

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Case No. 2011-GS-44-0413

The State of South Carolina,.....Respondent,

v.

Stephen Douglas Berry,.....Appellant.

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant adopts and incorporates by reference the Statement of Case and Facts presented in his Initial Brief. The factual history discussed below is limited to reply to the issues raised in the Respondent's Statement of the Case.¹

During Appellant Stephen Berry's trial, the victim testified as to sexual acts occurring between Berry and her between May 2010 and _____ 2010, which is the date range set forth in the Indictment. In _____ 2010, the victim reached the age of sixteen. (Tr. p. 132, lines 16-18). Over the objection of Berry's counsel, the trial court allowed the victim to testify further as to alleged acts between Berry and her occurring after her sixteenth birthday. (Tr. p. 138, line 24 – p. 139, line 1; p. 139, lines 16-17).

During the trial the State also called Kim Roseborough, a psychotherapist and social worker, as a witness. (Tr. p. 444, lines 14-25). During Roseborough's testimony, Berry's counsel objected to any statements relating to Ms. Roseborough's opinion that the circumstances of the victim's disclosure were consistent with a disclosure of sexual abuse. (Tr. p. 454, lines 2-15). Following a lengthy discussion with counsel outside the jury's presence, the judge sustained the objection. (Tr. p. 459, line 8). Shortly thereafter, Berry's counsel again objected to similar testimony of Ms. Roseborough and the judge overruled the objection. (Tr. p. 477, lines 1-21).

INTRODUCTION

The parties are in agreement regarding much of the law related to the issues at bar, including the law governing the admission or exclusion of trial testimony. The admission or exclusion of evidence is a matter within the discretion of the trial court and

¹ Similarly, under the Argument section of this Reply Brief, Appellant adopt and incorporates by reference those arguments raised in his Initial Brief. For the sake of brevity, Appellant offers the arguments herein as a limited reply to those issues presented in Respondent's Initial Brief.

will not be reversed on appeal absent an abuse of that discretion. *State v. Saltz*, 346 S.C. 114, 551 S.E.2d 240 (2001). Furthermore, the parties agree that an abuse of discretion occurs when the trial court's ruling lacks any evidentiary support or is based on an error of law. *State v. McDonald*, 343 S.C. 319, 540 S.E.2d 464 (2000). The parties disagree, however, as to whether an error of law occurred relating to the admission of the victim's trial testimony.

The parties further agree that the admission of expert testimony must not violate the requirements of *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). However, the parties disagree as to whether this issue was properly preserved for review and whether the admission of the State's expert's testimony violated *Kromah*.

For the reasons set forth below, the arguments raised by Respondent should be rejected, Berry's conviction should be reversed, and this case remanded to the Union County Court of General Sessions for a new trial.

ARGUMENTS

I. RESPONDENT'S ARGUMENT THAT THE VICTIM'S TESTIMONY WHICH EXCEEDED THE SCOPE OF THE INDICTMENT WAS PERMISSIBLE UNDER *LYLE* IS UNAVAILING.

Before his trial started, Appellant Berry's counsel moved to limit the testimony regarding any alleged sexual acts to the dates contained in the indictment. (Tr. p. 69, lines 20-23). The State was later allowed to introduce testimony that the alleged acts continued to occur beyond the dates set forth in the indictment. (Tr. p. 70, lines 17-23).

It is well settled law that a defendant has a right to be tried only for the crimes set forth in the indictment. *State v. Thompson*, 230 S.C. 473, 96 S.E.2d 471 (1957). Because of this fundamental right, there are only limited circumstances where testimony that

exceeds the scope of the indictment may be admitted. The circumstances are firmly established in *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). According to *Lyle*, “evidence of other crimes is competent to prove the specific crime charged when it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.” *Id.* at 416, 118 S.E. at 807. *Lyle* specifically states that “evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution’s theory of the defendant’s guilt of the particular crime charged.” *Id.* at 415-16, 118 S.E. at 807.

The State argued at trial that the testimony in question established the basis for the delay between the victim turning sixteen and the date she finally disclosed the abuse. (Tr. p. 70, line 17 – p. 71, line 2). Respondent argues that if the testimony had been prohibited, the jury would have been lead to believe that the contact between the victim and Berry ended when she turned sixteen.

Immediately prior to trial, during the hearing on Berry’s motion *in limine* regarding this testimony, the following exchange took place between the solicitor and the trial court:

Solicitor Anthony: Yes, sir. She – The case is not going to make really any sense if it is portrayed to the jury that these acts stopped right at her sixteenth birthday, four months passed before she ever told anybody.

The Court: Well it’s not the Court’s responsibility to make the case make sense. I mean it’s got the facts; the facts are the facts and the allegations are for a certain time period – I’ll give it some thought but I don’t see how a continuing relationship is a commission of a crime and it may be reversible. *Lyle*: It’s kind of *Lyle* in reverse that this continued pattern of bad acts afterward the how [sic] she reached the age of consent.”

(Tr. p. 71, lines 2-13).

As evidenced above, any testimony related to alleged acts occurring after the victim turned 16 served no other purpose than to corroborate the prosecution's theory of Berry's guilt, in direct violation of the requirements of *Lyle*. Without the testimony, the solicitor worried that the State's case would not "make sense."

This testimony was improperly admitted and reversal is required.

II. RESPONDENT'S ARGUMENT THAT THE ISSUE OF WHETHER THE TRIAL COURT'S ALLOWANCE OF THE STATE'S EXPERT TO IMPROPERLY BOLSTER THE VICTIM'S TESTIMONY WAS NOT PRESERVED FOR REVIEW IS WITHOUT MERIT.

The trial court erred in allowing the State to offer testimony which vouched for and bolstered the victim's assertions, through its expert psychotherapist and social worker Kim Roseborough, who had previously counseled the victim. This testimony violates *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). In contrast to the State's argument on appeal, this issue was properly preserved for review. During Ms. Roseborough's testimony, Berry's counsel specifically referenced the *Kromah* case to the trial court, outside the jury's presence. Berry's counsel stated as follows:

I will say at the outset of my argument, Your Honor, this case is extremely new. I believe it was just filed in January which would have been last month and I don't think the time period has passed but I do think it is instructive on this issue...

In this case, Your Honor, the court expressly addressed this forensic interviewer's comments regarding her assessment of the demeanor of essentially in this case what is a child victim's demeanor and how it relates to whether that child was believable in a disclosure of sexual abuse. It is an extensive recitation of how that forensic interview [sic] was certified as an expert in forensic interviewing and how even though the person was qualified as an expert that does not allow that person to comment on anything involving the credibility of a witness.

It further does caution that there are certain statements that should be avoided at trial, one of which is any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter.

It is our concern, Your Honor, that should Ms. Roseborough testify, as the State has ask [sic] her to do, that her disclosure, to mean the victim's disclosure is consistent or inconsistent with the disclosure of sexual abuse.

That is asking Ms. Roseborough to comment in a manner that would require her to comment on whether she believes the victim's allegations in this matter involved in this case when our Supreme [sic] has determined this an improper comment.

(Tr. p. 454, line 18 – p. 456, line 2). The trial court sustained the objection. (Tr. p. 459, line 8).

Later, and in spite of the trial court sustaining Berry's counsel's *Kromah* objection, the court then allowed the precise type of testimony prohibited by *Kromah*. Following a discussion by Ms. Roseborough of typical symptoms of trauma that are exhibited by children who have been sexually assaulted, she was allowed to testify as to which of those symptoms were exhibited by the victim. Specifically, Ms. Roseborough stated as follows:

BY SOLICITOR ANTHONY:

Q: Okay. Are there any specific trauma symptoms that children would tend to show following a sexual assault?

A: Yes.

Q: And what are those or some of those?

A: Some of those would be hyper-vigilance. A very exaggerated, startled response. There could be distressing intrusive thoughts about the event that occurred. These can sometimes cause really significant problems with concentration because they are having intrusive thoughts and they are not able to get the event out of their mind. A lot of people can have and one of the symptoms certainly is agitation, outbursts of anger. They also can have feelings of detachment that lead to very significant depression and anxiety and the symptoms that would go along with both of those; lack of sleep, problems with appetite. Those types of things.

Q: And in regards to any of your treatment of the victim, did you make observations and form opinions as to specific symptoms of trauma suffered by her?

A: Yes.

Q: And what were those?

A: Over time the victim became much more agitated and had a lot of feelings of guilt and separation and detachment from her family. She became increasingly more angry and had some ---

MS. INZERILLO: Your Honor, I'm going to object.

THE COURT: I overrule your objection. Go ahead.

A: Thank you. Had some very violent outbursts toward people in her family, her dad and her brothers. And she became more withdrawn. She had a lot of feelings of loneliness and detachment. She became so clinically depressed that I was concerned about her and referred her to a psychiatrist.

(Tr. p. 476, line 10 – p. 477, line 21)

Respondent argues that this issue is not properly preserved for review because trial counsel's objection was not made on a specific ground. The South Carolina Rules of Evidence provide that an objection must state a specific ground "**if the specific ground was not apparent from the context,**" SCRE 103(a)(1) (emphasis added). Here, the specific ground was apparent from the context, given the line of questioning contained in the above exchange and the previous in-depth discussion of *Kromah*. Allowing Ms. Roseborough to testify first as to examples of specific trauma symptoms that children would tend to show following a sexual assault, and then to testify as to which of those symptoms the victim exhibited, constitutes an improper bolstering of the victim's allegations. The above testimony is tantamount to allowing Ms. Roseborough to testify that she believes the victim. It is in direct violation of *Kromah* "for a witness to testify as

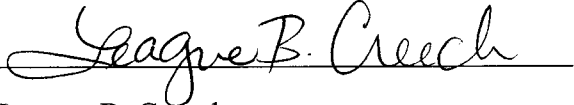
to his or her opinion about the credibility of a child victim in a sexual abuse matter.”
Kromah at 358, 727 S.E.2d at 499 (citing *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct.
App. 2011)).

This testimony was improperly admitted and reversal is warranted.

CONCLUSION

For the reasons set forth herein and in Appellant’s Initial Brief to this Court,
Berry respectfully requests that his conviction be reversed and this case remanded to the
Union County Court of General Sessions for a new trial.

Respectfully submitted,



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August 5, 2014

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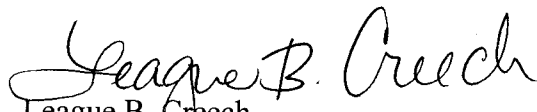
Re: The State of South Carolina, Respondent v. Stephen Douglas Berry, Appellant
Appellate Case Number: 2013-000435

Dear Ms. Kitchings:

Enclosed please find an updated Initial Brief of Appellant and an updated Reply Brief of Appellant in the above-referenced matter. These updated versions include the appropriate redactions to ensure compliance with the Supreme Court's order of April 15, 2014. Please replace the Initial Brief of Appellant previously filed on February 7, 2014 and the Reply Brief of Appellant previously filed on August 7, 2014 with the enclosed documents. By copy of this correspondence on opposing counsel, I am serving them with a copies of these updated documents.

Thank you for your assistance in this matter and please do not hesitate to contact me if you have any questions or require any additional information.

Sincerely,


League B. Creech

/LBC
Enclosures

cc: William M. Blich, Jr., Esquire
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