

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chester County

J. Ernest Kinard, Jr., Circuit Court Judge

RECEIVED

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SC COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

KEVIN EUGENE LAWS,

APPELLANT

APPELLATE CASE NO. 2013-000446

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in qualifying a forensic interviewer as an expert witness in “child sexual abuse counseling and treatment?”

STATEMENT OF THE CASE

On January 28, 2013, a Chester County grand jury indicted appellant for second degree criminal sexual conduct with a minor and committing a lewd act upon a child. On February 26, 2013, appellant was tried before the Honorable J. Ernest Kinard and a jury R. 1. Curtisha Mingo represented the State and Everett Stubbs represented appellant. R. 1. The jury acquitted appellant of criminal sexual conduct. R. 210, ll 10 – 21. The jury convicted appellant of committing a lewd act. R. 210, ll. 10 – 21. Judge Kinard sentenced appellant to fifteen years' imprisonment suspended upon the service of five years' imprisonment and three years' probation and registration as a sex offender. R. 224, ll. 3 – 13. Appellant timely served and filed a notice of appeal and this appeal follows.

ARGUMENT

The trial court erred in qualifying a forensic interviewer as an expert witness in child sexual abuse counseling and treatment.

Appellant's stepdaughter, Minor, accused him of several instances of inappropriate sexual conduct. R. 43, l. 9 – 75, l. 15. Appellant testified in his own defense and emphatically denied the allegations. R. 159, ll. 5 – 8. Shortly after appellant's wife forced him to move out of the house and Minor's allegations were made to law enforcement, appellant's best friend moved into his former home and began living with his wife. R. 169, ll. 20 – 24. Even though Minor accused appellant of digitally penetrating her and having oral sex with her multiple times, the jury disbelieved her testimony and acquitted appellant of the second degree criminal sexual conduct charge. R. 48, ll. 11 – 14. R. 59, l. 21 – 60, l. 7. R. 66, ll. 3 – 8. R. 68, ll. 13 – 23. R. 70, ll. 4 – 11. R. 210, ll. 10 – 21. The jury sent a note that they could not reach a verdict on either count and after instruction from the trial judge to continue deliberating, convicted appellant only of committing a lewd act. R. 209, l. 17 – 210, l. 21. The jury deliberated for over four hours. R. 207, l. 8 – 209, l. 24

Prior to trial, the defense moved to limit the testimony of the forensic interviewer. R. 17, l. 11 – 20, l. 25. The defense, referring the trial judge to State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), also argued that it would be improper to qualify the forensic interviewer as an expert witness.¹ R. 17, ll. 11 – 22. The solicitor originally agreed that she would not call the forensic interviewer as an expert. R. 18, ll. 5 – 7. After reading Kromah

¹ Defense counsel did not refer to the Kromah case by name, but the discussion, including mention of the footnote in the opinion, make it highly likely that Kromah was the basis of the argument. R. 19, ll. 19 – 21. In a later discussion the solicitor refers to the case as "Cromwell" which is likely a phonetic transcription of "Kromah" by the court reporter. R. 26, ll. 13 – 16.

and considering the issue overnight, the trial judge said, “Now, why do you want to put this forensic person up? As I look at it all she can’t testify to anything.” R. 26, ll. 2 – 5. The trial judge further stated that a forensic interviewer cannot offer an “opinion as to the child’s behavior.” R. 26, ll. 18 – 22. The solicitor then said she did not plan to have the forensic interviewer testify outside of the limitations expressed in Kromah. R. 26, ll. 23 – 25.

The State’s last witness was a forensic interviewer, David Kellin (“Kellin”). R. 145, ll. 7 – 23. After questioning regarding his qualifications, the solicitor offered him as “an expert in child sexual abuse counseling and treatment.” R. 146, ll. 10 – 14. The trial judge allowed him to be qualified.² R. 146, l. 14. Kellin then testified he treated Minor for post-traumatic stress disorder (“PTSD”). R. 146, ll. 22 – 24.

The qualification of Kellin as an expert and allowing his subsequent irrelevant testimony was error. Kromah mandates reversal of appellant’s conviction. In Kromah, just as in this case, a forensic interviewer was qualified as an expert witness. Discussing the qualification of the forensic interviewer in Kromah, the Supreme Court said, “[W]e state today that we can envision no circumstance where [a forensic interviewer’s] qualification as an expert at trial would be appropriate.” Id. at ___, 737 S.E.2d at 499 n.5. The Court further noted that the “label of expert should be jealously guarded by the court and never loosely bandied about.” Id. at ___, 737 S.E.2d at 499. The Court could not have been more clear that qualification of a forensic interviewer as an expert is error.

² Defense counsel voiced no objection to Kellin’s qualification. R. 146, l. 13 Appellant urges this Court to abandon its traditional error preservation rules in this case and view defense counsel’s pre-trial objection under Kromah as curing his failure to object to Kellin’s qualification or any of his subsequent testimony.

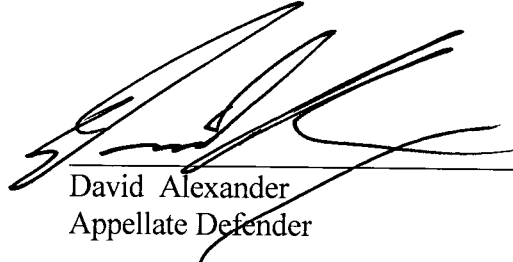
While the forensic interviewer was not qualified as an expert in forensic interviewing, his testimony served the same purpose that was banned in Kromah: vouching for complainant's veracity. Kellin testified extensively that PTSD is caused by "a life injuring experience" and that he treated Minor for PTSD after appellant supposedly committed these crimes. R. 147, l. 6 – 151, l. 21. He classified Minor's symptoms as at the "highest level." R. 150, ll. 5 – 6. He offered opinions on how often children delay reporting abuse which, on its face, was unscientific.³ R. 151, ll. 8 – 10. All of his testimony—about actions that happened **after** any alleged misconduct—was irrelevant to whether a crime occurred and was meant for the imprimatur of an expert's opinion to corroborate Minor's allegations. It could serve no other purpose and therefore violated the rule stated in Kromah. In this close case, where the jury clearly did not believe much of the State's case and acquitted appellant of the most serious charge, the error was highly prejudicial.

³ Kellin testified that "75% of children never disclose [abuse] over a course of their lifetime." R. 151, ll. 10 – 13. If a child never discloses abuse, then it seems impossible that Kellin or even a legitimate social scientist could concoct a study to prove this figure to any reasonable degree of certainty.

CONCLUSION

For the foregoing reasons, appellant's conviction should be reversed and he should be granted a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line. The signature is stylized and somewhat cursive.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of November, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chester County
J. Ernest Kinard, Jr., Circuit Court Judge

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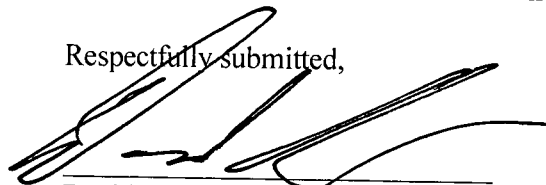
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kevin Eugene Laws states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge J. Ernest Kinard, Jr., which was held on February 27, 2013, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Kevin Eugene Laws.

Respectfully submitted,



David Alexander
Appellate Defender

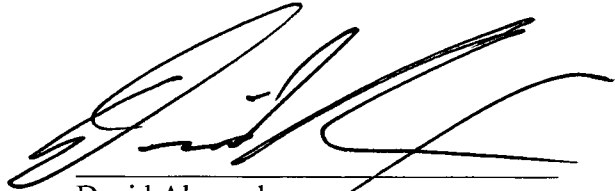
ATTORNEY FOR APPELLANT

This 18th day of November, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

November 18, 2013

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

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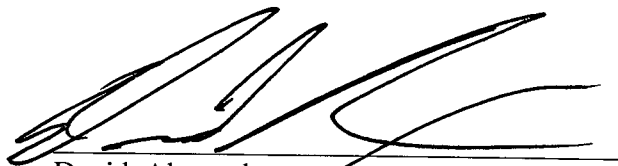
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CERTIFICATE OF SERVICE

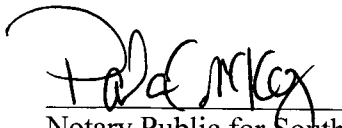
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Kevin Eugene Laws, 354497 at Evans Correctional Institution, this 18th day of November, 2013.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of November, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

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SC Court of Apper