ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NORMAN KEITH BURGESS,

APPELLANT

APPELLATE CASE NO. 2013-000006

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in qualifying a forensic interviewer as an expert in "counseling" and "abused children and adults" and allowing her to testify in a manner which impermissibly bolstered the complainant's testimony?

STATEMENT OF THE CASE

On August 21, 2012, a Pickens County grand jury reindicted appellant for crimes allegedly committed in March 2007. R. 431. Appellant was indicted for third degree criminal sexual conduct, second degree criminal sexual conduct with a minor, and lewd act upon a child. R. 429, 435. On December 17, 2012, appellant was tried before the Honorable G. Edward Welmaker and a jury. R. 1. Sam Tooker represented the State and John Abdalla and Brandt Rucker represented appellant. R. 1. The jury convicted appellant. R. 421, ll. 6 – 16. Judge Welmaker sentenced appellant to consecutive terms of imprisonment totaling 450 months. R. 426, ll. 6 – 16. Appellant timely filed and served a notice of appeal and this appeal follows.

ARGUMENT

The trial court erred in qualifying a forensic interviewer as an expert in "counseling" and "abused children and adults" and allowing her to testify in a manner which impermissibly bolstered the complainant's testimony.

The complainant, Minor, alleged that appellant began sexually abusing her when she was approximately fourteen years old. R. 77, l. 4 – 78, l. 2. Appellant was Minor's stepfather. R. 318, – 319, l. 11. Appellant testified in his own defense. R. 317, l. 3 – 347, l. 17. Appellant admitted having sex with the complainant when she was seventeen years old, but vehemently denied having sex with her before her seventeenth birthday. R. 330, l. 22 – 331, l. 6. Appellant testified that the complainant repeatedly approached him asking if they could be "friends with benefits." R. 329, l. 11 – 330, l. 14. Appellant admitted that acquiescing to her advances was a mistake but denied any illegal conduct and testified that the sex was consensual. R. 330, l. 17 – 331, l. 6.

The complainant eventually became pregnant with appellant's child. R. 134, l. 16 – 135, l. 16. After the child was born, family members teased complainant because the child looked like appellant. R. 286, ll. 9 – 18. Complainant's step-aunt testified that the complainant was "ashamed that she got caught, that she was sleeping with her step-dad." R. 286, ll. 14 – 18. Appellant testified that after he bought a Corvette, the complainant wanted the car and when he refused to give it to her, she grew at him angry and jealous of her mother. R. 333, l. 10 – 334, l. 17.

The State called Shauna Galloway-Williams ("Williams"), who was executive director of a forensic interviewing center. R. 174, l. 18 – 175, l. 11. The State first offered Williams as "an expert in counseling sexually abused children and adults." R.

178, ll. 7 – 8. The defense stated there was no objection "as to the expertise in counseling." R. 178, ll. 11 – 12. The court then asked the solicitor exactly what kind of expert was Williams. R. 178, ll. 13 – 14. The solicitor responded, "Well, counseling and then going into, I guess, her understanding of abused children and adults." R. 178, ll. 15 – 17. Appellant objected to "the latter portion" of this qualification. R. 178, ll. 18 – 19. The trial court ruled, "All right. She's admitted as an expert in that field." R. 178, ll. 20 – 21.

Williams claimed she had never spoken to the complainant. R. 180, ll. 12 – 14. She had never seen any of the complainant's written or video statements. R. 180, ll. 15 – 18. Williams claimed that she had never seen any evidence related to the case. R. 180, ll. 19 – 20.

Despite her supposed lack of knowledge of the specifics of the case, Williams offered testimony regarding what she claimed were general characteristics in child abuse cases. This testimony mirrored the complainant's accusations. Williams testified regarding "delayed disclosure" and that persons who have suffered from abuse failed to report it because of "fear." R. 181, l. 19 – 182, l. 1. This matched the complainant's testimony that appellant had threatened her and members of her family. R. 81, ll. 7 – 14. Williams also testified about "grooming." R. 191, l. 14 – 193, l. 1. Williams claimed that "grooming" meant an offender was "testing the waters with a child." R. 191, ll. 15 – 16. Williams also claimed that a form of "grooming" was exposing a child to sexual behavior and gave the example of her "primary caregivers engaging" in sex in front of a child and having them "watch it intentionally." R. 192, ll. 11 – 21. Williams' testimony

matched complainant's allegations that her mother and appellant forced her to watch them have sex. R. 74, l. 15 – 75, l. 11.

Williams supposedly hypothetical testimony had no other purpose but to bolster the complainant's credibility. Since sex was admitted, the only issues before the jury were the issues of consent and whether sex took place before the age of consent. Appellant denied nonconsensual sex and denied that any sex took place before appellant was seventeen years old. The complainant claims she was forced into sex and that the sex began when she was approximately fourteen. These opposing versions meant that the jury could not convict appellant without believing complainant's testimony. Therefore, complainant's credibility was the central issue in the case.

Qualification of Williams, a forensic interviewer, as an expert in "abused children and adults" was error. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). Williams' subsequent testimony, which mirrored exactly the claims of the complainant, was an attempted end-run around this Court's decision in Kromah and its predecessor cases. See State v. Douglas, 380 S.C. 499, 500, 671 S.E.2d 606, 607 (2009); State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). The only purpose of Williams' testimony was the improper invasion of the province of the jury. Kromah at 358, 737 S.E.2d at 499 – 500. The only inference to be drawn from Williams testimony was that the complainant was telling the truth. It was error to allow this testimony. Id.

Appellant was prejudiced by this error. Appellant testified in his own defense and several other witnesses testified in his favor. This case essentially boiled down to a "he said – she said" contest of the parties' credibility. In this type of case where parties' versions of

events are diametrically opposed, the improper bolstering of the complainant's credibility by the forensic interviewer was error and requires reversal and a new trial for appellant.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.

Respectfully submitted,

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of November, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NORMAN KEITH BURGESS,

APPELLANT

APPELLATE CASE NO. 2013-000006

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Norman Keith Burgess states:

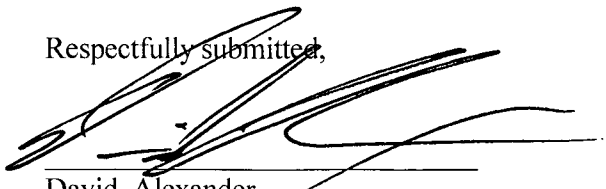
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge G. Edward Welmaker, which was held on December 19, 2012, 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 Norman Keith Burgess.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd 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 22, 2013

David Alexander
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NORMAN KEITH BURGESS,

APPELLANT

APPELLATE CASE NO. 2013-000006

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant 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 Record on Appeal have been served on Norman Keith Burgess, #353672 at McCormick Correctional Institution, this 22nd day of November, 2013.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of November, 2013.

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