THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ALBERT BRANDEBERRY,

APPELLANT.

APPELLATE CASE NO. 2012-212841

Appeal from Greenville County

Letitia H. Verdin, Circuit Court Judge

Opinion No. 2015-UP-015

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, appellant requests rehearing because this Court may have overlooked the fact that the "no corroboration" instruction was a charge on the facts, and it was fundamentally unfair and infringed on appellant's right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. The instruction detracted from the presumption of innocence. R. 453. (Issue two of the final brief).

It informed the jury that one witness, the alleged victim, was a special witness where none of the usual rules of ascertaining credibility applied. This was the "her word is her bond" witness.

The "no corroboration" statute was enacted so judges did not think they were compelled to

direct a verdict where the only evidence was the alleged victim's uncorroborated testimony or accusation. The same rationale was true for an appellate court considering a directed verdict issue on appeal. See, State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006).

As the dissent explained in Rayfield: "I would hold that it is error for a trial court to charge the jury that an alleged victim's testimony needs no corroboration. **Although section 16–3–657 contains current and correct law, it is not a proper subject of a jury charge. Section 16–3–657 prevents courts, either on a dispositive motion at the trial level or on appellate review, from finding a lack of sufficient evidence to support a conviction because the alleged victim's testimony is uncorroborated."** See, State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006). (emphasis added). See, also, State v. Bagwell, 201 S.C. 387, 23 S.E.2d 244, 249 (1942) (similar instruction on "uncorroborated' statements of accomplices should be received with caution and should be scrutinized by the jury with great caution as a charge on the facts which violated the state constitution).

Shauna Galloway-Williams "expert testimony" in "child abuse and treatment"

Petitioner submits this Court may have overlooked the fact that State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct.App.1999) and State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993) are no longer good law to the extent they allow bolstering by testifying about common behavioral traits of alleged sexual assault victims.

Appellant filed a "motion to exclude testimony of non-treating expert." R. 454. Appellant asserted the testimony of Galloway-Williams[1] should be excluded because the expert was not qualified to render an opinion on this particular subject, the expert's testimony is not necessary to the trier of fact, and the reliability of the basis for the opinion is not sufficient to support the opinion.

[1] Galloway-Williams is hereinafter referred to as "Williams" for ease of reference.

Appellant cited Rule 703, SCRE: State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); Watson v. Ford Motor Company Inc., 389 S.C. 434, 699 S.E.2d 169 (2010); State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009); State v White, 382 S.C. 265, 676 S.E.2d 684 (2009). R. 454.

Brief reiteration of trial facts

Defense counsel Bannister noted that the proposed witness, Williams, was not treating the alleged victim, and she was going to testify about other sexual assault victims in generalities. Counsel said her testimony was "implicitly saying that's what perpetrators typically do in all cases that I am working on." Counsel said this lumped all perpetrators and victims into one category. "I don't think it's necessary for an expert opinion. I'm – it's a little bit of a pig in a poke." R. 210, l. 12 - 212, l. 4.

The solicitor argued that unlike defense counsel the jurors were "not legal experts. They are not experts of child sexual abuse." The solicitor argued the testimony was necessary, and the judge said she would review the case law on the subject before ruling. R. 212, ll. 7-24.

Defense counsel then noted the more recent cases of State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); State v. Tapp, 398 S.C. 376, 728, S.E.2d 468 (2012), as the now controlling case law. R. 212, l.23 - 213, l.17.

Williams testified that nondisclosure rates among women range from *thirty-three to ninety-two percent* "and among men from among *forty-two to eighty-five percent.*" R. 249, ll. 2-12. (emphasis added). The "vast majority" of individuals that "we have seen have been abused by a close family member or a friend, someone known to the child. There are very few cases we see where the child has been abused by a stranger or someone that is unknown to them." R.251, ll. 10-18.

When questioned about any follow-up to determine which of the cases ever led to a conviction, Williams could only respond: "We could track that. We became accredited in 2007." R. 253, l. 18 - 254, l. 7. Williams admitted she was not aware of any statistics on how many accused people were "indicated for DSS," had their cases dismissed, or referred to law enforcement. She was also not aware of how many of those accused pled guilty or went to trial. Regarding those that went to trial she was not sure of any statistics on what verdicts were rendered. R. 254, ll. 14-22.

After hearing the testimony the judge ruled that she would not allow any questioning about whether it was more common for a family member to abuse a child than a stranger. She would also not allow testimony about whether a child who had been victimized was likely to become again become "a victim later." R. 258, ll. 8-22. It was undisputed that the father of this minor admitted he abused her.

Defense counsel objected that this testimony constituted improper bolstering of the child's disclosure. He argued that the "expert" opinion in essence was that the alleged victim in this case **"fits into what we understand to be a kind of the common way that children disclose, [therefore] she should be given credibility."** R. 259, l. 4 - 260, l .5. (emphasis added). The judge ruled she would allow this testimony about "delayed disclosure." R. 260, ll. 6-11. She was qualified as an expert in "child abuse and treatment" over appellant's objection. R. 309, ll. 1-23.

Williams maintained that disclosure was "a process," and that "a lot of times, children are abused by someone that is known, loved, and trusted by them. That may be a family member." R. 312, l. 10 - 314, l. 25. She then testified about how the "proximity that the child has to the perpetrator" could play a part. She added that once the perpetrator was away the child may feel "safer to disclose." R. 315, l. 1 - 316, l. 4.

Williams offered that *forty-two percent of children did not delay disclosure but that fifty-eight percent of children did delay telling anyone.* R. 330, ll. 15-25.

No longer good law

Following State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), cases from the 1990's such as Weaverling and Schumpert can no longer be considered to be good law to the extent they permit "expert" testimony that could not pass a modern day reliability gatekeeping analysis. Further, they are no longer good law to the extent they allow the "expert" to bolster the testimony of the alleged victim through junk science statistics, and unreliable testimony.

In Kromah, our Supreme Court noted that while forensic interviewers may be useful as a tool to aid law enforcement their work is "not appropriate for use in a courtroom." Appellant understands that in this case Williams was not testifying as a forensic interviewer, although she is one. **Regardless, what occurred in this case was not occurring in a vacuum. The approach for the state, given the case law from this Court and the Supreme Court, is to now have the witness, here Williams, not appear as a forensic interviewer but as an expert in "delayed disclosure" or some other "child abuse" expert title.** Here, Williams allegedly did not know anything about the case, and had not even interviewed the alleged victim. Nonetheless, **defense counsel here correctly argued this was simply a backdoor attempt to improperly bolster the child's testimony**.

In State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009), our Supreme Court held there was no need for the testifying witness to be qualified as an expert. The Court then noted the impropriety of such a witness testifying that she believed the child. The Supreme Court and this Court have warned of "expert" testimony on "a compelling disclosure of abuse." See State v.

Jennings 394 S.C. 473, 716 S.E.2d 91 (2011). See, also, State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (2012).

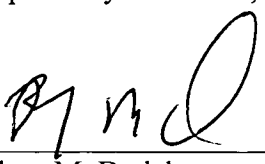
Williams here testified with the aura of an expert. She largely admitted her conclusions and opinions were based on her own experience. She did, as seen above, claim that statistics showed that 58% of abused children delayed telling anyone. This could be "for a day, months, years."

Further, as defense counsel correctly argued, the purpose of this testimony was to improperly bolter the credibility of the accusing witness. It was meant to have the jury conclude that the accusing witness in this case fit into a "normal pattern" of an abused person. That was improper, and it was highly prejudicial. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013); State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). See, also, State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (2012).

While this Court is bound by precedent, appellant respectfully submits it is within its authority to correctly hold that cases are no longer good law where it apparent they are no longer good law within the context of the facts of the case before this Court. Even non-scientific evidence must now pass the gatekeeping function of the trial judge to determine that the "expert" is qualified, and that the subject matter of the testimony is reliable. Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010); State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009).

Appellant respectfully submits that this Court should grant rehearing and reconsider its two holdings in this case.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 29th day of January, 2015.

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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 J. Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of January, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 29th day
of January, 2015.

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