STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERICK ARROYO,

APPELLANT

APPELLATE CASE NO. 2013-000694

INITIAL REPLY BRIEF OF APPELLANT

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Dr. Steenkamp's Testimony

The State agrees that expert witness Dr. Steenkamp's testimony was primarily relevant to Minor's credibility, but that it somehow falls outside of the prohibition against offering an opinion on the credibility of others. State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). See also State v. Perry, ___ S.C. ___, ___ S.E.2d ___, 2014 WL 3844218, at *10 (Few, C.J., concurring). The State's chain of inferences allowing Dr. Steenkamp's testimony is as follows:

1. Minor suffered from PTSD because of abuse committed by Arroyo;
2. Arroyo attacked Minor's credibility based on her failure to report the abuse and her initial denials;
3. Minor's PTSD explains why she did not immediately report the abuse and why she initially denied it;
4. Therefore, Dr. Steenkamp's testimony is relevant.

The problem with the State's reasoning is, of course, that it begins in the middle of the chain and leaves out the prohibited, important first links in the chain:

1. Minor told Dr. Steenkamp Arroyo abused her;
2. Dr. Steenkamp believed Minor;
3. Dr. Steenkamp diagnosed Minor with PTSD based on what Minor told her.

Implicit throughout Dr. Steenkamp's entire testimony is that in order to diagnose Minor with PTSD, she necessarily **believed** Minor. Dr. Steenkamp did not only opine that Minor had PTSD, she opined that the cause of Minor's PTSD was the sexual abuse by Arroyo. Tr. 467, l. 19 – 468, l. 6.

The State seeks to limit Kromah to a narrow ban on whether only forensic interviewers are permitted to utter a specific phrase that unambiguously states their belief that a child is telling the truth. This reading of Kromah ignores the principles underlying its result. These principles bar an opinion—especially from an expert witness—on a complainant's credibility because it usurps the jury's function. The State candidly admitted that Dr. Steenkamp's relevance was to credibility. Nothing in Dr. Steenkamp's testimony can be separated from the fact that she necessarily believed Minor in order to diagnose her with PTSD **and** tell the jury that the PTSD was a result of Arroy's abuse. This invited the jury to make the prohibited conclusion: Dr. Steenkamp is a psychologist and an expert in these things, and since Dr. Steenkamp believed Minor, then Minor must be telling the truth.

The State attempts to salvage Dr. Steenkamp's legally irrelevant and prohibited opinions with pre-Kromah cases holding that "rape trauma" evidence is admissible. To this end, the State cites State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) and its progeny, State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (1999). Schumpert is of questionable validity post-Kromah. If it is error to allow the jury to hear that a forensic interviewer, who often lacks any advanced education or true scientific skill, believes a child is telling the truth, then it must be significantly more prejudicial for a jury to hear that a psychologist or psychiatrist believes the child. The State's notion that Kromah somehow left Schumpert's reasoning untouched is a fiction. See also 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 modern trend in sex abuse cases recognizes the danger of this type of testimony and excludes it. Connecticut's jurisprudence provides a perfect example. State v. Favoccia, 51 A.3d 1002 (Conn. 2012). Favoccia is a well-researched and thoughtful opinion that

rigorously examines the logic behind expert testimony in child sex cases. Much like Schumpert and Weaverling, Connecticut's cases from the late 1980s and early 1990s allowed testimony from expert witnesses concerning the general characteristics of abuse victims and rape trauma syndrome. Favoccia at 1013-14 citing State v. Spigarolo, 556 A.2d 112 (Conn. 1989) (holding general behaviorial characteristics testimony admissible) and State v. Ali, 660 A.2d 337 (Conn. 1995) (holding evidence of rape trauma syndrome was admissible). Connecticut's Kromah happened in 2001 when it held that a forensic interviewer could not vouch for the credibility of a victim. Favoccia at 1014 citing State v. Grenier, 778 A.2d 159 (Conn. 2001). By 2005, Connecticut held that admission of a doctor's testimony of "a diagnosis of child sexual abuse" was error. Favoccia at 1014 citing State v. Iban C., 881 A.2d 1005 (Conn. 2005) (internal quotations and alterations omitted).

The Favoccia court conducted extensive national research on these issues. It cited twenty-one state and federal courts that "deem admissible expert testimony that a particular complainant has exhibited behaviorial characteristics identified as those of sexual assault victims—**so long as the expert does not offer an ultimate conclusion on the issue of sexual abuse or opine directly on the complainant's veracity."** Favoccia at n.26 and cases cited therein. The court found three jurisdictions prohibited "even generalized expert testimony about behaviors of child sexual assault victims, considering it to be a scientifically unfounded incursion into the jury's role of determining the credibility of witnesses." Favoccia at n.27 citing Sanderson v. Commonwealth, 291 S.E.3d 610, 614 (Ky. 2009); Commonwealth v. Dunkle, 602 A.2d 830 (1992); State v. Bolin, 922 S.W.2d 870, 873-74 (Tenn. 1996). The Favoccia court found persuasive the eleven states that refused to admit evidence from an expert who crossed the line between generalized characteristics of abuse

and connecting specified behaviors of the complainant consistent with abuse. Favoccia at 1015-16.

The Favoccia court credited the argument of the defendant: "[T]he defendant posits that permitting an expert witness to make that connection, but not opine directly on a complainant's credibility or diagnosis is the logical equivalent of permitting an expert to testify that the bird acts, walks and quacks like a duck, but then precluding that expert from opining that a particular bird is, in fact, a duck." Id. at 1009. Dr. Steenkamp opined the bird is a duck.

The pre-Kromah case that most resembles Dr. Steenkamp's testimony is State v. Dawkins, 297 S.C. 386, 393, 377 S.E.2d 298, 302 (1989). Dawkins specifically addressed the defense's objection to a psychiatrist's opinion of the credibility of the complainant. Id. The solicitor asked the psychiatrist, "Based on your examination and your observations of Pamela, are you of the impression that her symptoms are genuine?" Id. The psychiatrist answered, "Yes." Id. The Court found the question improper. Id. at 394, 377 S.E.2d at 302. Dr. Steenkamp's opinion that Minor suffered from PTSD as a result of abuse by appellant is logically indistinguishable from the improper questioning in Dawkins. The Court should not accept the State's invitation to accept an end-run around Kromah's broad proscription of expert opinions of a child's credibility.

Dr. Elsey's Report

The State claims that Dr. Elsey's answer of "yes" to whether the child was an "accurate reporter" was vague. The State also claims that this answer betrays nothing about Dr. Elsey's opinion of Minor's credibility. If this response was indeed vague and conveyed nothing about Minor's credibility, then for what purpose was it relevant? The State completely failed to distinguish the unredacted portions of Dr. Elsey's report from the opinions held inadmissible in Kromah and Jennings.

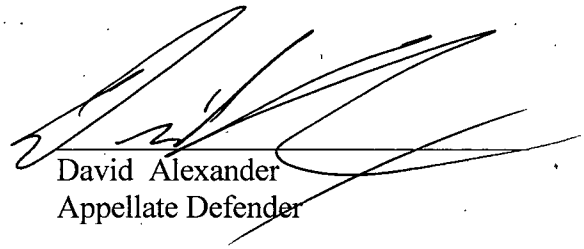
Harmless Error

The State hopes that the harmless error doctrine will save this conviction. Harmless error cannot apply in this closely contested case. The defendant testified and emphatically denied the charges against him. He was a distinguished combat veteran. The witnesses' versions of events were inconsistent. To find an error harmless, it must be harmless beyond a reasonable doubt. State v. Battle, 408 S.C. 109, 121, 757 S.E.2d 737, 743 (Ct. App. 2014). In Battle, the error was found not harmless because of conflicting evidence and the defendant's own testimony. Id. Much as in Battle, the evidence here was in direct conflict, the defendant testified, and any errors cannot be harmless.

CONCLUSION

For the reasons in appellant's brief, and in this reply, Arroyo's convictions should be reversed and this case remanded for a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of Ocotber, 2014.

STATE OF SOUTH CAROLINA
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THE STATE,

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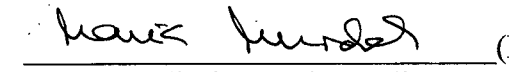
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant in the above referenced case has been served upon J. Benjamin Apli, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Erick Arroyo, #354743, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 10th day of October, 2014.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of October, 2014.


(L.S.)
Notary Public for South Carolina
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