

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Honorable Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2011-196447

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MAY 05 2014

Respondent, **SC Court of Appeals**

THE STATE,

vs.

CESAR ORLANDO PORTILLO,

Appellant.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

On April 9, 2014, this Court issued a published opinion in which it affirmed Appellant Cesar Orlando Portillo's conviction for first-degree criminal sexual conduct with a minor. State v. Portillo, Op. No. 5216 (S.C. Ct. App. filed April 9, 2014). Pursuant to Rule 221(a), SCACR, both Portillo and Respondent ("the State") petitioned this Court for rehearing, and this Court requested returns to those petitions for rehearing. For the following reasons, Portillo's petition for rehearing should be denied.

Portillo's Contentions Regarding this Court's Harmless Error Analysis

In his petition for rehearing, Portillo first contends that this Court erred in finding whatever error may have occurred as a result of Dr. Elsey's testimony to be harmless. In support of that contention, Portillo maintains that Dr. Elsey's testimony impermissibly vouched for the credibility of the victim and that the other evidence presented during trial did not conclusively prove his guilt beyond a reasonable doubt. For the reasons argued in the State's petition for

rehearing along with the grounds articulated in the Final Brief of Respondent and at the oral argument before this Court, the State contends that the trial judge did not err abuse her broad discretion in qualifying Dr. Elsey as an expert or in admitting his expert testimony. However, assuming that some portion of Dr. Elsey's testimony was improper, Portillo's contention that this Court erred in finding the admission of that testimony to be harmless is incorrect, and his petition for rehearing should be denied.

After an error is discovered on appeal, an appellate court must next determine whether the error was harmless. See State v. Northcutt, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007) ("Determining the trial judge committed error is the first step of our analysis. Next we must determine whether the error was harmless."). Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). An error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error generally depends on the materiality of the error in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

In the case sub judice, assuming Dr. Elsey's qualification as an expert was improper and the introduction of his testimony regarding coaching, hand gestures, and the victim's symptoms

of post-traumatic stress disorder was erroneous, any error in that regard was entirely harmless and could not have impacted the verdict under the particular facts and circumstances of Portillo's case. Initially, that is true because, based on Dr. Elsey's own testimony, the jury could not have been under the mistaken impression that Dr. Elsey was vouching for the victim's credibility or truthfulness. Critically, through his testimony, Dr. Elsey specifically emphasized to the jury that his testimony concerned what "[the victim] said she saw" and not what definitively occurred, and he unequivocally stated to the jury that he could not personally relay what actually occurred and had not made a determination in regard to the information reported to him. (R. p. 236; p. 247). As a result, his testimony was markedly different from the type of testimony found to be improper in the past and could **not** have been misconstrued as a comment on his opinion as to the credibility or truthfulness of the victim. Cf. State v. McKerley, 397 S.C. 461, 465-466, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding a forensic interviewer's testimony to be improper where the interviewer testified about giving an opinion as to whether something happened and about consistent information and compelling findings); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (Ct. App. 2011) (finding that a forensic interviewer's testimony constituted improper vouching where the interviewer testified that the victims provided compelling disclosures of abuse by Jennings and provided details consistent with the background information reported by the victims' mother, the police report, and other children). Furthermore, beyond the fact that Dr. Elsey made it clear to the jury that his testimony should not have been construed as a comment on the victim's credibility or believability, the other evidence presented during trial conclusively established Portillo's guilt such that Dr. Elsey's testimony could not have had any impact on the outcome of Portillo's case. Specifically, the victim testified for the jury about the incident without any hesitation or reticence, the recording of her forensic

interview was played for the jury and constituted extremely powerful evidence from which the jury could find Portillo's guilt, and, notably, no reason or motive for the victim to lie about the incident was ever identified or posited by Portillo. Moreover, the victim's aunt, who was also Portillo's wife, testified about the victim's immediate disclosure of the sexual abuse and Portillo's reaction to the allegations. Additionally, Dr. DeMarco testified about the redness and irritation she discovered around the victim's vagina and urethra during her medical examination of the victim, which was consistent with the type of sexual assault – oral sex – that occurred in Portillo's case. Furthermore, the victim's mother testified about the behavioral changes and characteristics that the victim exhibited after the incident, and that evidence constituted substantive evidence that a sexual assault had occurred. See State v. Alexander, 303 S.C. 377, 381, 401 S.E.2d 146, 149 (1991) (“Evidence of behavioral and personality changes tends to establish or make more or less probable that the offense occurred.”).

Based on the evidence and testimony presented during trial other than Dr. Elsey's testimony coupled with the fact that Dr. Elsey's express statements to the jury made it clear that his testimony should not have been considered as a comment on the victim's credibility or believability, any error in the qualification of Dr. Elsey as an expert in forensic interviewing or in admission of the challenged portions of Dr. Elsey's testimony was entirely harmless. See Wiley, 387 S.C. at 497, 692 S.E.2d at 564 (“No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.”); see also Calderon v. California, 525 U.S. 141, 146 (1998) (“The social costs of retrial or resentencing are significant. . . . The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error.” (citations omitted)); see, e.g., State v. Weaver,

361 S.C. 73, 89, 602 S.E.2d 786, 794 (Ct. App. 2004) (“[A] criminal defendant is entitled to a fair trial, not a perfect one.”). Accordingly, this Court properly found that any error that may have occurred to be harmless in its opinion. Portillo’s petition for rehearing should be denied.

Portillo’s Contentions Regarding this Court’s Issue Preservation Finding

In his petition for rehearing, Portillo next contends that this Court erred in holding that his appellate argument that the trial judge erred by allegedly failing to make specific findings as required by Rule 702, SCRE, was not preserved for appellate review. In support of that contention, Portillo acknowledges that no objection regarding Rule 702, SCRE, was raised during trial but nevertheless maintains that the issue was properly preserved for appellate review because “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.” (Portillo’s Pet. for Reh. pp. 10-11). Contrary to Portillo’s contentions, this Court committed no error in finding that issue to be unpreserved for appellate review.

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is “to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review.” Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). As a result, an issue is only preserved for appellate review in South Carolina if it was: (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); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002)

(identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). Critically, “[i]f 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).

In the case at bar, Portillo’s defense counsel did **not** ask the trial judge to make any findings pursuant to Rule 702, SCRE, during trial and did **not** raise an objection to the trial judge’s alleged failure to make any specific findings as to the subject matter of Dr. Elsey’s testimony, the expert qualifications of Dr. Elsey, or the reliability of Dr. Elsey’s areas of expertise. Instead, after questioning Dr. Elsey about his qualifications during a pre-trial hearing, defense counsel specifically indicated that he had no objection to Dr. Elsey being considered as an expert in the fields of child sexual abuse and child sexual abuse forensic interviews. (R. p. 27). Thereafter, during trial, defense counsel argued to the trial judge that it was unnecessary for Dr. Elsey to testify as an expert in regard to the interview process and his specific interactions with the victim because he asserted that such testimony was factual, did not involve an opinion, and was appropriate **without** expert qualification. (R. p. 205). Defense counsel then further argued:

With regard to the **other proposed questions** that [the solicitor] asked regarding the descriptive language and the significance of hand gestures, I – I believe that that line of questioning is **outside the scope of the areas** in which he had been qualified as an expert. He’s been qualified as an expert in forensic interviewing and child abuse, but not in – in an area of language interpretation or child development or anything of that nature **that would render that type of opinion appropriate**. And we would ask that that not be allowed in, in terms of the examination of Dr. Elsey.

(R. pp. 205-206) (emphasis added). Subsequently, the trial judge found Dr. Elsey’s testimony to be admissible after finding that it would be helpful to the jury and that Dr. Elsey was qualified,

and defense counsel renewed his previously-raised objections when Dr. Elsey was qualified as an expert before the jury. (R. pp. 206-207; p. 215).

Thus, during Portillo's trial, defense counsel argued to the trial judge that Dr. Elsey did not need to be qualified as an expert to testify about the factual portions of his testimony and was not personally qualified to testify about the significance of the victim's hand gestures and word choice because Dr. Elsey was allegedly not qualified as an expert in a field that defense counsel believed would have rendered that testimony appropriate. (R. pp. 205-206). However, defense counsel **never** asked the trial judge to make any specific findings pursuant to Rule 702, SCRE, and **never** asserted that the trial judge failed to make such findings. Because that specific issue and argument was not raised to the trial judge during trial, that particular argument and issue could not properly be raised for the first time on appeal. See State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) ("The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal."); see also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) ("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**." (emphasis added)). Accordingly, this Court correctly concluded that Portillo's appellate argument that the trial judge erred by allegedly failing to make specific findings as required by Rule 702, SCRE, was not properly preserved for appellate review, and his petition for rehearing should be denied.¹

Portillo's Contentions Regarding this Court's Abandonment Finding

In his petition for rehearing, Portillo finally contends that this Court erred in finding that his appellate argument regarding the admission of Dr. Elsey's testimony on post-traumatic stress

¹ Assuming that issue and argument had been preserved, the trial judge nonetheless committed no error in qualifying Dr. Elsey as an expert in child sexual abuse and permitting him to testify for the all of the reasons stated in the Final Brief of Respondent and during the oral argument before this Court.

disorder was abandoned on appeal. In support of that contention, Portillo asserts that he mentioned Rule 702, SCRE, in raising the issue regarding the post-traumatic stress order testimony on appeal and again asserts that it was incumbent on the trial judge to make specific findings pursuant to Rule 702, SCRE, when defense counsel challenged the qualification of Dr. Elsey as an expert. Contrary to Portillo's contentions, this Court correctly found that issue to have been abandoned.

In South Carolina, "conclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review." State v. Crocker, 366 S.C. 394, 399, n. 1, 621 S.E.2d 890, 893 (Ct. App. 2005). "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009). Critically, appellate courts will **not** consider arguments or issues raised on appeal in a conclusory or unsupported manner. Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 252, n. 3, 734 S.E.2d 161, 164 (2012).

In Portillo's case, defense counsel made the following argument in regard to Dr. Elsey's post-traumatic stress disorder testimony during trial:

With regard to his opinion regarding posttraumatic stress disorder, I believe he said that he saw symptoms of that. He did not provide any diagnosis for this child at any point along the way. I think, since he did not diagnose her with that particular affliction or any other affliction, it wouldn't be proper for him to testify as to her showing signs of such a thing. I think it would, in essence mislead, the jury in terms of dealing with that particular set of issues.

(R. p. 207). Thereafter, on appeal, Portillo raised the following issue: "The trial judge erred in allowing the expert to testify that the child witness had symptoms of post traumatic stress disorder without being able to make the actual diagnosis." (App. Br. p. 14). In support of that argument on appeal, Portillo stated in a conclusory fashion and without any citation to authority that Dr. Elsey "was not qualified to testify about the child witness exhibiting symptoms of PTSD

when the doctor admitted it would not have been appropriate for him to diagnose her with PTSD at that point in time” before again asserting that the trial judge failed to make specific findings pursuant to Rule 702, SCRE. (App. Br. p. 14).

Thus, in raising his appellate challenge to the admission of the post-traumatic stress disorder testimony, Portillo did not explain **why** Dr. Elsey’s inability to give a definitive diagnosis rendered his testimony flatly inadmissible and did not identify any authority to support such a proposition.² Instead, Portillo merely offered his conclusion that the testimony was inadmissible without any supporting authority. Because Portillo only raised the issue in a conclusory fashion and did not cite to any relevant case law or other authority in support of his challenge to the post-traumatic stress disorder testimony either during trial or on appeal, his issue with that testimony was waived and was not preserved for appellate review. See Crocker, 366 S.C. at 399, n. 1, 621 S.E.2d at 893 (“[C]onclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review.”); see also State v. Attardo, 263 S.C. 546, 551, n. 1, 211 S.E.2d 868, 869 (1975) (“ ‘The burden of proof is on the appellant to convince this Court that the lower court was in error.’ ” (citation omitted)); State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) (holding that a conclusory, unsupported argument was abandoned on appeal). Accordingly, this Court properly found the

² Notably, the likely reason that no support was offered for Portillo’s proposition was that the certainty of an expert’s opinion is a matter impacting the weight of the testimony and not its admissibility. See Melton v. Williams, 281 S.C. 182, 186, 314 S.E.2d 612, 614-615 (Ct. App. 1984) (“Assessment of the credibility of witnesses is a question for the jury, not the court, and **it is the jury that decides the weight to be afforded the testimony.**” (emphasis added)); see also Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1983) (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”); see, e.g., 31A Am. Jur. 2d Expert and Opinion Evidence § 90 (“Such matters as defects in an expert’s education or experience, the lack of an expert’s specialization or lack of specialized training, **the degree of an expert’s certainty as to his or her opinion, or the quality of the expert’s conclusions go to the weight to be given expert opinion testimony.** Furthermore, the mere fact that controversy, or even substantial controversy, surrounds an expert’s conclusion or opinion goes to the weight to be given such testimony.” (emphasis added and footnotes omitted)).

issue to have been abandoned and correctly declined to consider it on appeal. Portillo's petition for rehearing should be denied.³

Conclusion

Based on the foregoing coupled with the arguments raised in the Final Brief of Respondent and during the oral argument before this Court, the State respectfully requests that Portillo's petition for rehearing be denied. However, for the reasons articulated in the State's petition for rehearing, the State's Final Brief of Respondent, and during the oral argument before this Court, the State respectfully requests that the panel reconsider this matter, vacate a portion of its opinion, and affirm Portillo's conviction and sentence after finding that the trial judge committed no error in admitting the expert testimony regarding coaching, the hand gestures used by the victims, and the symptoms of post-traumatic stress disorder exhibited by the victim and that such testimony did not improperly vouch for the victim's credibility.

Respectfully submitted,

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May 5, 2014

³ Even assuming the issue had not been abandoned, the trial judge committed no error in allowing the introduction of Dr. Elsey's post-traumatic stress disorder testimony for the reasons articulated in the Final Brief of Respondent and during the oral argument before this Court.

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Honorable Diane Schafer Goodstein, Circuit Court Judge
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THE STATE,

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CESAR ORLANDO PORTILLO,

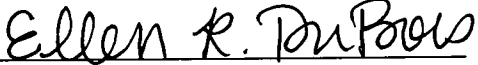
Appellant.

PROOF OF SERVICE

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

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 5th day of May, 2014.


ELLEN R. DuBOIS
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ALAN WILSON
ATTORNEY GENERAL

May 5, 2014

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: State v. Cesar Orlando Portillo – Appellate Case No. 2011-196447

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of Respondent's Return to Petition for Rehearing, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar No. 76901

MRF/
Enclosures

cc: Kathrine H. Hudgins, Esquire
Victim Services

RECEIVED

MAY 05 2014

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