STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM POU,

APPELLANT

APPELLATE CASE NO. 2012-213617

INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ARGUMENT IN REPLY

The state cites case law that is outdated and no longer good law since the Supreme Court in recent years has made it abundantly clear that "expert" opinion bolstering a child's sex allegations is impermissible, and that the trial judge has a "gatekeeping" duty on non-scientific evidence as well. Further, merely renaming the title of the expert from a "forensic interviewer" to another title does not change the underlying bolstering problem if the expert relays to the jury that the child is telling the truth in a slightly different fashion.

The state cites precedents of this Court and the Supreme Court from the 1990's that predates relevant precedent on the evils of bolstering in child sex cases. See, State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2011); State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2009); State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).

The state cites to the State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 487, 494 (Ct. App. 1999) language that "expert testimony concerning common behavioral characteristics of sexual assault victims and a range of responses to sexual assault encountered by experts is admissible." The state also cites State v. Schumpert, 312 S.C. 402, 506, 435 S.E.2d 859, 862 (1993), for the proposition that "both 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." (emphasis added). At a minimum Schumpert obviously mandated a Rule 403, SCRE analysis before such evidence could be admitted. Brief of Respondent at 9-10.

Further, and more importantly, such older cases must be viewed through the lens of modern precedents such as Kromah. For example, in State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (1997), this Court held that a psychotherapist possessed the ability and skill to be

qualified as an expert to render an opinion that the alleged victim suffered from post-traumatic stress disorder. The psychotherapist based her diagnosis and opinion of post-traumatic stress disorder on what she was told by the alleged victim and her observations of the victim's demeanor and symptoms exhibited by the alleged victim. She made no attempt to corroborate the alleged victim's testimony.

In State v. Henry the alleged victim testified she was an honor roll student in high school, but she was being sexually abused. R. 225-232. However, at the University of Florida her GPA fell to 1.88. She blamed her low grades on having nightmares and an inability to concentrate. She did not disclose the abuse.

The psychotherapist in Henry -- based on her "expertise" -- opined that it was not unusual at all for a person who was sexually abused to excel in high school while at home, and then have trouble coping once away from the abuser (in college). R. 374, ll. 13-16. It was not also unusual for that alleged victim to have nightmares, and not disclose the alleged abuse. The bottom line opinion of the psychotherapist was that the alleged victim suffered from PTSD. This, she explained, was a process people go through after suffering from a traumatic event such as being sexually abused. This Court can take judicial notice of the fact that certiorari in Henry to the Supreme Court was not sought.

In Henry, this Court cited State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App.1997), and State v. Schumpert, 312 S.C. 402, 506, 435 S.E.2d 859, 862 (1993), and held, essentially, that defects in the knowledge or experience of the experience of the expert, or the adequacy (reliability) of her testimony went to its weight and not its admissibility.

Clearly, an opinion that an "expert" believed the alleged victim's allegation of sexual abuse would be improper today. Moreover, in State v. White, 382 S.C. 265, 676

S.E.2d 684 (2009) our Supreme Court held that the trial court's gate keeping function in assuring reliability of expert testimony applies to non-scientific evidence also, thereby overruling State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App.1997).

"The familiar tenet of evidence law that a continuing challenge to evidence goes to 'weight, not admissibility' has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability. Nonscientific expert testimony must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter."[1] State v. White 326 S.C. at 273, 676 S.E.2d at 688.

In Morgan, this Court had held that behavioral science opinions offered by medical doctor and medical health counselor were not subject to challenge based upon reliability of the opinions or of methods and techniques used. It is apparent there has been a vast change in South Carolina precedent on this subject since Weaverling, Schumpert and Henry.

It is evident that solicitors have adopted a strategy of renaming forensic interviewers to "experts" in "child abuse dynamics" or similar titles in a thinly veiled attempt to evade the holding of Kromah. In fact, in an argument before this Court one Assistant Attorney General in the last several months candidly acknowledged that his office had recommended that solicitors not seek to qualify forensics interviewers as experts because they will be accused of bolstering the child's testimony.

[1] Appellant understands that the "expert" in Henry interviewed the alleged victim, and then cited to a variety of "statistics" on nondisclosure of abuse. The salient point is that the reasoning of Henry, the same as in Morgan is no longer good law.

There is no need for appellant to reiterate his arguments in his brief of appellant. Suffice it to say that here defense counsel correctly objected that Dr. Benedetto's testimony was meant to bolster the testimony of the minor given the similarities in alleged victim's life, and those same similarities which allegedly existed in the lives of other victims of sexual abuse. The jury was told that a child viewing domestic violence in her family would be scared to disclose abuse out of fear. Further, having a non-supportive mother would further cause the child to fear disclosing abuse.

The state presented evidence of domestic violence in the alleged victim's family during its case-in-chief. The state also offered evidence that the mother of the alleged victim here was a non-supportive (non-believing) mother.

Dr. Benedetto's testimony improperly bolstered the testimony of the alleged victim. It was not done in the **identical** fashion as that in Kromah because Dr. Benedetto, for years a "forensic interviewer" relying on the prosecutions "finding words" routine, was careful to say she had not interviewed the alleged victims.

However, qualifying Dr. Benedetto an expert in "child abuse dynamics," and not having her interview the minors, did not solve the bolstering problem. Appellant wants to be absolutely clear on "bolstering." It is presenting "expert" testimony which explicitly or implicitly informs the jury that the expert's testimony reveals that the child is telling the truth.

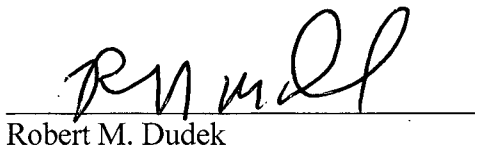
Dr. Benedetto's testimony here clearly conveyed that the child's behavior mirrored that of other alleged "non-disclosing" minors who had been sexually abused. It was a back door attempt to convey to the jury that Dr. Bendetto saw identical symptoms involving non-disclosure in a variety of other cases, it was common, and therefore the jury should believe

the accusing witnesses in this case who had the same experiences. This testimony, pursuant to Morgan, Henry, and Shumpert was inadmissible under the modern precedents of **our Supreme Court** in child sexual abuse cases.

CONCLUSION

By reason of the arguments in the brief of appellant, and in this reply brief, appellant's conviction should be reversed, and this case remanded to the Aiken County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

This 20th day of August, 2014.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of August, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 20th day of August, 2014.

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