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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

Respondent,

vs.

GABRIEL BETANCOURT, JR.,

Appellant.

Appellate Case No. 2017-001016

STATE'S PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, the State now requests a rehearing on the following points that this Court may have overlooked or misapprehended. In so doing, the State maintains all its prior arguments as set out in its brief of respondent.

I.

This Court found the prosecution elicited improper bolstering testimony from Erica Van Wagner, the treating therapist, because of: "[1] her testimony defining trauma focused cognitive behavioral therapy as 'evidence based,' [2] her discussion of Minor's symptoms, [3] her reasons for treating Minor, and [4] her specific diagnosis of PTSD in the context of Minor's sexual abuse overstepped the guidance provided in Makins."

No objection was raised to Van Wagner's description of trauma-focused cognitive behavioral therapy as "evidence-based", and further, the argument was not raised in the Brief of Appellant. Van Wagner explained the therapy "is a series of interventions that work to decrease stress or the stress related to an experience of trauma." R. p. 210, lines 5-7. She also explained the studies conducted showed "this is an effective course of treatment for someone who has experienced trauma." R. p. 210, lines 10-15. Testimony about the effectiveness of treating trauma is not bolstering because it is not testimony calculated to speak to the credibility of the child's allegations of sexual abuse. Her testimony explaining the therapy was researched did not create a danger the jury would conclude she was making a determination as to Minor's credibility.

The testimony of symptoms of trauma is clearly admissible under State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (finding rape trauma evidence is admissible to show that a sexual offense occurred) *overruled on other grounds by* State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016)). Van Wagner testified as follows:

> . . . [S]he described having symptoms of flashbacks, nightmares, she had trouble sleeping. She was having irritability and anger. There was a high score for avoidance symptoms, which is working to avoid things that remind her of trauma. People, places, events, things that would remind her **of the event** that happened. So that was another symptom that she presented with.

R. p. 232, lines 5-15. Clearly, Van Wagner treated these symptoms because of the effect the trauma had on her life, but Van Wagner did not tie these symptoms to sexual abuse. She did not testify as to what constituted "the event."

Van Wagner testified she diagnosed Minor with PTSD, but did not identify sexual abuse as the source of the trauma. R. pp. 232-33. Thereafter, Van Wagner, consistent with the outcry hearsay

exception (and within the time and place limitations), testified that during therapy, Minor reported being sexually abused. Tr. pp. 235-36.

This Court misapprehends State v. Makins, 433 S.C. 494, 860 S.E.2d 666 (2021). As indicated in this Court's block quote from Makins in the instant case, the therapist in Makins was not allowed by the trial judge to testify why she was treating the victim, to detail her treatment of minor, or to testify as to her diagnosis of minor. However, notwithstanding these limitations by the trial judge in Makins, the testimony, albeit limited by the judge in Makins, is nonetheless allowable as evidence that a sexual assault occurred under Schumpert and its progeny.

Although cited by the State in its brief, this Court did not address the controlling precedent found in Schumpert. In Schumpert, the Supreme Court rejected Schumpert's argument that trauma testimony could not be admitted to prove the crime occurred and held "that both expert testimony and behavioral evidence are admissible **as rape trauma evidence to prove a sexual offense occurred** where the probative value of such evidence outweighs its prejudicial effect." Id. at 505, 435 S.E.2d at 862 (emphasis added). "Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior." State v. White, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004) (finding testimony is admissible in prosecutions where the victim of sexual abuse is an adult). Makins did not alter the holdings of Schumpert and White. Instead, Makins did not cite Schumpert at all, and approvingly cited White for this proposition.

The Supreme Court's opinion in Makins does not limit the continuing viability of Shumpert and White, but instead recognizes the admissibility of trauma evidence, demonstrated when the

Court rejected Makins' arguments and explained the following:

> . . . In practical terms, the court of appeals' ruling would require the exclusion of treating experts' testimony in general – a result Makins acknowledged he is seeking but one he struggled to defend during oral argument. This Court and the court of appeals have generally allowed the testimony of treating experts in this context. See State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) (holding treating psychotherapist's testimony that adult victim's symptoms were consistent with those of someone who recently suffered trauma was probative to refute defendant's contention the sex was consensual and to prove a sexual assault occurred); [State v. Dawkins, 297 S.C. 386, 394, 377 S.E.2d 298, 302 (1989)] (considering testimony of the minor's treating psychiatrist); State v. Dempsey, 340 S.C. 565, 572, 532 S.E.2d 306, 310 (Ct. App. 2000) (addressing testimony of the minor's treating therapist); State v. Berry, 413 S.C. 118, 131, 775 S.E.2d 51, 57 (Ct. App. 2015) (concluding treating psychotherapist's testimony about minor victim's symptoms was based on personal observations and was admissible), *aff'd as modified on other grounds*, 418 S.C. 500, 795 S.E.2d 26 (2016).

Makins, 433 S.C. at 504, 860 S.E.2d at 672. The implication is clear the Supreme Court recognized the continuing admissibility of trauma evidence consistent with White, and by implication, Shumpert.

The Supreme Court's citation and approval of this Court's opinion in Berry is also telling. This Court, in Berry, found a treating counselor, Roseborough, did not bolster the victim's testimony when she testified victim suffered from symptoms of trauma and diagnosed the victim with PTSD. This Court held Roseborough's testimony "explained the common behaviors and characteristics of a child sexual trauma victim. We find such testimony is admissible under Schumpert and Weaverling. Furthermore, Roseborough's testimony regarding behaviors she witnessed in the victim was proper because it was based on her personal observations." Berry, 413 S.C. at 131, 775 S.E.2d at 57 (citing Schumpert and State v. Weaverling, 337 S.C. 460, 474-75, 523 S.E.2d 787, 794 (Ct. App. 1999)

("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible.")),

Schumpert and White are cases that remain controlling precedent that requires, regardless of discussion of the next issue, close consideration for this Court's analysis.

II.

Makins provides important analysis applicable to the second issue – the Boiter[1] issue – because of Makins' analysis of the standard of review. The Supreme Court observed, "If the standard of review were de novo, an appellate court could simply rule on the evidentiary . . . [issue] in accordance with its own view of the dynamic faced by the trial court. However, under the deferential standard applicable here, an appellate court cannot disturb the trial court's rulings unless they lacked evidentiary support or were controlled by an error of law." Makins, 433 S.C. at 501, 860 S.E.2d at 670. Identifying Makins as a difficult case, the Supreme Court explained its holding "largely turns on the application of this deferential standard to the trial court's rulings." Id.; see also State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App.2004) (A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances).

In the instant case, the trial court made a careful probative versus prejudice analysis, and observed the "false" accusation[2] of an isolated incident involving the biological father differed

[1] State v. Boiter, 302 S.C. 381, 396 S.E.2d 364 (1990).

[2] This Court concluded, without authority, that "Minor claims to have remembered events she could not possibly remember, and there is evidence indicating Mother created these concerns." A study in 2007 determined that among Euro-American and British adults, the chronologically earlies memories were age 2.5 years, a full year younger than the commonly believed age of 3.5 years. Carole Peterson What is your earliest memory? It depends Memory Vol. 29, 2021, Issue 6

significantly from the charged conduct of chronic abuse by Betancourt. The trial court's ruling is a ruling supported by evidence and is not premised on an error of law, and therefore should be affirmed.

It is unfortunate that this Court concludes in footnote three that Minor's comments constitute evidence of coaching. It is unsurprising that a parent would give their daughter suffering from ADHD and trauma some insight or a preview as to what the interview would entail, such as advising that the interviewer would present anatomic dolls. This equates "coaching" with simply good parenting skills. And Victim's knowledge that the red dress is being brought to law enforcement is simply not evidence of coaching or fabrication, just that she is familiar with her surroundings.

The opinion also misapprehends Mother's testimony when stating: "Mother admitted she spoke with Minor prior to Minor's forensic interview – despite Investigator Picone's admonition not to – and she reported what Minor told her to Picone." Mother testified she followed law enforcement's advice to not talk about the abuse with Victim **unless Victim brought it up**. Minor initiated a conversation advising, "Mama, I want to tell you, okay?" and then analogized digital fondling to turning on a light switch. R. pp. 268-69 (Mother: "No, sir. They said do not talk to her about it. If she wants to talk about it, **let her talk about it.**" p. 268, lines 3-5). Naturally, Mother disclosed the information to law enforcement. R. pp. 268-69. For Investigator Picone's part, he

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(www.tandfonline.com/doi/full/10.1080/09658211.2021.1918174) (last visited 9/27/22). On the preceding paragraph to this citation, Peterson observes "[T]hese means for age of earliest memory mask the huge variation that one finds between individuals." Id. This Court's opinion also overlooks that the mother might have reasons for being less than forthcoming about sexual abuse that the biological father might have committed, as mother's custody under the circumstances, at least in her view, was tenuous and could be revisited with a previously unreported incidence of abuse. Her testimony declining to confirm in total Victim's answer during the forensic interview does not conclusively prove the "allegation" or the recollection was false.

testified that he told her not to talk about the case because it was already traumatic enough for Minor, and then testified he usually asks parents to not ask questions before the interview. R. p. 108, lines 3-14. This fundamental misunderstanding of the testimony which suggests impropriety on the mother's part warrants this Court revisiting its opinion.

Further, this Court overlooks the context in which the "accusation" occurred. As noted in the opinion, Minor advised the interviewer she was there to talk about what Betancourt did to her. She did not say she intended to talk about her biological father. The accusation was not really an accusation at all. Instead, the "accusation" was in response to the forensic interviewer's question as to whether anyone else did something to her, and Minor answered the question like a ten year old might, unaware that this innocuous question would serve to impeach the previous hour's discussion and the testimony she would be called upon to provide to a court room of strangers.

The age of Minor when the possible incident of abuse occurred decries the relevancy of the short redacted passage found late in the forensic interview. The "accusation" if arising independently from Minor's actual memory represents family lore, not an accusation Minor came to the center to make. The mother's contribution to this recollection is maybe necessary for the recollection's existence, but the manner of its existence tells a jury nothing about the veracity of the claims made from Minor's own recollections of events that she experienced without Mother's involvement between the ages of five and ten years old, when a child's ability to recall is no longer limited. "Recent research has suggested that there is a [sic] not only a great deal of fluidity in what memory is retrieved and identified **as one's earliest**, but that this is malleable." Carole Peterson What is your earliest memory? It depends Memory Vol. 29, 2021, Issue 6 (emphasis added).

In Hughes v. Raines, 641 F.2d 790 (9th Cir. 1981), the Ninth Circuit noted, "The fact that the

two incidents were quite different further attenuates the inference to be drawn [that the accusation in this case was false]." Id. at 793. The court concluded, "Exploring the factual situation of the prior incident would have added extraneous issues that had little, if any, probative value. The limitation of the cross-examination was a reasonable exercise of discretion by the trial judge." Id.

Decided last year, Vanover v. State, 433 S.C. 31, 856 S.E.2d 160 (Ct. App. 2021), reviewed a potential false allegation in the context of a PCR hearing. This Court analyzed evidence of the false allegation under not just Boiter, but also Rule 404(b) SCRE, and further examined the extrinsic evidence supporting the claim under Rule 608, SCRE. In this regard, the purported false accusation in the instant case would be offered at trial for propensity and not genuine probative worth. Rule 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

In the instant case, this Court found error, "Because prior false allegations of sexual abuse are highly probative of a victim's credibility . . . ." This Court did not cite authority for the proposition. However, in Vanover, this Court observed:

> The rationale for excluding prior false accusations that do not have a significant degree of similarity to the charge at issue is that those false claims lack any meaningful probative value. As one noted jurist explained, "[t]he fact that a teenage girl has a disordered past and lies a lot (who doesn't) does not predict that she will make up stories about having sex." Redmond v. Kingston, 240 F.3d 590, 591 (7th Cir. 2001) (Posner, J.). In other words, evidence that a witness has lied in the past has questionable value "since very few people, other than the occasional saint, go through life without ever lying." Id. at 593.

Vanover, 433 S.C. at 41-42, 856 S.E.2d at 165 (Concluding: "Even adopting Petitioner's version of the Doe allegation – that Doe made an inappropriate comment before spanking Daughter and her friend on their behinds – the allegation bears no similarity to Daughter's allegation that Petitioner

fondled her and sexually abused her several times over several years."). Therefore, Respondent disagrees with the overbroad statement that a false allegation of sexual abuse will be "highly" probative of a victim's credibility. In the instant case, it certainly was not (even if assuming falsity). Vanover ("We again note Boiter, which held 'factual similarity' was relevant when a trial court is deciding whether to admit evidence of a victim's prior false allegation. 302 S.C. at 383-84, 396 S.E.2d at 365.").

As in Makins, the issue in the present case must turn on the standard of review, and not the Court's own view of the evidence. The trial court had a sufficient basis to conclude the purported false accusation bore little relevance to the charges against Betancourt due to the lack of similarity between the conduct alleged. Accordingly, this Court should grant the petition for rehearing.

WHEREFORE, the State requests this Court to grant the petition for rehearing and affirm the convictions and sentences.

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Respectfully submitted,

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PROOF OF SERVICE

I, Leigh Ann Stone, certify I have served the within Petition for Rehearing on Appellant by sending an electronic copy via email to the address listed in AIS for the following individuals:

William G. Yarborough, III, Esquire
Lauren C. Hobbis, Esquire
308 W. Stone Ave.
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I further certify all parties required by Rule to be served have been served.
This 29th day of September, 2022.

Leigh Ann Stone

LEIGH ANN STONE
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From: Leigh Ann Stone
Sent: Thursday, September 29, 2022 3:10 PM
To: 'bill@wgylaw.com'; 'laurenwgylaw@gmail.com'
Cc: David Spencer; William Blitch; Anne Mueller
Subject: State v. Gabriel Betancourt, Jr. (2017-001016)
Attachments: BETANCOURT - State's Petition for Rehearing (03114598xD2C78).PDF

Good Afternoon Mr. Yarborough and Ms. Hobbis,

Please find attached a copy of the Petition for Rehearing in The State v. Gabriel Betancourt, Jr. (2017-001016). This petition will be submitted to the South Carolina Court of Appeals via the AIS One Drive System.

If you will, please reply to confirm receipt of this email.

Thank you!

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