

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
The Honorable Roger M. Young, Circuit Court Judge

Opinion No. 5283 (S.C. Ct. App. filed Dec. 17, 2014)
Appellate Case No. 2015-000316

RECEIVED

MAR 27 2015

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ARTHUR SMITH,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

CHRISTINA CATOE BIGELOW
Assistant Attorney General
S.C. Bar No. 73562

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

INDEX1

ISSUE PRESENTED.....2

STATEMENT OF THE CASE.....3

ARGUMENT4

CONCLUSION12

ISSUE PRESENTED

The issue raised on appeal was not preserved for appellate review where counsel made a general objection stating no grounds; where the judge overruled the objection without stating any grounds; and where the grounds for the objection were not apparent from the context and were never placed on the record at any subsequent point. Regardless, the Court of Appeals properly concluded there was no reversible error with respect to the expert's re-direct testimony where his testimony as a whole explained why delayed disclosure and credibility are generally unrelated and where he never vouched for the credibility of this particular victim. Finally, even if the Court of Appeals erred in its analysis, Petitioner's conviction still should be affirmed where Petitioner opened the door to the expert's discussion regarding the relationship between delayed disclosure and credibility via his cross-examination of the expert.

STATEMENT OF THE CASE

Petitioner was indicted in Beaufort County in September 2003 for criminal sexual conduct with a minor in the first degree. He proceeded to trial on November 15-16, 2004, before the Honorable Jackson V. Gregory and the jury found him guilty. Judge Gregory sentenced Petitioner to twenty years. Petitioner subsequently moved for a new trial. A hearing on Petitioner's motion for new trial was held on November 17, 2004. In a written order dated April 19, 2005, Judge Gregory granted Petitioner's motion, and the State appealed. On June 22, 2009, the South Carolina Supreme Court affirmed the trial judge's grant of a new trial.

Petitioner was tried again before the Honorable Roger C. Young, Sr., and a jury on September 19-21, 2011. The jury found Petitioner guilty and Judge Young sentenced Petitioner to thirty years. A timely notice of appeal was served and filed.

On December 17, 2014, the South Carolina Court of Appeals affirmed Petitioner's convictions. See State v. Smith, 411 S.C. 161, 767 S.E.2d 212 (Ct. App. 2014). Petitioner's request for rehearing was denied on January 23, 2015. Petitioner timely submitted a Petition for Writ of Certiorari, and this Return follows.

ARGUMENT

The issue raised on appeal was not preserved for appellate review where counsel made a general objection stating no grounds; where the judge overruled the objection without stating any grounds; and where the grounds for the objection were not apparent from the context and were never placed on the record at any subsequent point. Regardless, the Court of Appeals properly concluded there was no reversible error with respect to the expert's re-direct testimony where his testimony as a whole explained why delayed disclosure and credibility are generally unrelated and where he never vouched for the credibility of this particular victim. Finally, even if the Court of Appeals erred in its analysis, Petitioner's conviction still should be affirmed where Petitioner opened the door to the expert's discussion regarding the relationship between delayed disclosure and credibility via his cross-examination of the expert.

Background Facts

After the victim and his parents moved from Buffalo, New York to Beaufort County, South Carolina, the victim's parents separated and the victim lived primarily with his biological mother. (R. p. 106-107). The victim visited his biological father, Petitioner, at his house from time to time. (R. p. 107). During these visits, beginning around when the victim was six years old, Petitioner would perform oral and anal sex on the victim. (R. p. 108). He would also make the victim perform oral sex on him and make him try to perform anal sex. (R. p. 109-110). The sexual abuse always occurred in Petitioner's house, specifically in Petitioner's bedroom, when the two of them were alone. (R. p. 108, lines 18-22). Petitioner threatened to kill the victim or break his bones if he told anyone what was happening. (R. p. 110, lines 20-24). The victim stated that the abuse continued for about two years. (R. p. 110, lines 2-5). He testified that the sexual abuse made him feel "terrible" and "angry" and that it hurt. (R. p. 109, lines 11-20). Because he was scared, the victim did not tell anyone about the abuse until after he stopped having contact with Petitioner. (R. p. 110-11).

The victim's aunt obtained custody of the victim and his two siblings in November 2001. (R. p. 91). At the time, the victim was "acting out" and exhibiting behavior that was

“concerning.” (R. p. 92). Specifically, the victim fondled other children, was physically aggressive, and destroyed property. (R. p. 92-93). The victim was sent to two different counseling centers because of these behaviors. (R. p. 93-94). One of the victim’s counselors testified that it appeared that the victim had been sexually abused and that he was suffering from symptoms of post-traumatic stress disorder. (R. p. 186-88). The victim’s aunt learned, in January 2002, that the victim had been sexually abused. (R. p. 95). After allowing the victim to spend more time in counseling trying to deal with his health issues, she took the victim, in May 2003, to file a police report regarding the sexual abuse. (R. p. 94-95). The victim had a forensic interview shortly thereafter and disclosed that he had been sexually abused in his biological father’s bedroom and that it began around age six or seven. (R. p. 148-49).

The victim’s brother testified that Petitioner also sexually abused him beginning around age six. (R. p. 118-19). The abuse involved oral and anal sex either in Petitioner’s bedroom or his bedroom, and Petitioner threatened to hurt his mother if he told anyone about the abuse. (R. p. 119; p. 122-23). Additionally, the victim’s sister testified that Petitioner sexually abused her when she was six and seven years old. (R. p. 126-27). She testified that Petitioner made her touch his penis with her hand and her mouth, and he would touch her vagina and her “butt.” (R. p. 127). The abuse mainly occurred in Petitioner’s bedroom. Petitioner told her that she should not tell anyone about the abuse. (R. p. 128).

Following trial, Petitioner was convicted of criminal sexual conduct with a minor in the first degree and was sentenced to thirty years. (R. p. 220; p. 233).

Facts Relevant to the Issue on Appeal

Tod Lynch-Stanley was qualified as an expert in sexual deviancy over the objection of the defense. (See R. p. 178-81). The judge immediately instructed the jurors that they were not required to accord extra weight to an expert's opinion and that they could give an expert's testimony as much weight as they felt it deserved.² (R. p. 181-82). Thereafter, the expert testified that he began treating the victim several years ago for "sexual acting out behavior" and other "aggressive behavior." (R. p. 182-83). He testified that in the course of treating the victim, he learned that the victim made a disclosure of sexual abuse. (R. p. 183, lines 18-21). He also testified without objection that it appeared to him that the victim had been sexually abused. (R. p. 186, lines 1-5). However, he stated that his focus was on treating the symptoms the victim was experiencing rather than "trying to uncover sexual abuse." (R. p. 186, lines 7-9). The expert further testified that the victim appeared to have symptoms of post-traumatic stress disorder. (R. p. 186, lines 11-17). He then discussed the phenomenon of "delayed disclosure" and testified that delayed disclosure is typically caused by shame, intimidation, and fear of the consequences of telling someone about the abuse. (See R. p. 189-91). He also testified that generally, the longer the delay, the more extensive the abuse. (R. p. 191, lines 15-19). He indicated that the length of delay is correlated with the degree of shame, which could be heightened by the fact that the abuser was a family member. (R. p. 192, lines 5-15).

On cross-examination, defense counsel inquired about delayed disclosure and asked what a "long period of delayed disclosure" would be. (R. p. 195, lines 13-16). The expert testified that a long delayed disclosure would be anything longer than two or three months. (R. p. 195, lines 24-25). He elaborated that some disclosures occur within

² The judge elaborated on this instruction in the final jury charge. (See R. p. 215, line 17 – p. 216, line 15).

minutes, while others occur after two or three months or after twenty years. (R. p. 196, lines 1-3). He agreed with defense counsel that a disclosure that occurred within a few minutes would not be a delayed disclosure. (R. p. 196, lines 4-8). When defense counsel asked him to classify a three-year delay,³ the expert testified “that would be a fairly long delayed disclosure.” (R. p. 196, lines 13-14). Defense counsel’s clear implication was that the longer the delay in reporting allegations of abuse, the less credible the victim.

In response, on redirect, the solicitor asked whether, in his opinion, the length of the delay in a disclosure would erode the credibility of the disclosure. (R. p. 197, lines 21-23). Defense counsel objected but did not state any particular grounds. (R. p. 196, line 24). The judge overruled the objection without referencing any grounds. (R. p. 196, line 25). The expert then testified as follows:

No, I really doesn’t. People disclose at different times. Different things, again, triggers and things like that, can come up that cause people more symptoms, so – and the other part of PTSD, the symptoms come up and PTSD occurs at different times when the trauma gets reenacted in some way and starts to overtake the person.

PTSD is really the body’s efforts to try and cope with the trauma that’s occurred, and then the body isn’t coping anymore. And so what happens is that’s when you see these more outlandish types of behaviors. So you might have someone who doesn’t show symptoms of sexual abuse for a year, six months, eighteen months, and then, all of a sudden, something triggers them and reminds them of the abuse and helps to reenact it in some way, and then they start to act out and do those things.

So that’s why you have disclosures that occur at different times as well, so 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. p. 197, lines 1-22).

Issue Preservation

Petitioner now argues the expert improperly commented on the victim’s credibility because he “in essence told the jurors that in deciding whether to believe his allegations,

³ The victim in this case disclosed the abuse by Petitioner approximately three years after it ended. (See R. p. 89-95; p. 104-111).

they should consider heavily the victim's alleged acting out and PTSD behaviors and not his significantly delayed disclosure."⁴ (Petition for Writ of Certiorari, p. 5). Initially, this issue was not properly preserved for appellate review because Petitioner's counsel failed to state any specific grounds for his objection to the expert's testimony and the trial judge did not rule on any specific grounds. (R. p. 196, lines 24-25). See, e.g., State v. Patterson, 324 S.C. 5, 17-18, 482 S.E.2d 760, 765-66 (1997) (a general objection which fails to specify the particular ground on which the objection is based is insufficient to preserve a question for review; a trial judge does not err by overruling a general objection); State v. Hess, 279 S.C. 14, 19, 301 S.E.2d 547, 550 (1983) (general objection to evidence did not bring the specific error to the trial court's attention; therefore, the issue raised on appeal was not preserved for review); State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (an objection must be made with sufficient specificity to inform the judge of the point being urged); see also State v. McLaughlin, 307 S.C. 19, 413 S.E.2d 819 (1992) (failure to request a more explicit ruling constitutes a waiver of any objection to a trial court's general ruling regarding admissibility); compare State v. Foster, 354 S.C. 614, 621, 582 S.E.2d 426, 429 (2003) (issue was sufficiently preserved for review where counsel objected *and added that* he was objecting because the statement would "add to" the witness's credibility).

The words "vouching" and/or "bolstering" do not appear at all in the record in conjunction with this expert's testimony, and no case law referencing vouching or bolstering was cited by defense counsel. (See R. p. 178-98). Counsel's objection could

⁴ Note that Petitioner's argument has been broadened to include a contention not raised in the argument to the Court of Appeals or in the Petition for Rehearing: that the expert told the jurors "they should consider heavily the alleged victim's acting out and PTSD behaviors." (Petition for Writ of Certiorari, p. 5; Final Brief of Appellant, p. 13-14; Petition for Rehearing, p. 1-2). See Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.").

have just as easily been based upon relevance under Rule 401 or undue prejudice under Rule 403. This Court cannot speculate or assume that the objection was based on improper vouching simply because this is a child sex abuse case. Accordingly, this issue was not preserved for appellate review, and the Court of Appeals should not have reached the merits.

Discussion

Even if the issue was somehow preserved, the Court of Appeals properly concluded there was no reversible error in this case. Initially, in the State's view, there exists a fundamental flaw in Petitioner's argument: Petitioner argues that the expert's testimony "improperly commented on the victim's credibility" while simultaneously acknowledging that the expert clearly stated that "credibility and delayed reporting are unrelated." (See Petition for Writ of Certiorari, p. 5 & p. 7). It would seem that the expert could not possibly be commenting on the particular victim's credibility under these circumstances.

Regardless, looking at the expert's testimony as a whole, including his direct and cross-examination testimony, the expert's redirect testimony did not improperly bolster the victim's credibility where the expert qualified his initial response and never gave an opinion regarding whether or not the victim was telling the truth.

The statements the Court of Appeal found to be most problematic are as follows:

The solicitor: "Does the length of the delay in the disclosure have any – in your opinion, does it erode the credibility of the disclosure?"

Expert: "No, it really doesn't."

The problem was that the phrasing of the State's question could have been misinterpreted to invite vouching regarding this particular victim's credibility. Likewise, the expert's response, standing alone, could have been construed as vouching for this particular victim's credibility. However, the expert continued his response by stating that

generally people disclose sexual abuse at different times for different reasons, and he went on to explain how post-traumatic stress disorder could generally play into this process. (R. p. p. 197). His response, as a whole, properly conveyed that - in general - the length of delay in a person's disclosure is not necessarily related to credibility, a fact about which the jury might have been confused in light of defense counsel's insinuations on cross-examination.⁵ See supra, p. 9-10. Considering the totality of the expert's testimony - including the fact that the expert never gave an opinion that the victim in this case was telling the truth - the expert did not improperly bolster the victim's credibility. See State v. Douglas, 380 S.C. 499, 503-504, 671 S.E.2d 606, 609 (2009).

Even if this Court were to find that the Court of Appeals wrongly analyzed the issue, it was still proper for the trial judge to allow the solicitor to elicit the re-direct testimony where Petitioner opened the door to this testimony via his cross-examination of the expert. Defense counsel spent much of her cross-examination asking about the length of delay in disclosures, clearly trying to suggest to the jury that a lengthy period of time between the reporting of allegations and the time frame in which the allegations occurred lessened the credibility of the person making the allegations. (See R. p. 195-96). The solicitor had a right to directly respond since defense counsel's suggestion was misleading to the jury. As the expert explained, delays in the disclosure of sexual abuse are extremely common for a variety of reasons. (See R. p. 170-71). See State v. Brown, 411 S.C. 332, 768 S.E.2d 246, 252-54 (Ct. App. 2015) (upholding admission of general expert testimony about the prevalence of delayed disclosure); see also John E. B. Meyers, Expert Testimony

⁵ Notably, the jury was thoroughly instructed that it should not accord extra weight to an expert's testimony simply because of his or her qualification as an expert (R. p. 181-82; p. 215, line 17 – p. 216, line 15), and defense counsel was still free to argue that the jury should discount the expert's testimony and consider the victim's delayed disclosure when evaluating his credibility. (See R. p. 202-203).

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.” (citations omitted)). Laypersons such as jurors would not likely understand how sexual abuse crimes - and juvenile sexual abuse crimes in particular - are fundamentally different from many other crimes, and, without correction of defense counsel’s suggestion, there was a danger that the jurors would be improperly misled into concluding that a lengthy delay in the disclosure of sexual abuse alone renders the disclosure not credible. See State v. Myers, 359 N.W.2d 604, 609-610 (Minn. 1984) (“The nature, however, of the sexual abuse of children places lay jurors at a disadvantage. . . . If the victim of a burglary failed to report the crime promptly, a jury would have good reason to doubt that person's credibility. A young child subjected to sexual abuse, however, may for some time be either unaware or uncertain of the criminality of the abuser's conduct. . . . [U]ncertainty becomes confusion when an abuser who fulfills a caring-parenting role in the child's life tells the child that what seems wrong to the child is, in fact, all right. Because of the child's confusion, shame, guilt, and fear, disclosure of the abuse is often long delayed.”).

Because Petitioner himself opened the door to the challenged testimony, he cannot now complain about it on appeal. See State v. White, 361 S.C. 407, 415-16, 605 S.E.2d 540, 544 (2004) (defendant opened the door to testimony about the victim’s credibility where counsel cross-examined the expert witness regarding whether she had cases in which she did not believe the alleged victim); State v. O'Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (holding a defendant may not complain of admission of evidence when he introduced the same kind of evidence on cross-examination); State v. Beam, 336 S.C. 45, 53, 518 S.E.2d 297, 301 (Ct. App.1999) (“Beam cannot complain about the

admission of evidence where he opened the door to the evidence.”); see also State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984); State v. Harvey, 253 S.C. 328, 339, 170 S.E.2d 657, 662-63 (1969); State v. Smith, 220 S.C. 224, 67 S.E.2d 82, 90-91 (1951). Therefore, even if this Court were to conclude the testimony specifically referencing “credibility” would be improper under normal circumstances, it was not improper in the context of this case where it was in direct response to defense counsel’s cross-examination. Accordingly, Petitioner is not entitled to reversal of his conviction.

CONCLUSION

For the reasons discussed above, Respondent requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTINA CATOE BIGELOW
Assistant Attorney General


CHRISTINA CATOE BIGELOW
SC Bar No. 73562

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

March 27, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
The Honorable Roger M. Young, Circuit Court Judge

Opinion No. 5283 (S.C. Ct. App. filed Dec. 17, 2014)
Appellate Case No. 2015-000316

RECEIVED

MAR 27 2015

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

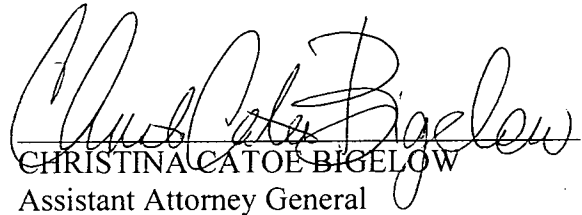
v.

ARTHUR SMITH,

PETITIONER.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the State's **Return to Petition for Writ of Certiorari** in the above-referenced matter has been served upon **Benjamin John Tripp**, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this 27th day of **March**, 2015.


CHRISTINA CATOE BIGELOW
Assistant Attorney General

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737



ALAN WILSON
ATTORNEY GENERAL

March 27, 2015

VIA HAND-DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court, S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED
MAR 27 2015
S.C. Supreme Court

RE: State of South Carolina v. Arthur Smith
Appellate Case No. 2015-000316

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the State's **Return to Petition for Writ of Certiorari** in the above-referenced matter, along with **Proof of Service** of the same.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

Christina Catoe Bigelow
Assistant Attorney General
S.C. Bar No. 73562

CCB/

cc: Benjamin John Tripp, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589