

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No. 2011-202734

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FEB 19 2014

SC Court of Appeals

THE STATE,

Respondent,

vs.

CHARLES M. DEVEAUX,

Appellant.

RESPONDENT'S PETITION FOR REHEARING

On February 5, 2014, this Court issued an unpublished opinion in which it reversed Appellant's conviction and sentence and remanded the case for a new trial. State v. Deveaux, Op. No. 2014-UP-042 (S.C. Ct. App. filed February 5, 2014). Pursuant to Rule 221(a), SCACR, Respondent ("the State") respectfully petitions for rehearing on the following points the State believes were possibly misapprehended or overlooked by this Court.

Proper Qualification

First, the State respectfully submits that this Court may have misapprehended or overlooked its argument regarding Raymond Olszewski's qualification as an expert. Because the judge properly qualified Raymond Olszewski as an expert in child abuse assessment, any alleged error in qualifying Olszewski as an expert in forensic interviewing was harmless.

Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. Before a witness is qualified as an expert, the trial court must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011); see also State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 819 (2001).

Initially, Appellant's argument regarding the improper qualification of Olszewski as an expert in child abuse assessment is not preserved.

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). An appellant is limited to the arguments he makes at trial. See, e.g., State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000).

After the State moved to qualify Olszewski as an expert in forensic interviewing and child abuse assessment, defense counsel questioned Olszewski regarding his qualifications as a forensic interviewer and the reliability of forensic interviewing. (R. pp. 271-272.) Thereafter,

defense counsel stated, “[W]e don’t think this is a science that he can be an expert in, Judge.” (R. p. 273.) Appellant’s objection seemed to only relate to the qualification of Olszewski as an expert in forensic interviewing, not child abuse assessment. Therefore, any argument that the trial judge erred in qualifying Olszewski as an expert in child abuse assessment is not preserved.

However, regardless of preservation, Olszewski was properly qualified as an expert in child abuse assessment; therefore, Olszewski’s testimony regarding delayed disclosure and the level of detail children provide was properly admitted.

Notably, behavioral evidence regarding victims of sexual abuse has historically been introduced in criminal sexual conduct cases. See State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993) (“[B]oth 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.”); State v. Kirton, 381 S.C. 7, 17, 671 S.E.2d 107, 112 (Ct. App. 2008) (quoting testimony on the subject of delayed reporting presented during Kirton’s trial on a charge of criminal sexual conduct with a minor); State v. Weaverling, 337 S.C. 460, 474, 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.”).

Further, other jurisdictions have recognized the value of such testimony.¹ See, e.g., State v. Reser, 767 P.2d 1277, 1282 (Kan. 1989) (“There are numerous cases from other jurisdictions

¹ See also John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol’y 1, 45-46 (2010) (“Psychological research demonstrates that delayed reporting is common among sexually abused children.”) (citations omitted). Laypersons such as jurors are not likely aware of this, and, without correction of defense counsel’s suggestion, there was a danger that the jurors would be improperly misled into concluding that a lengthy delay in the disclosure of sexual abuse renders the disclosure not credible. See State v. Myers, 359 N.W.2d 604, 609-610 (Minn. 1984) (“The nature, however, of the sexual abuse of children places lay jurors at a disadvantage. . . . If the victim of a burglary failed to report the crime promptly, a jury would have good reason to doubt that person’s credibility. A young child subjected to sexual abuse, however, may for some time be either unaware or uncertain of the criminality of the abuser’s conduct. . . . [U]ncertainty becomes confusion

where expert testimony regarding characteristics of sexually abused children has been held properly admitted as providing helpful background information to the jury.”).

In this case, Olszewski testified that he had a bachelor’s degree in psychology and a master’s degree in social work. (R. p. 266.) In addition, Olszewski took and taught numerous courses that related to child sexual abuse. (R. p. 268.) Based on his specialized knowledge, training, and expertise, Olszewski was able to offer testimony on child sexual abuse that was outside of the common knowledge and experience of a typical juror and that the jury could have found to be helpful in resolving the factual issues raised in Appellant’s case. See Henry, 329 S.C. at 278, 495 S.E.2d at 469 (“[T]he relevant inquiry concerning qualification of the proffered expert is whether the witness possesses the necessary skill, learning, education, training, knowledge, or experience to enable the witness to give opinion testimony.”). Specifically, Olszewski’s testimony regarding delayed disclosure and the level of detail given by children was outside the common knowledge of the jury and assisted the jury. Thus, Olszewski was properly qualified as an expert in child abuse assessment.

No Bolstering Occurred

Second, the State respectfully submits that this Court may have misapprehended or overlooked its argument regarding bolstering. None of Olszewski’s testimony amounted to bolstering; therefore, the trial judge properly admitted his testimony.

“Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror.” State v. Taylor, 404

when an abuser who fulfills a caring-parenting role in the child’s life tells the child that what seems wrong to the child is, in fact, all right. Because of the child’s confusion, shame, guilt, and fear, disclosure of the abuse is often long delayed.”).

S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) (quoting State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), rev'd in part on other grounds, 380 S.C. 499, 671 S.E.2d 606 (2009)).

In Douglas, our Supreme Court held that the forensic interviewer never addressed the veracity of the victim. Douglas, 380 S.C. at 503-504, 671 S.E.2d at 609. In Douglas, the forensic interviewer testified regarding how she conducted her interviews and made a deal with the victim that they were going to tell each other the truth. Id. In its reasoning, the Supreme Court found that the forensic interviewer never stated she believed the victim, and the victim never agreed to tell the truth to the forensic interviewer. Id. at 504, 671 S.E.2d at 609. Thus, there was no evidence that the forensic interviewer believed the victim was telling the truth. Id.

In State v. Hill, this Court held that the forensic interviewer's testimony concerning coaching and the level of detail the victim provided in the case was not improper bolstering. State v. Hill, 394 S.C. 280, 295, 715 S.E.2d 368, 377 (Ct. App. 2011). In Hill, Olszewski, the same expert in the case at hand, testified regarding the level of detail the victim provided. Id. at 293, 715 S.E.2d at 375-376. In its reasoning, this Court stated the following:

In the case at hand, as in Douglas, the forensic interviewer never addressed the veracity of Victim. He testified only that he saw the types of details in Victim's interview that he would look for to determine whether a child had been coached. He gave no opinion on whether Victim was being truthful, or even that Victim had not, in fact, been coached. Accordingly, we find no reversible error in the admission of this testimony.

Id. at 295, 715 S.E.2d at 376-377.

In this case, this Court highlighted Olszewski's testimony regarding how the victim was "better than young children" at providing details of abuse. However, just like the experts in Douglas and Hill, Olszewski never addressed the veracity of the victim. Further, very similar to

the proper testimony in Hill, Olszewski testified only that he saw the types of details in the victim's interview that he would look for to determine whether a child had been coached. He gave no opinion on whether the victim was being truthful, or even that the victim had not, in fact, been coached. In other words, Olszewski's testimony did not eliminate the possibility that Victim was coached. Accordingly, the trial judge properly overruled Appellant's objection.

Conclusion

Based on the foregoing reasons coupled with the arguments raised in the Final Brief of Respondent and during oral argument, the State respectfully asks that the Court reconsider this matter, rehear the case, and affirm Appellant's convictions and sentence.

Respectfully submitted,

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Respondent's Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.
This 19th day of February, 2014.


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