 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Roger M. Young, Circuit Court Judge

RECEIVED

FEB 20 2015

S.C. Supreme Court

Opinion No. 5283 (S.C. Ct. App. filed 12/17/2014)

03-GS-07-1756

THE STATE,

RESPONDENT,

V.

ARTHUR SMITH,

PETITIONER,

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

INDEX.....	1
CERTIFICATE OF COUNSEL.....	2
QUESTION PRESENTED.....	3
STATEMENT OF THE CASE.....	4
ARGUMENT.....	5
CONCLUSION.....	8

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 23, 2015.

QUESTION PRESENTED

Whether the State's expert witness improperly commented on the credibility of the alleged victim of sexual abuse where he testified, "No, [the delayed disclosure] really doesn't [erode the victim's credibility]"; where he further testified, "I never see it as a credibility or non-credibility thing"; and where he finally testified that when assessing credibility, a person should primarily consider factors other than the length of disclosure.

STATEMENT OF THE CASE

On September 25, 2003, the Beaufort County Grand Jury indicted Petitioner Arthur Smith for first degree criminal sexual conduct with a minor. R. 235-236. On September 19, 2011, Petitioner proceeded to trial before The Honorable Roger M. Young, Sr., and a jury. Gail Lovell represented Petitioner and James Bannon represented the State. R. 1; R. 68.¹

The State alleged that in 1999 and 2000, Petitioner forced his son, then around nine years old, to perform various sexual acts on him. R. 3, lines 21-24; R. 75, line 16—R. 77, line 15. In presenting its case, the State called Tod Lynch-Stanley as an expert in sexual deviancy. R. 178, lines 19-20; R. 181, lines 12 – 14. The purpose of his testimony was to explain how he observed symptoms in Petitioner’s son that were indicative of suffering sexual abuse. He testified that Petitioner’s son was acting out sexually, lying, stealing, setting fires, and spreading feces in school bathrooms. R. 182, line 24—R. 183, line 17. Lynch-Stanley then testified that such behavior can stem from experiencing poor sexual boundaries, whether viewing pornography, observing live sexual activity, or suffering molestation or more serious sexual abuse. R. 184, line 8—R. 186, line 5. He also testified that Petitioner’s son exhibited symptoms of post-traumatic stress disorder, and these along with his acting out behaviors were consistent with suffering sexual abuse. R. 186, line 3—R. 187, line 4.

Counsel for then State asked Lynch-Stanley to explain delayed disclosure. He responded, “[T]here’s many reasons for that,” and he specifically discussed intimidation, shame, and confusion. He also testified that “typically the longer there is in the delay of disclosure, typically it’s more

¹ Petitioner had previously attended a mistrial under the same indictment. The mistrial occurred because the previous trial judge determined that Petitioner’s son’s aunt improperly coached Petitioner’s son prior to his trial testimony and during his trial testimony using body language and other non-verbal signals. *State v. Smith*, 383 S.C. 159, 679 S.E.2d 176 (2009).

extensive abuse. . . . [Y]ou can't say that in every single case, but by and large, that would be the way that I would look at that or treat that." R. 189, line 5—R. 192, line 10. On redirect examination, counsel for the State asked Lynch-Stanley, "Does the length of the delay in the disclosure have any—in your opinion, does it erode the credibility of the disclosure?" Petitioner objected, and the trial judge overruled the objection. Lynch-Stanley answered, "No, it really doesn't. People disclose at different times. . . . I never see it as a credibility or non-credibility thing. I think when you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure." R. 196, lines 21-23; R. 197, lines 1-22. Finally, Lynch-Staley testified that three years would be a fairly long delay in disclosing sexual abuse. R. 196, lines 4-14.

At the conclusion of trial, the jury found Petitioner guilty, and the trial judge sentenced him to thirty years' incarceration. R. 220, lines 10-19; R. 232, line 3—R. 233, line 19. The South Carolina Court of Appeals affirmed in a published opinion in which Judge Geathers concurred in part and dissented in part. *State v. Smith*, Op. No. 5283 (S.C. Ct. App. filed Dec. 17, 2014); App. 1-14.

ARGUMENT

LYNCH-STANLEY'S IMPROPERLY COMMENTED ON THE ALLEGED VICTIM'S CREDIBILITY BECAUSE HE IN ESSENCE TOLD THE JURORS THAT IN DECIDING WHETHER TO BELIEVE HIS ALLEGATIONS, THEY SHOULD CONSIDER HEAVILY THE ALLEGED VICTIM'S ACTING OUT AND PTSD BEHAVIORS AND NOT HIS SIGNIFICANTLY DELAYED DISCLOSURE.

"The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). "For an expert to comment on the veracity of a child's accusations of sexual abuse is improper." *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). This Court has elucidated a number of types of statements that fall within this prohibition. *See generally State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). This

Court has prohibited statements that directly or indirectly telling the jury how to weigh particular factors bearing on a witness's credibility. *See Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 (2011) (statements that alleged victims "provided details consistent with the background information received from their mother, the police report, and the other children" could only be interpreted to mean forensic interviewer believed the children); *Kromah*, 401 S.C. at 360, 737 S.E.2d at 500 (forensic interviewer may not give opinion that a child's behavior indicated the child was telling the truth); *id.* at 359 n.6, 737 S.E.2d at 500 n.6 (citing *Seward v. State*, 76 P.3d 805, 814 (Wyo. 2003) ("[A] forensic interviewer's testimony about her use of 'truthfulness criteria' and her assessment of the victim's credibility based on the content of the victim's interview responses was testimony that 'directly vouched for the victim's credibility.'")); *Smith v. State*, 386 S.C. 562, 564, 689 S.E.2d 629, 631 (2010) (improper bolstering for forensic interviewer to state alleged victim "had no reason 'not to be truthful'").

One important factor bearing on witness credibility that is particularly important in cases of sexual misconduct is whether the witness has been inconsistent in making the accusation. *See, e.g.*, Rule 801(d)(1), SCRE (addressing the use of a witness's prior statement to rebut a charge against her of recent fabrication and setting forth special rules when the witness is an alleged victim of criminal sexual conduct); *State v. Lee*, 360 S.C. 530, 538, 602 S.E.2d 113, 118 (Ct. App. 2004), *aff'd*, 375 S.C. 394, 653 S.E.2d 259 (2007) (finding substantial, actual prejudice from defense counsel's inability to refute delayed disclosure evidence presented by the State through its expert witness).

In this case, Lynch-Stanley's testimony amounted to telling the jurors in in deciding whether to believe Petitioner's son's allegations, they should consider heavily Petitioner's son's acting out and PTSD symptoms and not his significantly delayed disclosure. Lynch-Staley testified that

Petitioner's son's acting out in certain ways and showing signs of PTSD was consistent with suffering sexual abuse. On the other hand, Petitioner's son's delayed disclosure was a type of inconsistency in his allegations insofar as he reasonably had prior opportunities to make the allegations but did not. Counsel for the State properly asked Lynch-Stanley to explain the latter factor and its possible causes. However, by asking thereafter whether the length of the delay in the disclosure eroded the Petitioner's son's credibility, counsel for the State essentially asked Lynch-Stanley to instruct the jury how to weigh this factor against the behavioral factors he had described—a determination that was supposed to be solely within the province of the jury.

Naturally, Lynch-Stanley's response to this question was also improper. He stated, "No, [the delayed disclosure] really doesn't [erode credibility]. People disclose at different times. . . . I never see it as a credibility or non-credibility thing." Thus, he flatly told the jury not to consider seriously the delayed disclosure in assessing Petitioner's son's credibility.

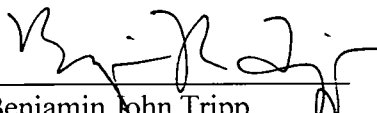
The majority opinion from the Court of Appeals concluded that Lynch-Stanley's testimony on redirect examination was not an improper "because Lynch-Stanley qualified his initial [improper] response and never gave an opinion regarding whether the victim was telling the truth." Specifically, the majority believed his statement that "I never see it as a credibility or non-credibility thing. I think when you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure" cured the impropriety by "stressing that credibility and delayed reporting are unrelated." However, as explained above, delayed disclosure and credibility are related insofar as the delayed disclosure evidence was relevant, admissible evidence bearing on Petitioner's son's credibility. Thus, as Judge Geathers alluded to in his dissent, the majority's conclusion is erroneous because stressing that credibility and delayed reporting are unrelated still in effect told the jury that the evidence of delayed disclosure was not a worthwhile factor in this case.

Overall, Lynch-Stanley's response readily told the jurors that considerations of shame, intimidation, and confusion accounted for Petitioner's son's delayed disclosure and that the delay was not a factor to seriously consider in determining his credibility: "*No, it really doesn't [matter]. People disclose at different times [for these other reasons]. . . . I never see it as a credibility or non-credibility thing. I think when you're looking at credibility, you're looking for other types of things, [such as acting out and symptoms of PTSD], but not necessarily the length of disclosure*" (emphasis added). Thus, even though, as the Court of Appeals noted, Lynch-Stanley never gave a direct opinion on whether Petitioner's son was telling the truth, he told the jury how to weigh the factors bearing on the witness's credibility, and the testimony was therefore improper.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court grant his petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER.

This 20th day of February, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County
Roger M. Young, Circuit Court Judge

Opinion No. 5283 (S.C. Ct. App. filed 12/17/2014)
03-GS-07-1756

THE STATE,

RESPONDENT,

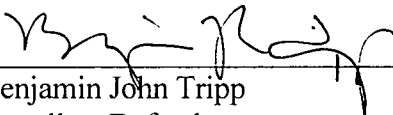
V.

ARTHUR SMITH,

PETITIONER,

CERTIFICATE OF SERVICE

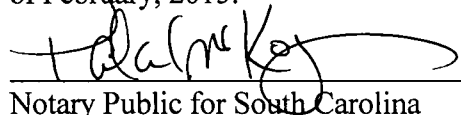
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Christina Catoe Bigelow, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the S.C. Court of Appeals, this 20th day of February, 2015.



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of February, 2015.



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