THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DAMON T. BROWN,

APPELLANT

APPELLATE CASE NO. 2012-213548

Appeal from Pickens County

G. Edward Welmaker, Circuit Court Judge

Opinion No. 5288

PETITION FOR REHEARING

Appellant, Damon Tyler Brown, by and through his undersigned counsel, respectfully petitions this Court for rehearing pursuant to Rule 221(a), SCACR because this Court misapprehends the fact that (1) child abuse dynamics and delayed disclosures are not subjects beyond the ordinary knowledge of the jury, (2) Shauna Galloway-Williams' testimony did improperly bolster the minor complainants' credibility and improperly corroborate their testimony, and (3) any probative value of Galloway-Williams' testimony was substantially outweighed by the

danger of unfair prejudice to Appellant. Appellant respectfully asks this Court to reexamine its opinion and grant rehearing.

This Court misapprehends the argument that the subject matter of Galloway-Williams' testimony was not beyond the ordinary knowledge of the jury. In Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), the South Carolina Supreme Court specified the following three-prong test for expert testimony:

> [E]xpert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. **First, the trial 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 trial 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 trial court must evaluate the substance of the testimony and determine whether it is reliable.

Id. at 446, 699 S.E.2d 169, 175 (internal citations omitted) (emphasis added).

The first prong of the three-prong test in Watson was not met in this case. As defense counsel argued at trial, "[T]his is not outside the realm of ordinary lay knowledge . . . the jury can make their own determination based on the witnesses' own testimony. They've testified already as to why they delayed in disclosure, why they didn't report it, why they reported it when they did. And so the jury can already make that decision based on what they've heard. They don't need an expert to come on the stand and help them resolve why they would do that." R. 241, ll. 2-10; see also R. 240, l. 14 – 241, l. 2.

Defense counsel's assertions at trial were correct. The complainants had thoroughly explained their actions and thoughts to the jury. No expert knowledge or opinions were required

for the jury to understand or make its own determination as to why the complainants were delayed in disclosing and what caused them to eventually disclose. The complainants testified they were embarrassed, afraid to disclose, or blamed themselves. A juror can understand that a victim of sexual abuse may not disclose immediately because of fear, embarrassment, or an irrational desire to blame themselves. A juror can also understand that it is possible the more one discusses a past experience the more details one may provide, especially when being asked specific questions. The jury did not need expert testimony to explain this subject matter as it did not involve scientific, technical, or other specialized knowledge. See Rule 702, SCRE. Therefore, the trial judge abused his discretion by allowing Galloway-Williams to testify as an expert.

Additionally, the Court misapprehends the highly prejudicial nature of Galloway-Williams' improper bolstering testimony in light of the lack of physical evidence in this case. Moreover, this Court failed to properly reconcile the outdated opinions in State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999) and State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) with our Supreme Court's holding in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). After Kromah, Weaverling and Schumpert are no longer good law.

This Court reads Kromah too narrowly. The intent of Kromah and the line of cases that preceded it, including State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000), Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010), State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), and State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012), among others, was to eliminate opinions vouching for the credibility of witnesses. The state has simply renamed forensic interviewers as experts in spurious fields like "child abuse dynamics

and disclosure." This testimony does not aid the trier of fact. Rather, it invades the province of the jury.

It is clear from the record that the state in this case attempted to circumvent Kromah by presenting a witness who had not met with the complainants, but who was familiar with the case, and presumably the complainants' testimony and specific allegations, as a result of discussions with the Solicitor's Office. While Galloway-Williams did not meet with the complainants, the state still used her to indirectly comment on the complainants' credibility and provide greater weight to their testimony which is prohibited by Kromah.

Galloway-Williams' testimony was very likely interpreted by the jury to express that they should believe the complainants because their behavior is typical, expected, and complies with the behavior of the majority of other victims of sexual abuse. For example, Galloway-Williams testified that between ***seventy and eighty percent*** of children are delayed in disclosing abuse just like the complainants in this case. Her testimony strongly implied that because the complainants acted in the same manner as other victims of sexual abuse they must be telling the truth. Therefore, admitting her as an expert and allowing her to testify was error for "[t]he assessment of witness credibility is within the exclusive province of the jury." McKerley, 397 S.C. at 464, 725 S.E.2d at 141 (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)).

Not only was Galloway-Williams' testimony used to bolster the complainants' testimony, it was also highly prejudicial to Appellant and cumulative. Under Rule 403, SCRE, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." Because the complainants had already testified as to why they disclosed when they did and what caused them to disclose, among other details, Galloway-Williams' testimony was merely cumulative. It was used solely

by the state to reinforce and reiterate the reasoning for the complainants' actions and behavior. See Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) ("Improper corroboration testimony that is *merely cumulative to the victim's testimony*, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.") (emphasis in original).

Galloway-Williams' testimony was also prejudicial to Appellant because there was no physical evidence presented in the case and the sole issue was the credibility of the complainants. Because the complainants' credibility was the most critical determination of this case and Galloway-Williams' testimony was used solely to bolster their credibility, Appellant was clearly prejudiced and should be granted a new trial. See Jennings, 394 S.C. at 480, 716 S.E.2d at 94-95 ("Because the children's credibility was the most critical determination of this case, we find the admissibility of the [forensic interviewer's] written reports was not harmless.").

Appellant respectfully requests this Court grant rehearing and decide this case under the correct legal standard set forth by our Supreme Court in Kromah and the line of cases that preceded it.

Respectfully submitted,

Lara M. Caudy
Appellate Defender

This 22nd day of January, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

JAN 22 2015

SC Court of Appeals

Appeal from Pickens County

G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAMON T. BROWN,

APPELLANT

APPELLATE CASE NO. 2012-213548

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of January, 2015.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 22nd day of January, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.