STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Richland County
Deandra G. Benjamin, Circuit Court Judge
Appellate Case Tracking No. 2012-21905

THE STATE,

RESPONDENT,

-v-

ISAAC ANTONIO ANDERSON,

APPELLANT

REPLY BRIEF OF APPELLANT

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CASES

I. The Purpose of Heather Smith's Testimony Was to Improperly Bolster and Vouch for the Credibility of the Child Witness and Not to Educate the Jury.

The question presented in this appeal is whether the testimony provided by Heather Smith, as an expert witness, constitutes impermissible bolstering and vouching of the child witness. The question of whether it was proper for Smith to be qualified in the first place was addressed by State v. Kromah, 401 S.C. 340 (2013), and the answer is no. See State v. Portillo, 2014 WL 1385177 *3 (Ct. App. 2014)("Clearly, under Kromah, the trial court erred in qualifying Dr. Elsey as an expert in the field of forensic interviewing."). In this regard, the Respondent's arguments and reliance on cases such as State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999), State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004), and State v. Taylor, 404 S.C. 506, 745 S.E.2d 124 (Ct. App. 2013), are misplaced.

The Supreme Court's decision in Schumpert stands for the proposition that rape trauma evidence is admissible to prove that a sexual assault had in fact occurred. 312 S.C. at 506. The Schumpert decision recognized that State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), overruled State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987). Schumpert, 312 S.C. at 506. Hudnall reversed the defendant's conviction where the Supreme Court found that the pediatrician expert witness's testimony concerning the common characteristics of child victims of sexual abuse where such testimony had no probative value and only served to bolster the child's testimony. Hudnall, 293 S.C. at 100. Alexander, on the other hand, held that an expert witness's testimony regarding the victim's mental trauma may be used to prove the elements of the crime for which the

defendant is accused. Alexander, 303 S.C. at 380–81. The Respondent does briefly note the Supreme Court's overruling of Hudnall in this regard but does not advance the position that the testimony advanced by Smith was for the purpose of proving an element of Criminal Sexual Conduct with a Minor in the First Degree.

Instead, the Respondent argues that Smith's testimony "served to educate the jury and to eliminate likely misconceptions regarding the behaviors of abused children." At the same time, the Respondent no prejudicial error exists because "an expert testifies or provides evidence which supports the underlying charge levied by the victim, it does not result in improper or impermissible bolstering or vouching. It is only when the testimony invades the province of the jury and makes a comment on the credibility of the victim." It is difficult to reconcile the two arguments where the latter tacitly admits the abnormal or unusual behavior of the child witness may serve to discredit the child's testimony. See State v. Cardany, 35 Conn. App. 728, 732, 646 A.2d 291 (App. Ct. 1994)("It is natural for a jury to discount the credibility of a victim who did not immediately report alleged incidents of abuse whether or not the defense emphasizes the delay in cross-examination. Thus, testimony that explains to the jury why a minor victim of sexual abuse might delay in reporting the incidents of abuse should be allowed as part of the state's case-in-chief.").

It is one thing to introduce the testimony of an expert witness for the purpose of explaining facts in issue, such as a tracking dogs, State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007), blood splatter evidence, State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990), or pain suffered by a victim, State v. von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996). It is another thing altogether to introduce testimony regarding

behavior evidence where it proves a fact at issue, such as state of mind, as was the case in State v. Hill, 287 S.C. 398, 339 S.E.2d 121 (1986). Here, however, the issue is testimony introduced for the purpose of explaining why another witness's testimony should be believed. Again, the State did not introduce this testimony at trial for the purpose of proving an element of the crime and, yet again, the Respondent does not now advance that purpose.

While the Respondent couches its argument in terms of "educating" the trier of fact, that such testimony is for the purpose of vouching and bolstering the testimony of the victim is clear from the cases cited by the Respondent. The Respondent first relies on State v. Reser, 244 Kan. 306, 767 P.2d 1277 (1989), which involved the testimony of a social worker with regard to the symptoms, common patterns of behavior resulting from trauma, and the delayed reporting of abuse. 244 Kan. at 309–15. The Kansas Supreme Court, in its later opinion in State v. Ganoa, 293 Kan. 930, 270 P.3d 1165 (2012), recognized that cases such as Reser, reflected "refinement of certain principles over time." Id. at 943. After recognizing that the behavior testimony in Reser was relevant to the issue of corroboration, id. at 942, and not the purpose for which the Respondent advances here, the Kansas Supreme Court further noted that

> [i]nitially we set limits on the subject of an expert's testimony, forbidding invasion of the jury's province and its responsibility to judge credibility. Even a psychiatrist or psychologist could not testify that a particular alleged victim had been subjected to rape or abuse by a particular defendant or in a particular manner consistent with the State's version of events. But the rules relaxed somewhat as the testimony became more general. A victim's diagnosis with post-traumatic stress disorder or rape trauma syndrome could be made and described for the jury by those with appropriate professional qualifications—initially, only a psychiatrist or psychologist, and then, after statutory changes, certain social workers.

Id. at 943-44(citing State v. Lash, 237 Kan. 384, 699 P.2d 49 (1985)). This dictum by the court observes correctly the underlying substance to the testimony at issue is exactly what the Respondent says that it is not: an invasion of the province of the jury.

The Respondent next turns to People v. Spicola, 16 N.Y.3d 441, 947 N.E.2d 620, 922 N.Y.S2d 846 (2011), which concerned the testimony of a clinical social worker who opined with regard to Child Sexual Abuse Accommodation Syndrome. 16 N.Y.3d at 453–60. The Respondent's reliance on this case is unpersuasive. First, citing its earlier decision in the consolidated appeal of People v. Banks and People v. Taylor (hereinafter "Taylor"), 75 N.Y.2d 277, 552 N.Y.S.2d 883, 552 N.E.2d 131 (1990), the Spicola court recognized the New York rule that behavioral evidence—in the case of Banks and Taylor, Rape Trauma Syndrome—was admissible only for the purpose of explaining behavior, not to prove that an actual crime occurred. Taylor, 75 N.Y.2d at 293. This puts Spicola in discord with Schumpert. Second, the New York Court of Appeals reiterated its holdings in Matter of Nicole V., 71 N.Y.2d 112, 524 N.Y.S.2d 19, 518 N.E.2d 914 (1987), that such behavioral evidence "accepted by us and by courts of other jurisdictions, even in criminal cases, either to *bolster credibility of infant victims* or to corroborate the victim's testimony." 71 N.Y.2d at 121(citing People v. Keindl, 68 N.Y.2d 410, 509 N.Y.S.2d 790, 502 N.E.2d 577 (1986); State v Kim, 64 Haw. 598, 645 P.2d 1330 (1990), overruled by State v. Batangan, 71 Haw. 552, 799 P.2d 48 (Haw. 1990); State v Middleton, 294 Or. 427, 657 P.2d 1215 (1983); State v. Sandberg, 392 N.W.2d 298 (Minn. Ct. App. 1987), reversed in part, affirmed in part by 406 N.W.2d 506 (Minn. 1987); Doe v. N.Y. City Dep't of Soc. Serv., 709 F.2d 782 (2d Cir. 1983), cert. denied sub nom Catholic Home Bur. v. Doe, 464 U.S. 864, 104 S.Ct. 195, 78 L.E.2d 171

(1983))(emphasis supplied). In this way, the law as cited by Spicola and the cases cited therein, specifically that behavioral evidence may be introduced to bolster a child witness, is in direct contravention of South Carolina law, see Kromah, 401 S.C. at 358–59(citing State v. Hill, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011); Smith v. State, 386 S.C. 562, 564–65, 689 S.E.2d 629, 631 (2010))("Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter.").

The Respondent then relies on State v. Carpenter, 147 N.C. App. 386, 556 S.E.2d 316 (Ct. App. 2001), which held that behavior evidence such as the testimony at bar was "clearly instructive and helpful to the jury in understanding the evidence since '[t]he nature of the sexual abuse of children . . . places lay jurors at a disadvantage.'" 147 N.C. at 393(citing State v. Oliver, 85 N.C. App. 1, 11, 354 S.E.2d 527, 533 (Ct. App. 1987)). In Oliver, the case relied upon by the North Carolina Court of Appeals in Carpenter, the court held that

> [t]he nature of the sexual abuse of children, particularly mentally retarded children, places lay jurors at a disadvantage. Common experience generally does not provide a background for understanding the special traits of these witnesses. Such an understanding is relevant as it would help the jury *determine the credibility of a child who complains of sexual abuse*.

Oliver, 85 N.C. App. at 11-12(emphasis supplied).

State v. Roenfeldt, 241 Neb. 30, 486 N.W.2d 197 (1992), is another case supplied by the Respondent which is not dispositive of this issue. In Roenfeldt, the Nebraska Supreme Court affirmed the admission of behavior testimony where it proved an element of the crime: "[t]he expert testimony, though not premised upon an examination of B.W., was relevant in assisting the trier of fact in understanding and determining the issue in

B.W.'s case (whether appellant had sexually assaulted her)." Id. at 39. It was not introduced merely to "educate" the jury, as claimed by the Respondent. Moreover, the case relied on by the Roenfeldt court, People v. Nelson, 203 Ill. App.3d 1038, 149 Ill. Dec. 161, 561 N.E.2d 439 (Ill. App. Ct. 1990), restricted the use of such behavior testimony to "to rebuttal after the victim's credibility has first been attacked," indicating the court's recognition that such evidence is directly tied to the credibility of the child witness. Id. at 1045.

State v. Cardany, supra, is yet another case relied on by the Respondent where an appellate court recognized behavioral evidence as impugning the credibility of a child witness. The Connecticut Appellate Court began its reasoning by noting the Connecticut Supreme Court's decision in State v. Spigarolo, 210 Conn. 359, 556 A.2d 112 (1989), where in the supreme court permitted the use of behavioral evidence

> where defense counsel has sought to impeach the credibility of a complaining minor witness in a sexual abuse case, based on inconsistency, incompleteness or recantation of the victim's disclosures pertaining to the alleged incidents, the state may offer expert testimony that seeks to demonstrate or explain in general terms the behavioral characteristics of child abuse victims in disclosing alleged incidents.

Id. at 380. According to the Cardany court, the Spiragolo decision "specifically left open the question of whether the state could use such expert testimony in the absence of the defendant's impeachment of the victim's credibility." Cardany, 35 Conn. App. at 731. The court then rationalized allowing the introduction of such behavior evidence in the prosecution's case in chief, concluding that

> [i]t is allowed, in part, to satisfy the jury that the victim behaved reasonably in light of the alleged assault. "If the victim's report had been immediate as would be expected ... the jury might logically infer that the victim's trial testimony more probably was truthful." On the other hand, "[a] delayed statement undermined the victim's credibility because it was

> considered 'obvious that for one who claims to have been [sexually abused] to have long kept silence about it, would, if unexplained, weaken the force of any testimony that [he or] she might give in court, in support of a prosecution for such an offense.'"

Id. at 732 (quoting State v. Parris, 219 Conn. 283, 291, 592 A.2d 943 (1991); State v. Sebastian, 81 Conn. 1, 6, 69 A. 1054 (1908))(alterations in original). Finally, the court opined that "It is natural for a jury to discount the credibility of a victim who did not immediately report alleged incidents of abuse whether or not the defense emphasizes the delay in cross-examination." Cardany, 35 Conn. App. at 732.

The Respondent's reliance on Kilby v. Commonwealth of Virginia, 52 Va. App. 397, 663 S.E.2d 540 (Va. Ct. App. 2008), is irrelevant. The only substantial law provided by Kilby concerned the issue of a witness's qualification as an expert in the field of delayed disclosure. Id. at 546–47. The Virginia Court of Appeals found that the appellant had failed to preserve any legal issues concerning the expert's actual testimony and thus refused to address them. Id. at 548. As Kromah specifically prohibits the qualification of a forensic interviewer as an expert witness, see Kromah, 401 S.C. at 359n.5, Portillo, 2014 WL 1385177 at *3, the Respondent's reliance on Kilby is non sequitur.

The Supreme Court of Oregon permitted the prosecution to introduce behavior testimony in the case of State v. Perry, 347 Or. 110, 218 P.3d 95 (2009), because it was introduced for purpose of rebutting the inference raised by the defense that no abuse had occurred. Id. at 117–18. The court found that the

> defendant's theory of the case was that the victim was fabricating. One part of that theory was that a trier of fact could infer that the victim's delay in reporting tended to show that the events about which the victim testified had never happened. But Keltner's testimony that similar delayed reporting often is seen in verified cases of child sexual abuse tended to counter that inference.

Id. at 118. Admittedly, the Oregon Supreme Court did not reason like the other courts heretofore discussed and concluded that such behavior testimony in general dealt with credibility in some respect. The court, instead, permitted the testimony for the reasons stated above and not for the purposes of educating a misinformed jury, as the Respondent argues here.

The Respondent's reliance on State v. Friday, 2010-2309 (La. App. 1 Cir. 6/17/11), 73 So.3d 913 (La. Ct. App. 2011), writ denied, 2011-1456 (La. 4/20/12), 85 So. 3d 1258, is just as irrelevant as its reliance on Kilby. The issue before the Court at present—impermissible vouching and bolstering—was not an issue before the Friday court. While the Friday court does not rely on any legal precedent or make any revealing analysis in reaching its conclusion, it appears that the Louisiana appellate court's entire consideration was whether the elicited testimony was beyond the scope of the witness's expertise:

> [i]t would not have been beyond her expertise to explain, based on her own practice and experience, the basics of delayed disclosure. Thus, when the defendant objected to Caruso being asked if it was unusual for children to not report sexual abuse immediately, the trial court overruled the objection. We find no error in this particular ruling of the trial court.

Id. at 931. In this way, the Friday case is not dispositive law in the case at bar.

The issue that the Massachusetts appellate court addressed in Commonwealth v. Bougas, 59 Mass. App. Ct. 368, 795 N.E.2d 1230 (Mass. App. Ct. 2003) was "separate[ing] permissible efforts to educate the jury regarding typical symptoms of sexually abused children of which lay persons would not normally be aware, from impermissible interference with the jury's obligation to make ultimate decisions regarding witness credibility." Id. at 375(citing Comm. v. Dockham, 405 Mass. 618, 628–630, 542

N.E.2d 591 (1989); Comm. v. Ianello, 401 Mass. 197, 201–202, 515 N.E.2d 1181 (1987)). There, the trial court allowed the prosecution to present expert testimony regarding "delayed disclosure syndrome" and declined to allow the defense to introduce expert testimony concerning how "children enmeshed in serious family turmoil often fabricate allegations of this nature." Bougas, 59 Mass. App. Ct. at 375. In affirming the trial court's ruling, the Bougas court followed the Supreme Judicial Court of Massachusetts's holding in Dockham. There, the Massachusetts high court reached its final conclusion allowing behavior testimony after analyzing the decisions of other courts which "uniformly allowed expert testimony on the typical symptoms of sexually abused children because the information is beyond the common knowledge of jurors and of assistance in assessing a victim witness's testimony and credibility." Com. v. Dockham, 405 Mass. at 629(citing State v. Lindsey, 149 Ariz. 472, 720 P.2d 73 (1986); State v. Myers, 359 N.W.2d 604 (Minn. 1984); Smith v. State, 100 Nev. 570, 688 P.2d 326 (1984)). The high court then went on to quote the concurring opinion in Middleton, supra, noting the issues of conceptions of witness reliability discussed therein. Dockham, 405 Mass. At 630. The appellate court in Bougas, in making its ruling, replied on the referred to its earlier analysis in Commonwealth v. Deloney, 59 Mass. App. Ct. 47, 794 N.E.2d 613 (Mass. App. Ct. 2003), wherein the court struggled at length with the separation of general testimony about child abuse symptoms and impermissible vouching. Id. at 55–59.

The proffered reason for allowing this sort of behavior evidence in McCoy v. State, 278 Ga.App. 492, 629 S.E.2d 493 (Ct. App. 2006), was since, as also pointed by the Respondent, "'[l]aymen would not understand this syndrome without expert

testimony, *nor would they be likely to believe that a child who denied a sexual assault, or who was reluctant to discuss an assault, in fact had been assaulted.*'" Id. at 494(quoting Allison v. State, 256 Ga. 851, 852, 353 S.E.2d 805 (1987))(emphasis supplied). The Supreme Court in Allison, the longstanding precedent to which the Respondent refers, relied on the court's earlier decision in Smith v. State, 247 Ga. 612, 277 S.E.2d 678 (1981), which permitted an expert to opine about "battered wife syndrome" even though it constituted giving an opinion on an ultimate issue of fact. Id. at 616–19. The Allison court addressed a similar issue, that is, the admission of expert testimony concerning child sexual abuse syndrome to demonstrate that such abuse had occurred. Allison, 256 Ga. at 851–53. Keri v. State, 179 Ga.App. 664, 347 S.E.2d 236 (Ct. App. 1986), is inapposite to McCoy and Allison. There, the issue before the court in Keri were statements made by a child victim for the purpose of a medical diagnosis. Id. at 667–68.

Both State v. Robins, 369 Mont. 291, 297 P.3d 1213 (2013), and Wheat v. State, 527 A.2d 269 (Del. 1987), stand for the proposition that such behavior evidence is introduced for the purpose of addressing another witness's credibility. Wheat in particular noted that "'[b]y explaining the emotional antecedents of the victim's conduct and the peculiar impact of the crime on other members of the family, an expert can assist the jury in evaluating the credibility of the complainant.'" Id. at 273(quoting State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984)).

It is clear from several of the cases cited by the Respondent that the specific focus of this sort of testimony is geared entirely towards the credibility of a witness. While, in some instances, this may not constitute a direct comment on a child witness's credibility,

it is evident that such testimony constitutes an indirect comment on the child witness's credibility.

The Respondent also claims that while it may be error for the trial court to have qualified Smith as an expert in forensic interviewing, there was no abuse of discretion in qualifying her as an expert in the field of child abuse assessment. This is a "rose by any other name" argument. To argue that Smith should be allowed to give opinion testimony as a child abuse assessment expert as opposed to the prohibited forensic interviewing expert flouts both the letter and the spirit of the law as set forth in Kromah.

II. The Appellant's Right of Confrontation Was Violated When He Was Not Allowed to Contemporaneously Cross-Examine the Child Witness Regarding Her Statements in the Recorded Interview

At the outset, the Appellant makes clear two issues. First, the Appellant does not contend that there has been a violation of his Sixth Amendment rights as set out in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.E.2d 177 (2004). Instead, the Appellant argues that his right of confrontation was violated per Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.E.2d 666 (1990). Second, the Appellant does not assert that he was entitled or should be entitled to be present at the forensic interview here before the case.

The Respondent argues that the requirements of Craig were satisfied because the child witness was available for cross-examination. The problem with the Respondent's contention is that the recording in question was not in evidence at the time of the child witness's testimony. The record reveals that there had been pre-trial motions regarding the video prior to the child witness testifying and prior to its actual introduction. There was no way for the Appellant to cross-examine the child witness concerning the recording while she was on the stand, thereby opening the door to its introduction.

The Respondent further argues that "contemporaneous cross-examination" simply means that the child is available and subject to cross-examination. In this regard, the Respondent confuses Crawford with Craig. In Crawford, the United States Supreme Court prohibited the use of testimonial hearsay where the declarant was not available to testify and the defendant had not prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 53–54. The word "contemporaneous" does not appear any where

in the Crawford opinion. See generally Crawford, supra. Instead, Craig only permitted the close circuit examination of the child witness because, inter alia, that "the defendant retains full opportunity for contemporaneous cross-examination." Craig, 497 U.S. at 851.[1]

The Respondent goes on to argue that the Appellant's Right of Confrontation was not violated because he had the opportunity to recall the child witness in his case in chief. It is difficult to understand how the Respondent's argument passes constitutional muster, specifically given Craig's unambiguous mandate that such cross-examination be contemporaneous. Waiting until the prosecution is done calling all of its witnesses and finished with its case in chief is not contemporaneous.

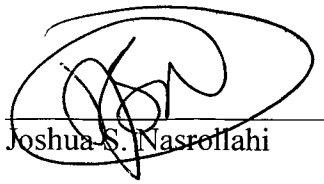
In support of this argument, the Respondent relies on State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011), and State v. Stokes, 391 S.C. 390, 673 S.E.2d 434 (2009). Those cases addressed objections at trial raised under Crawford and related precedent. See Hill, 394 S.C. at 374–75(cases cited therein), Stokes, 391 S.C. at 398–404(cases cited therein). Neither this Court nor the Supreme Court passed on the issue of whether there existed a Craig violation. Instead, those cases dealt with the issues of the opportunity for effective cross examination, as delineated in Crawford and related Supreme Court decisions; they never touched on the issue of whether such cross-examination was contemporaneous as required by Craig.

[1] The Respondent also argues that "[n]othing in Craig concerned the admission of prior out of court statements by the witness." Resp. Brief at 20. This is not the issue before the Court. The issue is whether the Appellant's Right of Confrontation was violated when additional testimony of the child witness was presented vis a vis the recorded interview without the Appellant having the opportunity to contemporaneously cross-examine her.

Conclusion

For the reasons addressed here and for those reasons stated in the Appellant's Brief, this Court should reverse the Appellant's conviction and order a new trial.

July 17, 2014



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