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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO DORCHESTER COUNTY
Honorable Diane S. Goodstein, Trial Judge
Honorable Heath P. Taylor, PCR Judge

Appellate Case No. 2025-000584

VERNON COOLEY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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QUESTIONS PRESENTED

PETITIONER'S STATEMENT OF THE QUESTION

Whether the Court of Appeals erred in finding the trial judge properly allowed 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 the follow up examination was consistent with digital penetration because the testimony improperly bolstered the credibility of the minor witness?

RESPONDENT'S COUNTERSTATEMENT OF THE QUESTION

Whether the Court of Appeals correctly held the trial court did not err in allowing an expert in child abuse pediatrics who conducted a physical examination on the minor victim to testify that redness to minor victim's genital area, as observed in a photograph from an earlier examination but not in the subsequent examination, meant the minor victim probably had an injury consistent with digital penetration because (1) the expert did not offer an opinion on the victim's credibility, (2) the expert interviewed the victim for a medical purpose, (3) the expert did not testify to specific disclosures made by the victim, (4) the State called an independent expert to testify to potential causes for the redness, and (5) if improper, the testimony was a harmless error.

STATEMENT OF THE CASE

In August 2018, the Dorchester County Grand Jury indicted Vernon L. Cooley (“Petitioner”) for criminal sexual conduct with a minor – second degree (2016-GS-18-0534). (App. 352-53). On August 27, 2018, Petitioner proceeded to a jury trial before the Honorable Diane S. Goodstein. The State was represented by Assistant Solicitors Sheila Mims and Ryan Templeton. Petitioner was represented by Charlie Whirl (“trial counsel”). The jury convicted Petitioner, and Judge Goodstein sentenced Petitioner to twenty (20) years in prison. (App. 354). Petitioner did not appeal.

On July 23, 2019, Petitioner filed an application for post-conviction relief (“PCR”). (App. 355-61). On November 17, 2021, the State (“Respondent”) filed its Return and a partial motion to dismiss. (App. 362-69). On January 25, 2023, an evidentiary hearing was convened before the Honorable Heath P. Taylor. Assistant Attorney General Caroline Whitney O’Kelly represented Respondent, and Christopher R. Geel, Esquire, represented Petitioner at the hearing.

On February 21, 2023, Judge Taylor granted Petitioner PCR relief in part, granting a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), and denied Petitioner relief on remaining grounds. (App. 404-12). On March 2, 2023, a notice of appeal was filed. On September 27, 2023, Petitioner filed a petition for writ certiorari and a separate brief pursuant to *White*.

On February 12, 2025, the Court of Appeals denied certiorari on Petitioner’s question on the PCR court’s ruling on his ineffective assistance of counsel claims and granted certiorari on Petitioner’s belated appeal claim. The Court of Appeals determined there was evidence to support the PCR court’s finding that Petitioner was entitled to a belated appeal. Petitioner and Respondent filed briefs for belated appeal review pursuant to *White v. State*.

Following briefing and without oral argument, the Court of Appeals affirmed the trial court's admission of testimony from an expert in child abuse pediatrics regarding her opinion of the minor victim's genital injury based on her observations, finding no error since the expert did not offer her opinion on the minor victim's credibility. *Cooley v. State*, Op. No. 2025-UP-050 (S.C. Ct. App. filed Feb. 12, 2025). Petitioner's petition for rehearing was denied on March 24, 2025. This petitioner for writ of certiorari follows.

STATEMENT OF THE FACTS

At trial, minor victim (“Victim”) testified that on March 5, 2016, when she was twelve (12) years old, her grandfather agreed to take Victim and her siblings to breakfast. (App. 99-100). When Victim arrived at her grandfather’s house, no one was there but him. (App. 101). While alone with her grandfather, Victim testified he began kissing on her neck and touching her vaginal area inside of her pants. (App. 101). Victim testified the two went to his room, wherein she laid on the bed and he pulled down Victim’s pants and inserted his fingers in her vagina. (App. 101-02). Shortly after the incident, Victim went to a friend’s house and called her stepfather to pick her up. (App. 104-05). Victim disclosed the events to her stepfather, who contacted the police. (App. 105-06). Victim spoke to police and was taken to the hospital. (App. 106).

Melissa Blanchard (“Detective Blanchard”), a Dorchester County Sheriff’s Office detective, testified she arrived at the scene and spoke to Victim and her stepfather. (App. 182-83). Blanchard testified Victim ultimately revealed that a sexual assault occurred. (App. 183). Blanchard called a victim’s advocate to escort Victim to MUSC to submit to a sexual assault kit and set up a forensic interview at the Dorchester Children’s Advocacy Center. (App. 184).

Katherine Fabrizio (“Fabrizio”), an expert in child abuse pediatrics, testified she examined Victim while working at MUSC. (App. 259). Fabrizio reviewed the SLED report, lab work, photographs, and talked to Victim. (App. 260-61). Fabrizio took pictures during her examination of Victim on March 24th. (App. 261). Fabrizio testified she observed redness of the hymenal tissue in the photos from Victim’s first examination on March 5th but did not observe redness in the subsequent examination on March 24th. (App. 261-63). Fabrizio testified the disappeared redness meant Victim probably had an acute injury to that area initially, and the injury had resolved. (App. 263). Fabrizio further testified the injury is consistent with digital penetration. (App. 263-64).

STANDARD OF REVIEW

The decision to admit or exclude testimony from an expert witness is within the sound discretion of the trial court. *State v. Makings*, 433 S.C. 494, 500, 860 S.E.2d 666, 670 (2021). The trial court's decision to admit expert testimony will not be reversed on appeal unless there is an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013).

REASON WHY CERTIORARI SHOULD BE DENIED

This Court should deny the petition for writ of certiorari because existing case law sufficiently establishes the standard for what constitutes improper bolstering in child sex abuse cases, and the Court of Appeals correctly determined that the expert's testimony in this case was not improper under that precedent.

ARGUMENT

The Court of Appeals correctly held the trial court did not err in allowing an expert in child abuse pediatrics who conducted a physical examination on the minor victim to testify that redness to minor victim's genital area, as observed in a photograph from an earlier examination but not in the subsequent examination, meant the minor victim probably had an injury consistent with digital penetration because (1) the expert did not offer an opinion on the victim's credibility, (2) the expert interviewed the victim for a medical purpose, (3) the expert did not testify to specific disclosures made by the victim, (4) the State called an independent expert to testify to potential causes for the redness, and (5) if improper, the testimony was a harmless error.

The Court of Appeals correctly determined Fabrizio's testimony regarding her observations of the genital redness on Victim did not constitute improper bolstering because Fabrizio did not offer an opinion on the victim's credibility. If specialized knowledge will assist the trier of fact to understand the evidence... a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion. Rule 702, SCRE. An expert giving an opinion is allowed to rely on facts and data that are not admitted into evidence, or even admissible, if the facts or data are of a type reasonably relied upon by experts in the particular field. Rule 703, SCRE. Although experts are allowed to give an opinion, they may not offer an opinion regarding the credibility of other witnesses. *Kromah*, 401 S.C. at 358, 737 S.E.2d at 499.

In Petitioner's trial, the court held a hearing outside of the jury's presence to proffer Fabrizio's testimony. (App. 231-55). Concerned with the potential for bolstering, the trial court limited the scope of Fabrizio's testimony by instructing her to only testify to medical diagnoses she made as Victim's treating nurse practitioner. (App. 245-248). The trial court further instructed Fabrizio not to speak on the sexual abuse disclosure Victim made during the physical examination. (App. 251-52).

Before the jury, Fabrizio was qualified as an expert in child abuse pediatrics and testified that she conducted a physical examination on Victim on March 24th. (App. 25). Fabrizio testified

Victim was seen in the emergency room two weeks earlier on March 5th and photographs were taken then. (App. 260-61). In preparation for the subsequent examination on March 24th, Fabrizio reviewed photographs, lab work, and SLED notes. (App. 260). Fabrizio testified that she took pictures during her March 24th examination of Victim and was able to review [and compare] photographs from the March 5th visit. (App. 261). Fabrizio testified that she observed a redness in Victim's hymenal tissue in pictures from the March 5th visit, but the same redness was not seen in the subsequent March 24th visit. (App. 261; 263). Fabrizio opined the redness probably meant Victim had an acute injury to that area initially, but the injury had resolved. (App. 263). Fabrizio further testified the injury is consistent with digital penetration. (App. 263-64). On cross-examination, Fabrizio testified that the redness could also be caused by non-specific causes unrelated to sexual abuse. (App. 266).

A. Fabrizio did not offer an opinion on the Victim's credibility, believability, or veracity.

Fabrizio's testimony did not improperly bolster Victim because Fabrizio did not offer an opinion on Victim's credibility, believability, or veracity. Assessment of witness credibility is within the exclusive province of the jury, and witnesses are generally not allowed to testify whether another witness is telling the truth. *Kromah*, 401 S.C. at 358, 737 S.E.2d at 499-00. Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child in a sexual abuse matter. *Id.*; compare *Smith v. State*, 386 S.C. 562, 564-65, 689 S.E.2d 629, 631 (2010) (determining a forensic interviewer's testimony that she found the victim's statement "believable" was improper bolstering) with *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (determining a forensic interviewer's testimony was not improper bolstering where an interviewer never stated she believed the victim and gave no other indication concerning the victim's veracity).

In *State v. Kromah*, the Supreme Court found a forensic interviewer's testimony was improper bolstering when the interviewer testified there was a "compelling finding" of child abuse. *Kromah*, 401 S.C. at 356, 737 S.E.2d at 498-99. The Court analogized the forensic interviewer's comments with similar comments made by another forensic interviewer in *State v. Jennings*, in which the *Jennings* interviewer testified to a "compelling finding" of abuse. *Id.* at 359, 737 S.E.2d at 500 (citing *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011)). Concerned with comments by forensic interviewers, the *Kromah* Court set forth the following list of comments *forensic interviewers* should avoid at trial:

- Statements that the child was told to be truthful;
- A direct opinion as to the child's veracity or tendency to tell the truth;
- Any statement that vouches for the child's believability, such as stating a "compelling finding of abuse;"
- Any statement to indicate the interviewer believes the child's allegations; or
- An opinion that the child's behavior indicated the child was telling the truth.

Id. at 360, 737 S.E.2d at 500 (emphasis added).

Fabrizio did not speak to the credibility of Victim, unlike the forensic interviewers in *Kromah* and *Jennings*. Instead, Fabrizio opined to possible causes of the redness she observed in the photographs from the physical examination, which included causes both related and unrelated to sexual assault. Fabrizio never opined or gave any statement on whether she believed Victim and gave no indication regarding Victim's veracity or credibility. Thus, the Court of Appeals correctly determined Fabrizio's testimony did not constitute improper bolstering because she did not testify to or give any opinion on Victim's credibility, believability, or veracity.

B. As a nurse practitioner, Fabrizio interviewed Victim for a medical purpose to conduct a physical examination and render a medical diagnosis, and not for an investigatory purpose to fact-find or aid law enforcement.

Fabrizio's testimony did not improperly bolster Victim because Fabrizio interviewed Victim for medical purposes to conduct a physical examination, not for an investigatory purpose. The Courts are primarily concerned with forensic interviewers, who interview children for an investigatory purpose to aid law enforcement, testifying about statements the victim made during the interviews. *Kromah*, 401 S.C. at 357, 737 S.E.2d at 499 (stating “[a] forensic interviewer is a person specially trained to talk to children when there is a suspicion of abuse or neglect....The job of the [forensic] interviewer is not to provide therapy but to collect facts...a forensic interviewer's purpose is to prepare for trial” (citations omitted)); *Briggs v. State*, 421 S.C. 316, 327-29, 806 S.E.2d 713, 719-20 (2017) (stating forensic interviewers serve in child sex abuse cases for evidentiary and investigatory purposes and are specially trained to determine “if something happened” to “aid law enforcement in their investigatory process” (citing *State v. Anderson*, 413 S.C. 212, 221, 776 S.E.2d 76, 80 (2015))). Both the *Kromah* and *Briggs* Courts found the purpose for which an interviewer questions a child in a sex abuse case is consequential to the admissibility of the interviewer's testimony before the jury. *See Briggs, supra; see Kromah*, 401 S.C. at 357-58 n. 5, 737 S.E. 2d at 499 n.5.

Unlike the forensic interviewers in *Briggs* and *Kromah*, Fabrizio interviewed Victim as a treating nurse practitioner, during the course of a physical medical examination, for purposes of rendering a medical diagnosis. Fabrizio did not interview the Victim for investigatory purposes to aid law enforcement in determining whether a criminal investigation is warranted. *Briggs*, 421 S.C. at 328, 806 S.E.2d at 713 (“In *Anderson*, we recognized that one ‘purpose of [a forensic] interview is to allow law enforcement to determine whether a criminal investigation is warranted....In both *Kromah* and *Anderson*, however, we specifically held this investigatory

purpose should not be discussed in the forensic interviewer's testimony before the jury" (citations omitted)).

The mere fact that Fabrizio interviewed Victim and testified in Petitioner's trial does not automatically suggest improper bolstering as Petitioner argues. The purpose for which Fabrizio interviewed Victim matters, and here, Fabrizio interviewed Victim to aid Fabrizio in providing medical care as evidenced by her testimony. Fabrizio testified that she conducted a physical examination on Victim and was required to follow [medical] protocol, review photographs and lab reports, and talk to victim as a part of the physical examination. (App. 259-60). Fabrizio testified that the physical examination included checking for injuries to Victim's genital area to ensure the patient is healthy and observe physical changes such as herpes, warts, or breakouts. (App. 262-63). The mere fact that Fabrizio testified to the jury that she "talked to" Victim does not raise an inference to the jury that Fabrizio believed Victim as Petitioner argues. Thus, the trial court properly allowed the testimony.

C. Fabrizio's did not testify to specific disclosures made by Victim and opined regarding medical observations resulting from the physical examination.

Fabrizio's testimony did improperly bolster Victim because Fabrizio did not testify to the specific disclosures made by Victim during the examination. In *Perry*, the Court of Appeals found a treating physician's testimony did not improperly bolster the minor victim when the physician did not testify to the minor victim's disclosures, did not comment on the truthfulness of the victim's history of sexual assault, and testified to the results of the medical examination. *State v. Perry*, 420 S.C. 643, 665-66, 803 S.E.2d 899, 911 (2017), *overruled on other grounds by State v. Perry*, 430 S.C. 24, 842 S.E.2 654 (2020).

In Petitioner's case, Fabrizio testified that she "talked to" Victim but neither testified about her conversations with Victim nor repeated to the jury any disclosures made by Victim, similar to

the treating physician in *Perry*. Fabrizio's testimony that Victim's injury was consistent with digital penetration and other causes did not improperly bolster Victim because an expert is allowed testify to an opinion based on their observations and specialized knowledge. Thus, the trial court properly allowed the testimony.

D. In adherence to *Anderson* precedent, the State called Dr. Amaya as an independent expert in child abuse pediatrics to testify regarding the potential causes for the redness observed in Victim's genital area.

To avoid the risk of improper bolstering, the State called Dr. Amaya, an expert in child abuse pediatrics, to testify as an independent expert regarding the potential causes for the redness observed. Petitioner argues that Fabrizio's testimony was unnecessary since Dr. Amaya testified regarding the potential causes for the redness. However, dual expert testimony is not improper bolstering. Though a dual expert testifying is not improper bolstering per se, the risk of improper bolstering might be avoided where the State calls a blind expert. *State v. Makins*, 433 S.C. 494, 860 S.E.2d 666 (2021); *Anderson*, 413 S.C. at 219, 776 S.E.2d at 80 (stating to avoid improper vouching by a forensic interviewer, the better practice is to not have the interviewer who examined the alleged victim testify but rather to call an independent expert).

In *Makins*, the Court found a witness' testimony did not constitute improper bolstering when the minor victim's therapist testified as *both* an expert and the treating therapist and gave limited testimony about certain disclosures the victim made that sexual abuse had occurred. *Makins*, 433 S.C. at 497-04, 860 S.E.2d at 668-69. The Court noted the case was a close question but found the testimony served a purpose other than to vouch for the victim's credibility. *Id.* at 503-05, 860 S.E.2d at 671-72. However, the Court suggested that the risk of improper bolstering might be avoided by calling an independent expert to testify. *Id.* at 505, 860 S.E.2d at 672.

In adherence to *Anderson* and *Makins* precedent, the State in Petitioner's case called Dr. Amaya as an independent expert in child abuse pediatrics to testify regarding the potential causes for the genital injury. Petitioner contends the cumulative nature of Dr. Amaya and Fabrizio's testimonies increased the prejudicial impact of any improper bolstering by Fabrizio, citing *Kromah*, 401 S.C. at 357, 737 S.E.2d at 499 ("jurors can have a tendency to attach more significance to the testimony of experts" (n. 5 omitted)). Petitioner's argument stands in contrast with the *Anderson* and *Makins* precedents. Here, the State made reasonable efforts to avoid improper bolstering by calling an independent expert witness. Additionally, the risk of improper bolstering from having two experts testify was remedied by the trial court's jury charge that "[a]n expert witness' testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert." (App. 329).

The mere fact that Fabrizio testified as both Victim's treating nurse and an expert in child abuse pediatrics is not improper bolstering per se as Petitioner argues. Fabrizio's testimony served a purpose other than to vouch for Victim's credibility since Fabrizio testified to her observations during the course of a medical examination. Additionally, Petitioner argues Fabrizio's testimony was prejudicial in light of testimony from Detective Blanchard. However, Blanchard's and Fabrizio's testimonies are distinguishable. Blanchard interviewed Victim for an investigatory purpose and testified regarding disclosures made by Victim. By contrast, Fabrizio interviewed Victim for a medical purpose and did not testify to disclosures made by Victim. Thus, the trial court properly allowed the testimony.

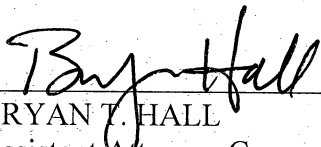
E. Should this Court find Fabrizio's testimony was improper, Petitioner was not prejudiced under a harmless error analysis because Petitioner trial did not turn solely on the Victim's credibility.

Respondent submits that even if this Court finds Fabrizio's testimony was not prejudicial under a harmless error analysis because the State presented physical evidence of the assault from Victim's underwear from the day of the incident (State's Ex. 1; app. 106-07); SLED analysis of Victim's underwear (State's Ex. 12; app. 216-17); a CSC kit from MUSC (State's Ex. 8); and a sexual assault evidence collection kit (State's Ex. 11; app. 217-23). *Anderson*, 413 S.C. at 219, 776 S.E.2d at 79 (holding the forensic interviewer's improper testimony was not a harmless error because there was no physical evidence of the sexual abuse, and the case "turned solely on the credibility of the victim"). Therefore, the Court of Appeals correctly affirmed the trial court's ruling.

CONCLUSION

Based on the foregoing argument, the Court of Appeals correctly affirmed the trial court's ruling, finding no error. Accordingly, Respondent respectfully requests this Court to affirm the Court of Appeals' rulings and deny Petitioner's writ for certiorari.

Respectfully submitted,


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