STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case Tracking No. 2013-002158

The State, Respondent,

vs.

Gerald Barrett, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in allowing the expert testimony to be introduced at trial. The South Carolina Supreme Court's decision in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), is completely inapposite and no case has overruled the established precedent of State v. Shumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) and State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999).

II. The trial court did not err in denying Appellant's motion for a continuance when the State had no obligation to inform the defense of the testimony prior to trial and Appellant had an opportunity to obtain an expert based on the State's notice.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court did not err in allowing the expert testimony to be introduced at trial. The South Carolina Supreme Court's decision in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), is completely inapposite and no case has overruled the established precedent of State v. Shumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) and State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999).

Appellant contends the trial court erred in admitting the testimony of the State's expert witness. He claims State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), bars her qualification as an expert because she served as the forensic interviewer. Further, he seems to contend her testimony was inappropriate and should not have been allowed by the trial court. Any issue related to the substance of her testimony is not preserved for review on appeal because Appellant never objected to any of the testimony as it was presented to the jury. Further, Kromah does not bar a person from being qualified as an expert in a field other than forensic interviewing. The qualification of the State's expert and her testimony were entirely appropriate under State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) and State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999).

Preservation

Any issue related to the substance of the expert's testimony is not preserved for review on appeal. The expert proffered testimony during which many discussions were had between counsel and the court regarding her testimony and its validity. However, this was pre-trial and the trial court reserved any final ruling. (T.138; R.___). Additionally, immediately before the expert's testimony, the trial court reminded counsel

of the need to object to any testimony to protect the record. (T.233; R.___). When the State's expert did testify, Appellant never raised a single objection to her testimony. (T.244-248; R.___). It was incumbent on Appellant to raise an objection when the actual testimony was presented to the jury and to raise any specific issues related to that testimony he wished to preserve for review on appeal. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("In most cases, '[m]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.'"); State v. Kirton, 381 S.C. 7, 43, 671 S.E.2d 107, 125 (Ct. App. 2008) (same). As a result, no issue related to the expert's actual testimony is preserved for review on appeal.

Merits

On the merits, the expert was properly qualified and properly allowed to testify regarding delayed disclosure. First, Appellant contends the trial court improperly qualified the State's expert because she served as forensic interviewer. Next, Appellant maintains her testimony was irrelevant and improperly admitted. Finally, Appellant seems to argue the controlling cases of State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) and State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999) were overruled by State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). All of these contentions are without merit.

The trial court properly qualified the State's expert as a mental health professional in the area of "child sexual abuse characteristics and behavior." The Supreme Court's opinion in Kromah does not bar her qualification as an expert in child sexual abuse

characteristics and behavior. Further, based on her education, expertise, and training she was clearly qualified to offer the limited expert testimony she offered regarding delayed disclosure.

While Kromah specifically found a person cannot be qualified as an expert in forensic interviewing, the case did not preclude a person from being qualified in another area solely because that person also acted as a forensic interviewer. See Kromah, 401 S.C. at 357 n.5, 737 S.E.2d at 499 n.5. The case dealt solely with testimony regarding the interview of a child abuse victim by a forensic interviewer. It did not involve any testimony regarding behavioral characteristics of victims of trauma such as sexual abuse, nor did it relate to any other testimony an expert may give on a subject outside of forensic interviewing.

If the argument is taken to its extreme, a case could present a situation in which a law enforcement officer serves as the forensic interviewer, as was the case in State v. Douglas, 380 S.C. 499, 503–04, 671 S.E.2d 606, 609 (2009). The same officer may also be a fingerprint expert or the DNA expert involved in the case. Taking Appellant's argument to its conclusion, because that same person interviewed the child, the law enforcement officer could not then be qualified as an expert in DNA analysis. Clearly, this is not the intention or rationale of Kromah, and this Court should not extend Kromah to the absurd result that a person who serves as a forensic interviewer cannot be qualified as an expert in any other field.

Additionally, the testimony presented by the State's expert is proper testimony for an expert and the trial court properly admitted it before the jury. First, Appellant spends much of his brief discussing the expert's testimony regarding Child Sexual Abuse

Accommodation Syndrome (CSAAS). Appellant is using smoke and mirrors in a clear effort to misdirect the Court's attention as this testimony **only** was offered during the **proffer** of the expert's testimony and was not at all offered by the State during the expert's testimony before the jury. Ironically, the only time CSAAS is mentioned before the jury is when **Appellant's** counsel raises it in recross-examination. (T.261; R.___). The main testimony Appellant complains was improperly admitted was either brought out only in a proffer by the State and not before the jury or was brought out by his own counsel and certainly does not form the basis of any error of which he can complain.

Next, the testimony actually presented to the jury by the State's expert related to delayed disclosure and the behavioral characteristics of a child victim of trauma including sexual abuse. The expert testified kids usually never tell and then explained the main reasons they fail to disclose abuse. She explained delayed disclosure is a common occurrence in the sexual abuse field and that many times adults are the last ones to find out about the abuse. (T.244-245; R.___).

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004).

Qualification of a witness as an expert and the subsequent admission of that witness's testimony are matters within the sound discretion of the trial court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). An abuse of discretion occurs

when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

As this Court very recently explained:

> Expert testimony differs from lay testimony in that an expert is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions. On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training.
>
> . . . .
>
> First, the [circuit] court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the [circuit] court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the [circuit] court must evaluate the substance of the testimony and determine whether it is reliable.

State v. Brown, Op. No. 5288 (S.C. Ct. App. Filed January 7, 2015) (Shearouse Adv.Sh. No. 1, p.28-29) (quoting Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010)).

"[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499 (2013). "For an expert to comment on the veracity of a [victim's] accusations of sexual abuse is improper." State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). This Court recently stated:

> "Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the

> complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror." State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), rev'd in part on other grounds, 380 S.C. 499, 671 S.E.2d 606 (2009). Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain "the assessment of witness credibility . . . within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013). Any time 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 or veracity of the victim.

The Courts of this state have examined behavioral testimony in several cases. Initially in State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987), the South Carolina Supreme Court held expert testimony regarding common behavioral characteristics exhibited by child victims of sexual abuse was not admissible to establish abuse had occurred. The Court held this evidence admissible only to rebut a defense claim that the victim's response was inconsistent with such a trauma. Id. at 100-101, 359 S.E.2d at 61. The Supreme Court changed direction in State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), holding trauma testimony of a rape victim is relevant to prove the elements of criminal sexual conduct since such evidence makes it more or less probable that the offense occurred.

In State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), the South Carolina Supreme Court considered expert testimony regarding rape trauma syndrome. The expert

testified to characteristics commonly found in sexual assault victims. Id. at 505, 435 S.E.2d at 861. The Supreme Court overturned its holding in Hudnall, and specifically found: "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."

This Court had a chance to address similar behavior testimony in State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). In Weaverling, an expert testified regarding behavior and characteristics of a sexually abused victim. This Court stated: "Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." Id. at 474-475, 523 S.E.2d at 794 (citing Frenzel v. State, 849 P.2d 741 (Wyo.1993); State v. Lujan, 192 Ariz. 448, 967 P.2d 123 (1998) (opinion testimony describing behavioral characteristics outside jurors' common experience is permitted as long as it meets other admissibility requirements)). This Court explained:

> Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. Frenzel, supra. It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor. Id. See also Lujan, supra (when facts of case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—like reactions of child victims of sexual abuse—expert testimony on general behavioral characteristics of such victims should be admitted).

Id. at 475, 523 S.E.2d at 794. This Court in Brown very concisely and correctly explained:

> We believe the unique and often perplexing behavior exhibited by child sex abuse victims does not fall within the

> ordinary knowledge of a juror with no prior experience—either directly or indirectly—with sexual abuse. The general behavioral characteristics of child sex abuse victims are, therefore, more appropriate for an expert qualified in the field to explain to the jury, so long as the expert does not improperly bolster the victims' testimony.

Brown, Op. No. 5288 (Shearouse Adv.Sh. No. 1, p.31); see also, State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) ("Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior.).

Numerous other states which have considered the issue of whether to allow testimony regarding delayed disclosure and other behavioral characteristics have also found it admissible; specifically finding the behavioral traits appropriate testimony for an expert. See State v. J.Q., 617 A.2d 1196, 1206 (N.J. 1993) ("There does not appear to be a dispute about acceptance within the scientific community of the clinical theory that CSAAS identifies or describes behavioral traits commonly found in child-abuse victims."); State v. Reser, 767 P.2d 1277, 1282 (Kan. 1989) ("There are numerous cases from other jurisdictions where expert testimony regarding characteristics of sexually abused children has been held properly admitted as providing helpful background information to the jury."); Keri v. State, 347 S.E.2d 236, 238 (Ga. App. 1986) (finding expert testimony assisted jury in understanding why sexually abused children are secretive, why they were frightened, why they act out and become disciplinary problems, and why the children could not give specific dates for the acts they say were committed by the defendant); see also John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45-46 (2010)

("Psychological research demonstrates that delayed reporting is common among sexually abused children. Frequently when children finally disclose, they give slightly different versions of the abuse to different interviewers. Finally, although there is debate about how many sexually abused children recant, it is undisputed that some children recant and some recant their recantation. Thus, from a psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such testimony is not worrisome." (footnotes omitted)).

The Georgia Court of Appeals found testimony about child sexual abuse syndrome admissible. McCoy v. State, 629 S.E.2d 493, 494 (Ga. Ct. App. 2006); see also, Keri v. State, 347 S.E.2d 236, 238 (Ga. App. 1986) (finding expert testimony assisted jury in understanding why sexually abused children are secretive, why they were frightened, why they act out and become disciplinary problems, and why the children could not give specific dates for the acts they say were committed by the defendant). Relying on its longstanding supreme court precedent, the Court found:

> The expert witness testified as to common characteristics of child sexual abuse syndrome, such as secrecy, delayed disclosure, helplessness, and accommodation. He offered no opinion, however, as to whether the victims in this case were being truthful. He left that determination for the jury. Since "[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."

McCoy, 629 S.E.2d at 494 (quoting Allison v. State, 535 S.E.2d 805 (Ga. 1987)).

The Montana Supreme Court recently stated:

> We have consistently upheld the use of experts to explain the complexities of child sexual abuse. Child sexual abuse is a topic that many or most jurors have no common

> experience with. This is particularly so when the alleged victim and perpetrator are family members. Child sexual abuse victims often respond to the abuse with seemingly puzzling and contradictory behavior. The expert's testimony educates and enlightens the jury. The jury can then make a more informed decision when it assesses the victim's credibility.

State v. Robins, 297 P.3d 1213, 1217 (Mont. 2013) (emphasis added). Further, the Court of Appeals of New York recently noted:

> Indeed, the majority of states permit expert testimony to explain delayed reporting, recantation, and inconsistency, as well as to explain why some abused children are angry, why some children want to live with the person who abused them, why a victim might appear 'emotionally flat' following sexual assault, why a child might run away from home, and for other purposes.

People v. Spicola, 947 N.E.2d 620, 635 (N.Y. 2011) (internal quotations and citations omitted).

In State v. Carpenter, 556 S.E.2d 316 (N.C. Ct. App. 2001), the North Carolina Court of Appeals found no error in allowing expert testimony regarding the fact delayed and incomplete disclosure is not unusual in cases of child abuse. In responding to the defendant's argument the state failed to show any scientific foundation for the opinion testimony, the North Carolina Court of Appeals noted the expert "was adequately qualified in the area of child sex abuse evaluations and interviews based on her extensive experience, training, and education, which included interviewing two thousand children in her career." Id., at 321. The court opined her testimony "was clearly instructive and helpful to the jury in understanding the evidence since the nature of the sexual abuse of children places lay jurors at a disadvantage." Id. (internal quotations and citations omitted).

The Nebraska Supreme Court observed the following:

> The reasoning for a rule allowing an expert to testify about sexual abuse in generalities, without being familiar with the alleged victim, is that few jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship, and the behavior exhibited by sexually abused children is often contrary to what most adults would expect.

State v. Roenfeldt, 486 N.W.2d 197, 204 (Neb. 1992) (citation and internal quotation marks omitted).

In State v. Cardany, 646 A.2d 291 (Conn. App. Ct. 1994), the Appellate Court of Connecticut held expert testimony on delayed disclosure was admissible in the prosecution's case-in-chief, noting: "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." Id. at 294.

In Kilby v. Commonwealth, 663 S.E.2d 540 (Va. Ct. App. 2008), the Virginia Court of Appeals found the trial court did not err in allowing a witness to provide expert testimony on delayed disclosure. Id., at 546-547. She was admitted as an expert in "forensic interviewing, child sex abuse disclosure by children of sexual assault and recantation." Id., at 543. In finding the admission of her testimony proper, the Virginia Court of Appeals noted she attended numerous forensic training programs and was qualified as an expert in state court and the military courts. She was the lead forensic interviewer at the children's hospital. Id., at 547.

In State v. Perry, 218 P.3d 95 (Or. 2009), the Oregon Supreme Court found expert testimony on the phenomenon of delayed disclosure by victims of child sexual abuse admissible. The expert testified examiners and interviewers in her organization received extensive specialized training, and there were specialized journals and other peer reviewed literature devoted to the area of child sexual abuse. The expert also testified that the phenomenon was common and well understood, with a body of literature concerning the issue. Id. at 97.

In responding to a claim of trial court error in allowing the prosecution's expert to testify about sexual abuse of children and characteristics of perpetrators, the Louisiana Court of Appeals noted the following:

> [The expert] testified very broadly about the general characteristics of sexual abuse victims, namely how such victims delay disclosure and some of the reasons why disclosure may be delayed, such as fear or shame. As discussed, part of [the expert's] training and experience included counseling children who were victims of sexual abuse. It would not have been beyond her expertise to explain, based on her own practice and experience, the basics of delayed disclosure.

State v. Friday, 73 So.3d 913, 931-32 (La. Ct. App. 2011).

In finding an expert's testimony on delayed disclosure admissible under its supreme court's authority, the Massachusetts Court of Appeals opined: "Expert testimony that abused children often delay reporting the abuse, a familiar and permitted proposition at least since [Commonwealth v. Dockham, 542 N.E.2d 591 (Mass. 1989)], informs the jury that the victim's failure to disclose in a timely fashion does not necessarily exonerate the defendant without suggesting that the particular child witness in the case was or was not abused." Commonwealth v. Bougas, 795 N.E.2d 1230, 1236 (Mass. Ct. App. 2003)

(emphasis added). The Court clearly acknowledges the educational aspect of the testimony, the disabusing of the misconceptions, and provides the jury with information they would not have otherwise possessed without bolstering or vouching for the child victim.

The Delaware Supreme Court elucidated:

> We agree that where a complainant's behavior or testimony is, to the average layperson, superficially inconsistent with the occurrence of a rape, and is otherwise inadequately explained, thus requiring an expert's explanation of its emotional antecedents, expert testimony can assist a jury in this regard. Exposing jurors to the unique interpersonal dynamics involved in prosecutions for intrafamily child sexual abuse can provide jurors with possible alternative explanations for complainant actions and statements that are, to average laypeople, "superficially bizarre," "seemingly unusual," "seemingly inconsistent," or normally attributable to "inaccuracy or prevarication." Thus informed, the jury will be better able to perform its fact finding duty.

Wheat v. State, 527 A.2d 269, 273 (Del. 1987).

The information provided by the State's expert enables the jury to make an informed decision. This Court should find, consistent with Weaverling and numerous other cases, the testimony of the State's expert regarding the limited topic of delayed disclosure was proper behavioral testimony. The testimony did not impermissibly bolster or vouch for the victim nor was it entirely irrelevant as it explained what could otherwise be confusing behavior by the victim in the aftermath of her abuse. Accordingly, this Court should find the testimony of the State's expert properly admitted by the trial court.

Finally, Appellant seems to argue Kromah overruled Schumpert and Weaverling and the other cases in South Carolina which allow behavioral testimony. The Kromah opinion did not address, or even mention, the rulings of Schumpert or Weaverling, nor

did it address the expert testimony of behavioral characteristics of trauma victims or rape trauma evidence, which formed the issue in those cases. The Kromah decision merely provided a roadmap for the use of the testimony of a forensic interviewer when testifying solely about the forensic interview. Because the issues raised in this appeal, and addressed by the Supreme Court in Schumpert and this Court in Weaverling, were not addressed in Kromah, the Kromah case is not dispositive precedent on the issue. See Hutto v. Southern Farm Bureau Life Ins. Co., 259 S.C. 170, 173, 191 S.E.2d 7, 8 (1972) ("It is, of course, settled law that 'a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion.'"); Holmes v. McKay, 334 S.C. 433, 441 n.3, 513 S.E.2d 851, 855 n.3 (Ct. App. 1999) (same). Accordingly, this Court should properly rely on Schumpert and Weaverling as it recently has in Brown, find the testimony of the State's expert properly admitted, and affirm Appellant's conviction and sentence.

II. The trial court did not err in denying Appellant's motion for a continuance when the State had no obligation to inform the defense of the testimony prior to trial and Appellant had an opportunity to obtain an expert based on the State's notice.

Appellant maintains the trial court erred in failing to grant his motion for a continuance because the State informed him of the testimony to be presented by its expert witness on the Thursday before trial began on Monday. Appellant was not entitled to know the content of the State's expert's testimony prior to trial and the State merely provided a courtesy to Appellant. There is no basis for the grant of a continuance and the trial court properly denied the motion.

First, there is no right to discovery in a criminal trial in South Carolina beyond what is provided by statute, case law, or court rule. See State v. Miller, 289 S.C. 316, 317, 345 S.E.2d 489, 490 (1986); State v. Flood, 257 S.C. 141, 184 S.E.2d 549 (1971) (holding there is no general discovery in criminal cases in South Carolina).[1] Further, there is no requirement either side turn over a general witness to the other side prior to trial. See Miller, 289 S.C. at 317, S.E.2d at 490 (interpreting prior Circuit Court Rule 103, now Rule 5, SCRCrimP, and finding a defendant cannot be required to turn over a witness list prior to trial); State v. Nicholson, 366 S.C. 568, 579, 623 S.E.2d 100, 105 (Ct. App. 2005) (finding "The State, however, is not required to provide its witness list to a criminal defendant").

Additionally, "[i]n South Carolina '[t]he grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of

[1] See e.g., Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (requiring the State to divulge to a criminal defendant exculpatory or mitigating information); Rule 5, SCRCrimP (requiring the State to disclose certain statements of the defendant, the defendant's prior record, certain documents and tangible objects, certain reports of examinations or tests, and witnesses to be called in response to an alibi defense).

discretion appears from the record.'" State v. Hill, 409 S.C. 50, 59, 760 S.E.2d 802, 807 (2014) (quoting Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007)). As our Supreme Court has stated: "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (citing State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)).

The Nicholson case is directly on point with the facts of this case and should be controlling. In Nicholson, the State intended to call an expert to testify about the general characteristics of a sex abuse victim. Nicholson, 366 S.C. at 579, 623 S.E.2d at 105. The State provided notice of the expert to the defendant, but the defendant requested a continuance claiming the notice was too close in time to trial for him to fully prepare his defense. Id. This Court found the trial court acted within its discretion in denying the motion for a continuance, finding the notice provided to the defendant was a "professional courtesy" because not witness list is required to be provided. Id. at 579, 623 S.E.2d at 105-106. The same holding should apply in this case in which a professional courtesy was extended but not required, and the trial court clearly did not abuse its discretion in denying Appellant's motion for a continuance when he failed to provide even the name of the person he sought to hire but was unable to in the time allowed.

Further, the two cases cited by Appellant are clearly inapposite to the case at hand. In McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008), the case was heard as a post-conviction relief case and not on direct appeal. At trial, counsel for petitioner called an expert who had testified at the first trial of McKnight favorably for the State, instead of finding and calling an expert who would be more favorable to the petitioner. Id. at 43-

44, 661 S.E.2d at 359. The Court found counsel should have requested a continuance to find a more suitable expert. Id. at 45, 661 S.E.2d at 360. The situation addressed in McKnight is completely different given the level of knowledge McKnight's counsel had going into the second trial as well as the fact he called an expert who he already knew to be more favorable to the State. Here, counsel speculated as to the type of testimony he might could find from an expert, presented no names of persons he could call as an expert, and merely complained about notice of which he was not entitled in the first place.

Appellant's second case is McMillian in which the Supreme Court found the entire case hinged on the testimony of a single witness who testified previously in McMillian's first trial. McMillian, 349 S.C. at 21-22, 561 S.E.2d at 604. Counsel requested a continuance to obtain a transcript to impeach the sole neutral witness. Id. The continuance was denied and the Court found error because it found the ability to impeach the witness to be of the utmost importance in that case. Id. at 22-23, 561 S.E.2d at 605. Unlike this case, counsel knew going into the second trial the importance of the testimony and the need for the transcript. In the instant case, as discussed above, counsel merely speculated regarding the need for an expert and there is no showing a countering expert would have had a significant difference on the outcome of the trial even if Appellant had located one to testify.

Accordingly, pursuant to the precedent of Nicholson, this Court should affirm the trial court's denial of Appellant's motion for a continuance and affirm his conviction and sentence.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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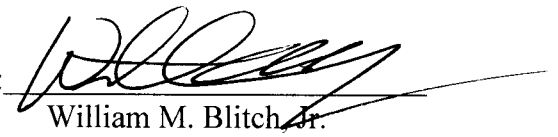
BY: 
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ATTORNEYS FOR RESPONDENT

January 15, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Kristi Lea Harrington, Circuit Court Judge
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The State, Respondent,

vs.

Gerald Barrett, Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, 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 15th day of January, 2015.

Sally Ellison

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January 15, 2015

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RE: State v. Gerald Barrett
Appellate Case Tracking No. 2013-002158

Dear Mr. Alexander:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services