence connecting Defendant to the charged offenses, and that the victim had made inconsistent statements. (MNT. - 8).

Defendant alleges that trial counsel was ineffective for failing to object to the admission of statements by A.S to different witnesses. *Defendant's Amended Motion for New Trial, February 26, 2018, Enumeration 2.* As held, *supra*, Section 4, statements by A.S. were properly admitted under the Child Hearsay Statute. Further, as held *supra*, Section 5, there was no violation of the Confrontation Clause of the Sixth Amendment. The danger of unfair prejudiced did not

[3] Hereinafter (MNT. -).

substantially outweigh the probative value. Had trial counsel lodged the objections posed by Defendant in *Enumeration 2*, the Court would have overruled such objections. "Failure to make a meritless objection cannot be evidence of ineffective assistance of counsel." Hayes v. State, 262 Ga. 881, 84-885 (1993). Trial counsel's representation did not fall below an objective standard of reasonableness.

Defendant alleges that trial counsel was ineffective for failing to object to the admission of State's Exhibit 9, the video and audio recording referenced *supra*, Section 6. *Defendant's Second Amended Motion for New Trial, March 9, 2018, Enumeration 5*. Consist with the holding *supra*, Section 6, the recording was properly admitted under the Child Hearsay Statute. Likewise, the holding *supra*, Section 5, applies to the allegation that trial counsel should have objected to a violation of the Confrontation Clause of the Sixth Amendment. There was no such violation. The danger of unfair prejudice from State's Exhibit 9 did not substantially outweigh the probative value of the evidence. Had trial counsel lodged the objections posed by Defendant in *Enumeration 5*, the Court would have overruled such objections. "Failure to make a meritless objection cannot be evidence of ineffective assistance of counsel." Hayes, 262 Ga. at 84-885. Trial counsel's representation did not fall below an objective standard of reasonableness.

Regarding both *Enumeration 2* and *Enumeration 5*, trial counsel testified that it was part of his strategy to ensure that the jury heard the various statements A. S. made to different witnesses. (T. - 22). Not only was trial counsel reasonable in declining to make a meritless objection, the decision not to make the objection was a reasonable strategy to place inconsistent statements by the victim in front of the jury.

Finally, Defendant alleges that trial counsel was ineffective for failing to object to testimony from the victim's grandmother's purported bolstering of the

victim. *Defendant's Second Amended Motion for New Trial, March 9, 2018, Enumeration 7.* The grandmother made the non-responsive comment, "Well, I knew a 5 year old couldn't make that up. I mean, it just wasn't possible." (T. - 491). In its full context, the witness was explaining why she decided to audio and video record the victim's outcry. It is not improper bolstering for a lay witness to testify that it would be difficult for a child of a certain age to make up a story about sexual abuse. In the Interest of B.H., 190 Ga. App. 131. 133-134 (1989). See also Mullis v. State, 292 Ga. App. 218, 220 (2008) (holding that an opinion regarding the mental ability to fabricate is not bolstering). Had trial counsel lodged the objection posed by Defendant in *Enumeration 7*, the Court would have overruled such objection. "Failure to make a meritless objection cannot be evidence of ineffective assistance of counsel." Hayes, 262 Ga. at 84-885. Trial counsel's representation did not fall below an objective standard of reasonableness.

The Court also finds that there is no reasonable probability that the alleged errors contributed to the jury's verdict. The evidence against Defendant was strong evidence. The collective prejudice from all of trial counsel's purported deficiencies is negligible. Schofield v. Holsey, 281 Ga. 809, 811-812 n.1 (2007). All alleged hearsay evidence was properly admitted, thus there is no prejudice. Even if there were a proper bolstering claim, trial counsel's failure to object did not create a reasonable probability that the outcome would have been different. See Moore v. State, 319 Ga. App. 849, 854 (2012) (In a case where the victim's mother testified that she believed the victim, trial counsel's failure to object did not create a reasonable probability that the outcome would have been different). See also Brown v. State, 302 Ga. 454, 462 (2017), Thomas v. State, 318 Ga. App. 849, 854 (2012), Al-Attawy v. State, 289 Ga. App. 570, 574 (2008), and Horne v. State, 262 Ga. App. 604, 606 (2003). As a result, Defendant has failed to show that, but for trial counsel's alleged unprofessional conduct, there is a reasonable probability that

the outcome of the trial would have been different. With regard to this ground, the motion is **DENIED**.

As outlined above, the Court denies the Amended and Original Motions for New Trial generally and in all their particulars.

SO ORDERED this 24 day of August, 2018.

Randy Rich, JUDGE
Superior Court of Gwinnett County

PREPARED BY:

Lee F. Tittsworth
Assistant District Attorney
Gwinnett Judicial Circuit

CC:

Lee F. Tittsworth, Assistant District Attorney
Frances C. Kuo, Attorney for the Defendant

APPENDIX C

Court of Appeals of the State of Georgia

ATLANTA, November 04, 2019

The Court of Appeals hereby passes the following order

A19A0816. JOSHUA D. MYERS v. THE STATE.

Upon consideration of the APPELLANT'S Motion for Reconsideration in the above styled case, it is ordered that the motion is hereby DENIED.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, November 04, 2019.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Stephen E. Castlen , *Clerk.*

APPENDIX D

SUPREME COURT OF GEORGIA
Case No. S20C0544

June 29, 2020

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

JOSHUA D. MYERS v. THE STATE.

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Court of Appeals Case No. A19A0816

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk