

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County

Honorable Heath P. Taylor, Circuit Court Judge

VERNON COOLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000362

BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in allowing an expert in child abuse pediatrics who interviewed the minor and conducted a follow up examination to opine that the redness seen in a photograph from an earlier examination but not in the follow up examination was consistent with digital penetration because the testimony improperly bolstered the credibility of the minor witness?

STATEMENT OF THE CASE

In August of 2018, the Dorchester County Grand Jury indicted Petitioner, Vernon Lamar Cooley, for criminal sexual conduct with a minor second degree, amended indictment #2016-GS-18-0534. (App. pp. 352-353). On August 27, 2018, Petitioner proceeded to jury trial before the Honorable Diane S. Goodstein. Charlie Lee Whirl represented Petitioner at trial. Sheila Mims and Ryan Templeton prosecuted the case. The jury returned a verdict of guilty. Judge Goodstein sentenced Petitioner to twenty (20) years in prison. (App. p. 354). Trial counsel did not file a notice of intent to appeal.

On July 23, 2019, Petitioner filed an application for post-conviction relief [PCR]. (App. pp 355-361). On November 17, 2021, the State filed a return and partial motion to dismiss. (App. pp. 362-369). On January 25, 2023, an evidentiary hearing was held before the Honorable Heath P. Taylor. Christopher R. Geel represented Petitioner at the PCR hearing. Caroline Whitney O'Kelly represented the State. In a written order signed February 21, 2023, Judge Taylor a belated appeal but denied other relief. (App. pp. 404-412). A timely notice of intent to appeal was served on March 2, 2023. This brief pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), and a separately filed petition for writ of certiorari follow.

STANDARD OF REVIEW

“The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” *Id.* at 429–30, 632 S.E.2d at 848. State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 494–95 (2013)

ARGUMENT

The trial judge erred in allowing an expert in child abuse pediatrics who interviewed the minor and conducted a follow up examination to opine that the redness seen in a photograph from an earlier examination but not in the follow up examination was consistent with digital penetration because the testimony improperly bolstered the credibility of the minor witness.

Petitioner is the maternal grandfather of the minor complaining witness. On March 5, 2016, the minor, who was twelve at the time, and her two younger siblings went to their grandfather's house with plans to go eat breakfast. (App. p. 99, line 9 – p. 100, lines 1-23). Minor testified that while she was in the house and her siblings were still outside Petitioner put his finger inside her vagina and rubbed his penis on the outside of her vagina. (App. p. 102, lines 3-7). According to the minor, they then went to Burger King and when they returned, she went home, got on her bike, and rode to her mom's friend's house that was "kinda far." (App. p. 104, lines 1-20). The mother's friend was not at home but Minor knew a friend in the area so she borrowed her phone, called her stepdad, and asked him to come and pick her up. (App. p. 104, line 21 – p. 105, lines 1-3). Minor testified that when he picked her up she told her stepdad that "Papa tried to rape me." (App. p. 105, lines 5-9). Stepdad confirmed that ordinarily Minor would have been in trouble for riding her bike that far away. (App. p. 139, lines 2-13). The stepdad called the police and Minor was taken to the hospital for an examination. (App. p. 106, lines 1-17).

The nurse who examined Minor on March 5, 2016, Stacey Defrank, did not testify at trial. Instead, the State called Katherine Fabrizio, who interviewed and examined Minor at a two-week follow up appointment on March 24, 2016. (App. p. 259, line 17 – p. 260, 261, 262, lines 1-15). Just prior to Fabrizio testifying before the jury the State proffered her testimony in camera. (App. pp. 230-243). Fabrizio testified that she reviewed photographs from the initial

examination on March 5th that showed some redness in the hymenal tissue. (App. p. 238, lines 1-18). Fabrizio testified that she talked with the minor before the exam and confirmed that there had been digital penetration. (App. p. 238, lines 19-24). Fabrizio testified that the redness seen during the initial examination was not present during the follow-up exam. (App. p. 239, lines 3-10). During the proffer the State asked Fabrizio, “After conducting your examinations and understanding the allegations, what was your diagnosis in this case?” (App. p. 240, lines 8-10). Fabrizio answered, “Sexual assault.” (App. p. 240, line 11). The State argued the testimony was admissible as a medical diagnosis. (App. p. 243, lines 15-18). Trial counsel objected to the testimony as improperly bolstering the credibility of the minor. (App. p. 247, lines 11-24).

The trial judge limited Fabrizio’s testimony stating, “I looked in the same area and I saw nothing. Is that consistent – based on your knowledge, experience and training, is that, based upon what you reviewed, is that consistent with digital penetration? Yes. I think you got an expert. I think that’s a [sic] close as you can get.” (App. p. 249, lines 2-6).

The State then called Fabrizio to testify before the jury. (App. p. 255, line 22). She testified that her specialty was in child abuse pediatrics. (App. p. 257, lines 14-16). She confirmed that she only saw cases dealing with child abuse. (App. p. 258, lines 6-7). Fabrizio was qualified, without objection, as an expert in child abuse pediatrics. (App. p. 259, lines 3-9). Fabrizio testified in front of the jury that Minor was seen in the emergency room for acute sexual assault on March 5th. (App. p. 260, lines 13-14).

Fabrizio again testified that she reviewed photographs from the initial examination on March 5th that showed some redness in the hymenal tissue. (App. p. 261, lines 2-23). Fabrizio testified that she interviewed and examined Minor on March 24, 2016. (App. p. 260, line 20 – p.

261, 262, lines 1-15). She testified that the redness seen during the initial examination was not present during the follow-up exam. (App. p. 263, lines 14-16). The prosecutor then asked, "Okay. Is that consistent or would that be consistent with digital penetration?" (App. p. 263, line 25 – p. 264, line 1). Fabrizio answered, "Yes." (App. p. 264, line 2). On cross examination the witness admitted that the redness could be caused by something other than digital penetration. (App. p. 266, line 10 – p. 267, lines 1-12).

Trial counsel did not renew the objection to Fabrizio's testimony when she testified before the jury. The failure to renew the objection was alternatively raised as an allegation of ineffective assistance of counsel in case an appellate court found that the failure to renew the objection waived the issue for appellate review. (App. p. 373, lines 10-25). The PCR judge correctly found, citing State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001), that trial counsel's objection to Fabrizio's testimony during the proffer preserved the bolstering issue for appellate review. (App. pp. 410-412). As a result, the PCR judge declined to address the issue as an allegation of ineffective assistance of counsel. (App. pp. 410-412). If this Court disagrees with the PCR court and finds that the failure to renew the objection waived the issue for appellate review, Petitioner respectfully requests the opportunity to separately brief the issue as an allegation of ineffective assistance of counsel.

The next witness called by the State was Dr. Michelle Amaya. (App. p. 267, line 23 – p. 268, lines 1-8). Dr. Amaya was also qualified, without objection, as an expert in child abuse pediatrics. (App. p. 269, lines 18-22). Dr. Amaya reviewed images and the report from the March 5, 2016, examination of Minor as well as the follow-up report done by Fabrizio. (App. p. 269, line 24 – p. 270, 271, lines 1-14). Importantly, Dr. Amaya did not interview or examine the minor. (App. p. 249, lines 17-19). The doctor testified that some redness was observed on the

hymenal tissue during the initial examination on March 5, 2016. (App. p. 271, lines 2-9). Redness was not seen during the follow-up exam. (App. p. 271, lines 15-21). The doctor opined that digital penetration could have caused the redness but also admitted there could be other causes. (App. p. 272, line 18 – p. 273, lines 1-16). The cumulative nature of Dr. Amaya testimony increases the prejudicial impact of Fabrizio’s bolstering testimony because the jury heard from two experts, one who interviewed Minor and one who did not, and they both came to the same conclusion. As noted by the Court in State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013) (n. 5 omitted), “. . . [A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts. The label of expert should be jealously guarded by the court and never loosely bandied about.”

The trial judge erred in allowing even the limited expert testimony of Fabrizio that the physical findings were consistent with digital penetration, the same allegation made by the minor and disclosed to Fabrizio by the minor during an interview. The testimony should have been limited to the fact that redness was observed in the initial exam but not in the follow-up exam. The clear inference before the jury was that Minor told Fabrizio that digital penetration took place and Fabrizio believed Minor because the physical findings were consistent with digital penetration. The testimony improperly bolstered the credibility of the minor witness.

In discussing a child abuse assessment expert the Court in State v. Anderson, 413 S.C. 212, 218–19, 776 S.E.2d 76, 79 (2015), wrote:

Certainly we recognize that there is such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims. *See, e.g.,* State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct.App.1999); *see also* State

v. *White*, 361 S.C. 407, 605 S.E.2d 540 (2004) (such witness may be more crucial where alleged victim is a child). The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk [*219] that the expert will vouch for the alleged victim's credibility.⁴ Compare *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct.App.2015) (distinguishing improper bolstering cases because in *Brown* the behavioral expert did not examine the victim). Here, Witness Smith vouched for the minor when she testified only to those characteristics which she observed in the minor.

While Fabrizio was not called as a behavioral expert and instead testified about physical findings, the risk of vouching or bolstering discussed in *Anderson* is the same. The clear implication from her testimony is that she believed the minor when she told her she had been digitally penetrated and as a result, formed the opinion that the physical findings were consistent with digital penetration. The fact that the witness conceded on cross-examination that the redness could have been caused by something other than digital penetration does not cure the improper bolstering.

In *State v. Kromah*, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013), the Court provided a general guideline for the testimony of forensic interviewers. The Court wrote that forensic interviewers should avoid testifying at trial that the child was told to be truthful; giving a direct opinion as to a child's veracity or tendency to tell the truth; making any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a "compelling finding" of abuse; making any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or giving an opinion that the child's behavior indicated the child was telling the truth. The Court in *Kromah*, however, wrote that a forensic interviewer may testify as to the time, date, and circumstances of the interview; any personal observations

regarding the child's behavior or demeanor; or a statement as to events that occurred within the personal knowledge of the interviewer.

Fabrizio was not a forensic interviewer although part of her examination included interviewing the child. Instead, she was qualified, without objection, as an expert in child abuse pediatrics, the same expertise for which Dr. Amaya was qualified. Normally, under Rule 702, SCRE, an expert may testify in the form of an opinion. “Further, even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others.” Kromah, 401 S.C. at 358, 737 S.E.2d at 499.

Fabrizio’s testimony that she interviewed Minor and then concluded that the physical findings were consistent with what the Minor told her conveyed to the jury that the expert found Minor credible. Fabrizio’s testimony circumvented the mandates of Kromah and the caution of Anderson. The testimony should have been limited to the fact that redness was observed in the initial exam but not in the follow-up exam. The error was compounded by the fact that Fabrizio testified that Minor was seen in the emergency room for acute sexual assault on March 5th (App. p. 260, lines 13-14), clearly indicating to the jury that the expert witness believed Minor and believed a sexual assault took place.

Fabrizio’s testimony was especially prejudicial in light of the additional improper bolstering testimony from Detective Blanchard. Detective Blanchard testified that Minor revealed that a sexual assault occurred. (App. p. 183, lines 23-25). The detective testified that Minor made a similar report to the nurse and a similar report to the forensic interviewer. (App. p. 184, lines 1-25). The prosecutor asked, “Once you had all that information together, what did you do next?” (App. p. 185, lines 1-2). The detective testified, “Given the report from MUSC that I received and the consistent disclosures from the juvenile, I prepared an affidavit and

presented it to the magistrate for a warrant.” (App. p. 185, lines 3-5). Trial counsel did not object to the detective’s testimony and this issue is separately raised as an allegation of ineffective assistance of counsel in the accompanying petition for writ of certiorari.

In Chappell v. State, 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019), the South Carolina Court of Appeals noted testimony of any witness is improper bolstering if: (1) the witness directly states an opinion about the victim's credibility, (2) the sole purpose of the testimony is to convey the witness’s opinion about the victim's credibility, or (3) there is no way to interpret the testimony other than to mean the witness believes the victim is telling the truth. See Briggs v. State, 421 S.C. 316, 325, 806 S.E.2d 713 (2017); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011); State v. McKerley, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (2012). See, also, State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013); Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002). Fabrizio’s testimony improperly bolstered the credibility of the Minor.

Fabrizio’s testimony is distinguished from the testimony of a witness who testified both as an expert in characteristics of child trauma and child sexual abuse dynamics and as Minor's treating therapist in State v. Makins, 433 S.C. 494, 860 S.E.2d 666 (2021). In Makins the Court found the expert’s testimony did not improperly bolster the credibility of the minor writing:

Whether Rich's testimony constituted improper bolstering is a close question. As a result of the limitations the trial court placed on her testimony, Rich never testified she advised Minor about the importance of being truthful, never testified directly as to Minor's truthfulness, and never opined Minor's behavior indicated truthfulness. While Rich was allowed to confirm she treated Minor, she was not allowed to explain why she was treating Minor, detail her treatment of Minor, or testify as to her diagnosis of Minor. Rich only addressed the circumstances of Minor's disclosure of abuse and the drawing Minor produced in therapy.

Makins, 433 S.C. at 503, 860 S.E.2d at 671. Fabrizio, as an expert, interviewed and examined Minor. Fabrizio did not limit her testimony to physical findings. Instead, the expert testified that

the physical findings were consistent with digital penetration, the allegation disclosed by the Minor. In contrast to the testimony in Makins, there is no other way to interpret the testimony other than to mean Fabrizio believes the Minor is telling the truth. An additional difference is that the sole purpose of Fabrizio's testimony that the physical findings are consistent with digital penetration is to convey her opinion about the Minor's credibility. This is especially true in light of the fact that Dr. Amaya, a witness who did not interview or treat the Minor, provided the same testimony. In contrast, the testimony of the witness in Makins served a valid evidentiary purpose as laying the foundation for the introduction of evidence in the form of a photo.

The testimony from Fabrizio is also distinguished from the testimony of the forensic interviewer found admissible in State v. Barrett, 416 S.C. 124, 785 S.E.2d 391 (Ct. App. 2016). In Barrett the South Carolina Court of Appeals found that the forensic interviewer "never directly or indirectly commented on the credibility of Victim's accounts of the alleged sexual assault. Moreover, she never addressed the veracity of Victim or opined whether Victim was being truthful." The Court in Barrett also noted that the forensic interviewer did not limit her testimony to explaining the exact behavioral characteristic the minor exhibited. In contrast, Fabrizio's testimony that she interviewed the minor and then found that the physical findings were consistent with digital penetration, the exact allegation disclosed by the minor, indirectly commented on the credibility of the minor.

CONCLUSION

Based on the above argument, this Court should reverse Petitioner's convictions and sentences and remand for a new trial.


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ATTORNEY FOR APPELLANT

This 27th day of September, 2023.