STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Marlboro County
Howard P. King, Circuit Court Judge

THE STATE,

Respondent,

vs.

GEORGE CHAVIS,

Appellant.

PETITION FOR REHEARING

This Court issued its opinion on February 4, 2015, affirming the conviction and sentence in a plurality opinion. State v. George L. Chavis, Opinion No 27491. In affirming the conviction and sentence, Justice Pleicones found error in qualifying expert Elliott as an expert in child abuse assessment and finding expert Griggs provided testimony that constituted improper bolstering. Justice Beatty joined this opinion. Chief Justice Toal and Justice Kittredge found no error. Justice Hearn dissented, agreeing there was error and opining that error was not harmless. Of course, the State agrees any error is harmless. The State is not making any further argument regarding Grigg's recommendation that Chavis and victim not be around each other. The State's petition for rehearing only concerns the finding that Elliott was not qualified to testify as an expert that there was a disclosure of abuse during Gist's forensic interview of Victim's stepsister. Gist was unavailable as a witness at trial. Elliott reached this conclusion

by reviewing the report of the forensic interview prepared by Gist.

Justice Pleicones noted Elliott's testimony that there was no way to discern her "error rate," and the limited peer review of her work. Justice Pleicones also writes: "When asked what her quality control procedures were, [Elliott] responded 'I use R[A]TAC protocol every time in the interview room.'"

The State's concern is that although this Court found that the expert testimony was non-scientific in nature, nonetheless, the majority applied the test for scientific testimony provided in State v Council, 335 S.C. 1, 515 S.E.2d 508 (1999). Under that test, the trial court must consider the following concerning expert testimony for scientific evidence: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality of control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." 335 S.C. at 19, 515 S.E.2d at 517. Justice Pleicones applied at least three out of four of the Council factors.

The majority opinion contradicts this Court's opinion in White that found these factors fail to serve a useful analytical purpose for non-scientific evidence. State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009). Given the importance of non-suggestive interviewing techniques geared towards children (who are not simply miniature adults), it is problematic that a higher standard will be applied to those trained in RATAC than other areas of non-scientific expertise. The Chief Justice astutely noted in her concurrence that forensic interviewing plays an important role in the investigation and prosecution of child sexual assault cases. The importance of forensic interviewing in this process is recognized by the legislature, which has provided for centers to provide forensic interviews. S.C. Code Ann. section 63-11-310 provides

for the establishment of Child Advocacy Centers that in addition to various therapeutic services, are required to provide "(1) a neutral, child-friendly facility for forensic interviews" as a response to child maltreatment.

Elliott was sufficiently qualified, as noted by the majority. Further, RATAC, even if not receiving uniform support, is a well-researched and widely practiced method for conducting non-suggestive interviews of child abuse victims. See Anderson, Jennifer, et al., The Cornerhouse Forensic Interview Protocol: RATAC, 12 T.M. Cooley J. Prac. & Clinical L. 193 (2010). Therefore, the methods she relied on are reliable. The majority opinion's analysis of "individual reliability" contradicts the analysis of other post-White cases reviewing the gatekeeper function concerning the admissibility of non-scientific expert testimony. See State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012) ("To be clear, the reliability of a witness's testimony is not a prerequisite to determining whether or not the witness is an expert.").

In the instant case, Elliott had sufficient training to read Gist's report and determine that a disclosure of abuse was made. Indeed, this does not require expertise, because it is merely relaying facts, not rendering an opinion, although it was improperly couched as "an opinion." The true issue was whether the testimony constituted double hearsay, an argument not presented on appeal and abandoned by trial counsel during the pretrial hearing. R. p. 125, lines 14-16. The Stepdaughter's report of sexual abuse is permissible outcry testimony, as presented to the jury. However, Elliot's testimony concerning Gist's out-of-court statement itself constitutes hearsay. State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) (Rule 703, SCRE, "does not . . . make hearsay automatically admissible simply because it was relied upon the expert.").

The State would respectfully state it is deeply troubled by the language in the opinion discussing Elliot's negative response to questions on an error rate, because it would be inappropriate if not impossible to determine an error rate, as one could not create a control group of abused and non-abused children. Such arguments should not factor into an analysis under White.

Further, the continuing problem that is understandably vexing to this Court is not the field of forensic interviewing itself, but the prosecution's proclivity to couch questions asking for conclusions, findings, or opinions. There is no purpose served for the State in couching questions in this manner. In the instant case, Elliott was inartfully asked: "[I]n your expert opinion, was a disclosure made?" That is a factual question masked as an opinion. Likewise, the question posed to Griggs about her recommendation following the Victim's disclosure of abuse was irrelevant, conceded by the State at oral argument (the State disagreed on its bolstering affect and whether the issue, as raised by Chavis, was preserved). But in both cases, the harmless error analysis, as articulated by Justice Pleicones, remains unchanged.

The present case represents an opportunity to give guidance to the bench and bar about the proper use of forensic interviewers as witnesses. Already, defense attorneys are hiring forensic interviewers as defense experts to critique the forensic interviews of child victims. "Expert testimony is generally needed to help the jury understand the imperfections of the interview." John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y, 48-49 (2010).

The State, likewise, will need expert testimony on interviewing techniques, especially in reply or rebuttal. In the case-in-chief, this testimony should be in the form of educator-expert

evidence, expert testimony that provides background information for juries. See generally Coble v. State, 330 S.W.3d 253 (Tx. Crim. App. 2010) (finding expert testimony about Texas prison classification system and prison violence admissible despite claim the testimony did not relate to appellant personally; testimony was relevant as rebuttal "educator-expert" evidence). Forensic interviewers should be allowed to be qualified as experts to talk about proper interviewing techniques, but not to give opinions on the credibility of victims, or to make recommendations or findings.

CONCLUSION

For the foregoing reasons, Respondent would request that the petition for rehearing be granted and the opinion of this Court be amended accordingly.

Respectfully submitted,

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February 19, 2015

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Honorable Howard P. King, Circuit Court Judge

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the Petition for Rehearing on Appellant's Attorney by depositing a copy of the same in the United States mail, postage prepaid, addressed to Robert M. Dudek, Esquire, Chief Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 19th day of February, 2015.

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