THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

CESAR PORTILLO,

APPELLANT

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 5216

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Cesar Portillo petitions the Court for rehearing. While the Court correctly found error in qualifying the forensic interviewer as an expert and allowing the interviewer to improperly vouch for the minor witness, counsel respectfully submits that the Court erred in its harmless error analysis by misapprehending the highly prejudicial nature of the forensic interviewer's improper bolstering testimony in light of the scant evidence of Petitioner's guilt. Additionally, counsel respectfully submits that the Court misapprehends the argument in regard to the improper expert qualification and Rule 702, SCRE, finding the issue

unpreserved for appellate review. Finally, counsel respectfully submits that the Court misapprehends the argument in regard to PTSD and Rule 702, SCRE, finding the issue abandoned.

The jury convicted Petitioner of performing cunnilingus on a nine year old. The minor witness testified that while she was asleep next to her cousin, she was awakened by her uncle, the Petitioner, who got into bed with her and moved her hand to his private parts. (R. p. 96, line 19 – p. 97 - 100, lines 1-15). The minor witness then testified that Petitioner zipped up and buckled his pants but pulled her pants down and licked her private parts. (R. p. 100, line 9 – p. 101, lines 1-25). According to the minor witness, he wiped her off with a towel. (R. p. 101, lines 17-18; p. 102, lines 21-23; p. 104, line 22 – p. 105, line 1). The minor witness testified that Petitioner touched himself and ejaculated into a trash can. (R. p. 102, line 24 – p. 103, 104, lines 1-16). There was no DNA evidence introduced at trial.

The trial court, over objection, qualified Dr. Donald Elsey as an expert in the area of child sexual assault cases and child sexual assault forensic interviewing. (R. p. 214, line 19 – p. 215, lines 1-8). This Court correctly found that, pursuant to State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the trial court erred in qualifying Dr. Elsey as an expert in the field of forensic interviewing. This Court wrote, "Clearly, under Kromah, the trial court erred in qualifying Dr. Elsey as an expert in the field of forensic interviewing." State v. Portillo, --- S.E.2d ---, 2014 WL 1385177 (S.C.Ct.App. April 9, 2014).

This Court then found the question of whether the testimony constituted improper vouching or bolstering more difficult, writing:

> In this case, Dr. Elsey's testimony may violate two of the types of questions now prohibited by Kromah. For instance, Dr. Elsey's testimony that victim was not coached is arguably a prohibited "statement that indirectly vouches for the child's believability." See id. at 360, 737 S.E.2d at 500 (prohibiting such testimony by a forensic interviewer). Furthermore, Dr. Elsey's testimony regarding hand gestures and PTSD symptoms may violate the prohibition on opining "that the child's behavior indicated the child was telling the truth." See id.

(prohibiting a forensic interviewer from stated opinion testimony). However, Dr. Elsey's testimony, as found by the trial court, was overall not as egregious as the type of opinion testimony generally found to be inappropriate vouching.

Counsel respectfully disagrees with the Court's characterizations and submits that Dr. Elsey's expert testimony clearly and unquestionably violated the well established rule prohibiting a witness, whether an expert or lay witness, to vouch for the credibility of another witness. Although this Court minimizes the bolstering nature of Dr. Elsey's testimony, this Court ultimately found the testimony improper writing, "After reviewing Dr. Elsey's testimony, we likewise find error in the admission of the statements that inappropriately vouched for the Victim." This Court then, however, found the error harmless writing, "After a review of the record in this case, we find any error arising form Dr. Elsey's qualification as an expert in forensic interviewing and his alleged vouching to be harmless beyond a reasonable doubt. See Kromah, 401 S.C. at 362, 737 S.E.2d at 501." This Court overemphasized the slight physical evidence in this case when it concluded that, like in Kromah, the error was harmless. The present case is easily distinguished from Kromah where the State presented conclusive evidence of guilt apart from the challenged testimony by the forensic interviewer that she made a compelling finding of physical child abuse.

In Kromah the child was seen in the emergency room with a sliced scrotum exposing right testicle. The severe injury to the child required surgery. The child also had injuries to his forehead, mouth and abdomen. A doctor testified that the injuries were the result of abuse and not accidental. Based on the fact that the defendant in Kromah admitted being alone with the child when the incident occurred, the medical evidence indicated that the serious injury was not accidental and that there was evidence of additional injuries, the South Carolina Supreme Court found any error in admitting the forensic interviewer's testimony about making a compelling finding of physical child abuse was harmless.

In stark contrast, the only physical evidence in the present case was some redness between the labial lips. (R. p. 177, lines 7-22). Dr. DeMarco testified, "Yeah. I did a – head-to-toe physical on her. And at the time that I saw her, she did have some redness between the labial lips, which, as you know, you know, on a – when you're looking at a woman's bottom, you've got the labia majora, which are the bigger lips that are there; and then the inner lips that are the labia minora, the smaller lips. So when you spread those apart, she was a little bit red and irritated there, which is the area around the vagina and the urethra." (R. p. 177, lines 9-18).

"To deem an error harmless, this court must determine 'beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.' " State v. Fonseca, 383 S.C. 640, 650, 681 S.E.2d 1, 6 (Ct.App.2009) (quoting Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993)), *aff'd,* 393 S.C. 229, 711 S.E.2d 906 (2011); see also State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006) ("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result."); State v. Mizzell, 349 S.C. 326, 333–34, 563 S.E.2d 315, 319 (2002) (finding error is harmless beyond a reasonable doubt if the "reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt"); State v. Pradubsri, 403 S.C. 270, 281, 743 S.E.2d 98, 104 (Ct.App. 2013) (explaining the requirement that a reviewing court must review the entire record to determine the effect of an error on the verdict in determining whether an error is harmless). Reviewing the entire record in the present case, guilt was not conclusively proven such that no other rational conclusion could be reached. In light of the improper qualification of Dr. Elsey and his improper bolstering of the minor's testimony, in the context of other evidence presented by the State, it cannot be said that Dr. Elsey's improper testimony did not contribute to the guilty verdict.

In regard to harmless error this Court wrote, "In this case, the evidence included the videotape of Victim's interview, and the trial testimony of Victim, aunt, Mother, Dr. DeMarco, and Dr. Elsey. In reviewing the record for harmless error, we first note there is physical evidence of sexual assault, despite Portillo's argument the physical evidence is slight compared to that in Douglas[1]." There is no question that the physical evidence in the present case, consisting of a little redness and irritation is slight in comparison to the tearing and scarring consistent with past penetration found in Douglas and the severe physical injury found in Kromah. The other evidence presented by the State consisted of the testimony of the minor, testimony by the aunt about statements made by the minor, limited to time and place, the testimony of Dr. Elsey and the videotape of the forensic interview. The State did not call the cousin who, according to the child witness, was asleep next to her in bed as these incidents occurred. The State did not present any forensic evidence at trial. The State's case was based on the testimony of the child witness and her credibility was the critical issue before the jury. The State's evidence was not such that guilt was conclusively proven by competent evidence, such that no other rational conclusion could be reached. The error arising from Dr. Elsey's qualification as an expert in forensic interviewing and his improper vouching was not harmless.

The trial court erred in allowing Dr. Elsey to improperly vouch for the credibility of the minor. The error was compounded by the fact that the trial court improperly qualified Dr. Elsey as an expert in forensic interviewing. As noted by the Court in Kromah, "[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others. It is undeniable that the primary purpose for calling a 'forensic interviewer' as a witness

[1] State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009).

is to lend credibility to the victim's allegations. When this witness is qualified as an expert the impermissible harm is compounded." Id. at 358, 737 S.E.2d at 499.

While Dr. Elsey did not testify that he made a compelling finding of abuse as in Kromah, his testimony still improperly bolstered the minor's testimony. Dr. Elsey testified about the RATAC method. (R. p. 219, line 13 – p. 220, 221, lines 1-15). Dr. Elsey testified, "And it gives us an ability to know how the child's going to answer questions, and can they answer questions accurately. If a child at that point gives us all sorts of misinformation, we may stop at that point." (R. p. 219, line 23 – p. 220, line 1). As there is no evidence that the interview stopped, the only conclusion to be drawn from Dr. Elsey's testimony is that the minor was not providing misinformation and Dr. Elsey believed her to be truthful. The testimony is specifically prohibited by Kromah.

The State asked Dr. Elsey "And – and I want to focus just a little bit on some of the language that [the child witness] used in – in her disclosure to you – or during that forensic interview. As an expert in the field of – of child-sexual assault cases, what, in your opinion – that description that she used as 'shaking or slapping the privates,' what does that mean to you, in terms of her language?" (R. p. 236, lines 4-10). Dr. Elsey answered, "To me it – she was just telling what she was seeing. She didn't really know what it was. She didn't describe what it – what – what it would be called. She just described something that she said she saw." (R. p. 236, lines 17-20). The State asked the doctor, "In your expert opinion, is there any significance to her use of that type [childlike] of language?" (R. p. 237, lines 11-12). Dr. Elsey testified, "Yes. It appeared to me she, again was just describing what she said she was seeing. She wasn't using language that it seemed somebody else had given to her. It was just what she said she experienced." (R. p. 237, lines 13-16). The State asked Dr. Elsey, "And similarly, when she described what came out of

Uncle Cesar's privates as – as 'yellow and smushy' or 'mushy' – I – I couldn't really tell – in – in your opinion as an expert, is there any significance to that description as well?" (R. p. 238, lines 9-13). Dr. Elsey responded, "Yes. Again, she never had a name for it. She just described it." (R. p. 238, lines 14-15).

Dr. Elsey's opinion that the minor's childlike language indicated that she had not been coached is a statement that indirectly vouches for the child's believability and an opinion that the child's behavior indicated the child was telling the truth. Both are prohibited by Kromah. The Court in Kromah wrote:

> Because the admissibility of forensic interviews and the testimony based thereon at trial has been the subject of several recent appeals, we believe it would be helpful to set forth, by way of example, the kinds of statements that a forensic interviewer should avoid at trial:
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> • that the child was told to be truthful;
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> • a direct opinion as to a child's veracity or tendency to tell the truth;
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> • any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a "compelling finding" of abuse;
>
> • any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or
>
> • an opinion that the child's behavior indicated the child was telling the truth.

401 S.C. at 360, 737 S.E.2d at 500.

When asked about the significance of hand gestures used by the child witness during the interview, Dr. Elsey testified, "Yes. Again, I think she was just trying to help me understand what she was trying to tell me, because I don't think she fully understand – understood what she was describing." (R. p. 237, lines 17 – p. 238, lines 1-2). Dr. Elsey also testified that the minor witness had symptoms of PTSD. Dr. Elsey testified, "There were concerns about her having some behavior changes they've noticed since she originally disclosed these things happening: not being able to

sleep; some nightmares; affecting her school work, her ability to focus in school." (R. p. 239, lines 23 – p. 240, lines 1-2). The State then asked, "And – and in your opinion as an expert, what are those symptoms, I guess – what did – what is the significance of those symptoms to you as an expert?" (R. p. 240, lines 3-5). Dr. Elsey answered, "Well, they're – they're concerning because they're disturbing to the child. Is there a connection between what she – what she said happened to her and these? She said there was. She said there was a connection. So as a professional I would want to get help for that child and that family so she could help control those behaviors and not interrupt her sleep, her school, any aspect of her life." (R. p. 240, lines 6-13).

Dr. Elsey testified that the symptoms described could be part of PTSD but admitted that it would be inappropriate for him to make that diagnosis at that point in time because he saw the child witness relatively soon after the incident and a PTSD diagnosis requires symptoms to be present for at least 30 days. (R. p. 240, lines 17-22). Instead, Dr. Elsey referred the child witness for "trauma-focused cognitive behavioral therapy,." which invites the jury to infer that he believed the child. Dr. Elsey testified that the symptoms could be indicative of a traumatic experience. (R. p. 242, lines 15-24). Dr. Elsey's testimony regarding the hand gestures and PTSD symptoms clearly violates the prohibition on opining that the child's behavior indicated the child was telling the truth established in Kromah.

Dr. Elsey's improper bolstering testimony, as an expert, was extensive and improper as for the same reason that the testimony in Kromah[2] from the forensic interviewer that she made a compelling finding for child abuse was improper. The difference in the present case, however, is that the error was not harmless. Counsel submits that the present case is analogous to State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct.App. 2012). In McKerley this Court wrote, "In light

[2] The forensic interviewer's qualification as an expert was not challenged in Kromah.

of Smith's [the forensic interviewer's] extensive inadmissible testimony bolstering the credibility of the victim, considered in the context of the other testimony and evidence of McKerley's guilt, we cannot say the erroneous admission of Smith's testimony did not contribute to the jury's decision." 397 S.C. at 467, 725 S.E.2d at 143. In the context of the other testimony and evidence presented by the State, it cannot be said that the erroneous admission of Dr. Elsey's testimony did not contribute to the jury's decision. The error was not harmless.

Dr. Elsey's testimony was improper, highly prejudicial and should have been limited by the trial court. The South Carolina Supreme Court set limits on the use of the forensic interviewer in both Kromah and State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012). In footnote five of the Kromah decision the South Carolina Supreme Court wrote:

> In considering the ongoing issues developing from their use at trial, we state today that we can envision no circumstance where their qualification as an expert at trial would be appropriate. Forensic interviewers might be useful as a tool to aid law enforcement officers in their initial investigative process, but this does not make their work appropriate for use in the courtroom. The rules of evidence do not allow witnesses to vouch for or offer opinions on the credibility of others, and the work of a forensic interviewer, by its very nature, seeks to ascertain whether abuse occurred at all, i.e., whether the victim is telling the truth, and to identify the source of the abuse. Part of the RATAC method, which is not without its critics, involves evaluating whether the victim understands the importance of telling the truth and whether the victim has told the truth, as well as the forensic interviewer's judgment in determining what actually transpired. For example, an interviewer's statement that there is a "compelling finding" of physical abuse relies not just on objective evidence such as the presence of injuries, but on the statements of the victim and the interviewer's subjective belief as to the victim's believability. However, an interviewer's expectations or bias, the suggestiveness of the interviewer's questions, and the interviewer's examination of possible alternative explanations for any concerns, are all factors that can influence the interviewer's conclusions in this regard. Such subjects, while undoubtedly important in the investigative process, are not appropriate in a court of law when they run afoul of evidentiary rules and a defendant's constitutional rights.

401 S.C. at 357, 737 S.E.2d at 499, n. 5.

In Whitner, the Supreme Court addressed the proper role of the forensic interviewer in relation to the videotape provision of S.C. Code §17-23-175. Whitner at 559, 732 S.E.2d at 867.

The Court stated that it had "confronted instances where the State has abused the statute and sought to have the forensic interviewer, improperly imbued with the imprimatur of an expert witness, invade the province of the jury by vouching for the credibility of the alleged victim." Id. Unlike those cases, the forensic interviewer in Whitner was only used to admit the recording of the child's interview. The interviewer "offered no improper testimony, and included no bolstering testimony that would invade the province of the jury." Id. The Court held that the use of the interviewer as "mere foundational trial testimony" should "serve as a model of how the statute is designed to work." Id.

Dr. Elsey's testimony, however, far exceeded the limitations of Kromah and Whitner by offering improper bolstering testimony that invaded the province of the jury as to the determination of the minor witness's credibility. Credibility was a critical issue in the present case given that the State offered very little evidence of guilt aside from the testimony and statements of the minor witness. The trial court's error in admitting Dr. Elsey's improper testimony, as an expert, was not harmless.

Petitioner also challenged Dr. Elsey's testimony as not meeting the requirements of Rule 702, SCRE. This Court found the issue was not preserved for appellate review writing in footnote two, "Portillo also argues the trial court erred in failing to make the findings required by Rule 702, SCRE. However, Portillo raises this issue for the first time on appeal; thus, it is not preserved for appellate review." Counsel respectfully submits that the issue in regard to Rule 702 was preserved when Petitioner objected to the qualification of Dr. Elsey as an expert. While counsel concedes that the words "Rule 702" were not spoken, counsel submits that once the challenge was made to the expert qualification, it was incumbent upon the trial court, in

executing its gatekeeping duties, to make the three key preliminary findings required by Rule 702.

In Watson v. Ford Motor Co., 389 S.C. 434, 445-447, 699 S.E.2d 169, 175 (2010), the South Carolina Supreme Court wrote:

> The admission of expert testimony is governed by Rule 702, SCRE, which provides:
>
> 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.
>
> Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge. Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions. See Rule 703, SCRE. On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training. See Rules 602 and 701, SCRE.
>
> For these reasons, expert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. See State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim). Next, while the expert need not be a specialist in the particular branch of the

> field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. See Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable. See State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements).
>
> Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability. Thus, only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate. See State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) (observing that the "familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence"). It is against this backdrop that we analyze whether the trial court erred in admitting the challenged expert evidence.

The trial judge, as gatekeeper, erred in failing to make the findings required by Rule 702, when Petitioner challenged the qualification of Dr. Elsey as an expert. See State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012). The issue in regard to Rule 702 is preserved for appellate review. If the trial judge had conducted an analysis pursuant to Rule 702, she would have found that Dr. Elsey's testimony failed to meet the requirements for the admission of expert testimony. As noted by the Court in Kromah, "The label of expert should be jealously guarded by the court and never loosely bandied about." 401 S.C. at 357, 737 S.E.2d at 499.

In addition to challenging Dr. Elsey's testimony in regard to PTSD as improper vouching, Petitioner additionally challenged, in issue three of the brief, the PTSD testimony on the ground that Dr. Elsey was not qualified to testify in regard PTSD and the trial judge failed to make the requisite findings pursuant to Rule 702, SCRE. This Court wrote, "We find Portillo abandoned these arguments. See State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct.App. 2011) ('An issue is deemed abandoned and will not be considered on appeal if the argument raised in a brief but not supported by authority.')." This Court then found any error harmless beyond a reasonable doubt. Counsel respectfully submits that Rule 702, SCRE is cited in issue three on page 15 of the final brief of Appellant as the authority for the argument that Dr. Elsey was not qualified to testify as to PTSD and the trial judge erred in failing to make the requisite findings pursuant to Rule 702, SCRE. (Final Brief of Appellant p. 15). Counsel did not abandon the issue and the error was not harmless.

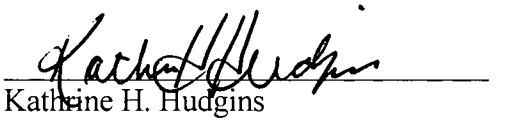
In issue one of the brief, counsel quoted extensively from Watson v. Ford Motor Co., 389 S.C. 434, 445-447, 699 S.E.2d 169, 175 (2010) with regard to Rule 702, SCRE. Counsel's reference to Rule 702 in issue three works in tandem with the argument is issue one. The Appellate Courts know the settled law regarding Rule 702 and the law was discussed in issue one. Abandonment is an extreme finding that should be reserved for fringe arguments or unknown theories.

As discussed above, once Petitioner challenged the expert qualification, it was incumbent upon the trial court, in executing its gatekeeping duties, to make the three key preliminary findings required by Rule 702. The trial judge erred in failing to make the requisite findings required by Rule 702 in regard to the PTSD testimony. If the trial judge had conducted an analysis pursuant to Rule 702, she would have found that Dr. Elsey's testimony in regard to

PTSD was inadmissible because it failed to meet the requirements for the admission of expert testimony. The error was not harmless in light of the improper vouching testimony and the scant evidence of guilt.

Counsel respectfully seeks rehearing on the above issues.

Respectfully submitted,



Katherine H. Hudgins
Appellate Defender

This 24th day of April, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CESAR PORTILLO,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Cesar Portillo, # 346989, Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210 this 24th day of April, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 24th day
of April, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.