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STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM MARION COUNTY
William H. Seals, Jr., Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2013-000335

THE STATE,RESPONDENT

v.

JIMMY TURNER,APPELLANT.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court properly allowed a witness qualified as an expert in child abuse assessment to testify that, consistent with her standard practice "when a child discloses any form of abuse," she recommended therapy for the child and recommended that the child have no contact with the "alleged perpetrator."

STATEMENT OF THE CASE

Jimmy Turner (Appellant) was indicted at the May 2012 term of the grand jury for Marion County for first-degree criminal sexual conduct (CSC) with a minor (2012-GS-33-194). He was represented by Marcus L. Woodson, of the Marion County Bar. Respondent (the State) was represented by Assistant Solicitor Fitzlee H. McEachin of the Twelfth Circuit Solicitor's Office. (R.p.1). On February 5-7, 2013, Appellant proceeded to trial by jury before the Honorable William H. Seals, Jr., pursuant to which he was found guilty as indicted. He was sentenced to life imprisonment for first-degree CSC with a minor and fifteen (15) years' concurrent imprisonment for lewd act. (R.p.271-274; R.p.270, lines 9-21). Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Appellant was charged with one count of first-degree criminal sexual conduct with a minor and one count of lewd act upon a minor based on allegations that he sexually abused the six-year-old female victim in November of 2011. At trial, after the jury was sworn, the judge gave brief preliminary instructions on the burden of proof, reasonable doubt, the roles of the judge and the jury, and the jury's duty to judge the credibility of the witnesses. (R.p.17, line 15-p.20, line 13). The parties then made opening statements. The solicitor told the jury that in November of 2011 Appellant took the six-year-old victim into a house where he raped her, sodomized her, and forced her to perform oral sex. He said the most important witness the jurors would hear from during the trial was the victim. (R.p.20, line 14-p.23, line 7). In response, Appellant emphasized he must be presumed innocent unless proven guilty beyond a reasonable doubt. He asked the jurors to focus on the fact that the victim initially claimed her mother's boyfriend was the person who sexually assaulted her but later changed her story to accuse Appellant when her mother did not believe the initial allegation. Appellant then said the medical evidence would show the victim showed no physical signs of abuse. (R.p.23, line 10-p.26, line 11).

The State then presented testimony and evidence from a series of witnesses, including the victim. First, the State called behavioral specialist Annette Wardy of Florence County School District One to the stand. She and a classroom teacher oversaw a room of emotionally disturbed elementary school students, including the victim, who was a first grader at the time of the initial disclosure. Ms. Wardy said the victim would sometimes have outbursts which resulted in her being placed in timeout in a separate room until she could calm down. On one such occasion in December of 2011, the victim

emerged from the timeout room sobbing and said she needed to tell Ms. Wardy something. The victim disclosed that someone had been bothering her sexually. Ms. Wardy first reported the disclosure to the classroom teacher, who notified the assistant principle, who in turn notified the Department of Social Services (DSS) and law enforcement. Ms. Wardy stayed with the victim until the authorities arrived. On cross-examination, Ms. Wardy acknowledged the victim did not name Appellant as the perpetrator when she reported the abuse. (R.p.26, line 19-p.39, line 25).

Next, the State called the victim's mother, Pearlene Commissiong, to the stand. She explained she and her daughter lived alone in Florence in 2011 which meant that when she had to work weekends at McLeod Regional Medical Center no one was home to watch the victim. As a result, the victim stayed those weekends in Marion with Ms. Commissiong's aunt, Janie Mae Thompson and her cousin, Faye Thompson. Appellant was Faye's boyfriend at the time, and he lived with the Thompsons in Marion. The family called him "Bear." Ms. Commissiong noticed a change in the victim's behavior in the summer and fall of 2011. One day in December of 2011, she received a message at work that the victim's school had called and needed her to call back as soon as possible. She returned the call and then went to the school to meet with the resource officer, teacher and other authorities before taking the victim home for the night. (R.p.40, line 16-p.51, line 21).

Ms. Commissiong testified she has a friend named Vincent Brunson who did not live with her in 2011 but sometimes stayed with her at the house. Typically he stayed when the victim was away in Marion, but sometimes he was there when the victim was home. She said Vincent was never at the house with the victim unless she was also

home. The morning after Ms. Commissiong was summoned to the school, she took the victim for an interview at the Care House in Florence. They spent about two hours talking separately to Ms. Sally Williamson, an employee with the Care House. Ms. Commissiong testified she never told the victim to tell anybody anything in regard to this case and has never told her to change her story. (R.p.52, line 1-p.54, line 11).

On cross-examination Ms. Commissiong acknowledged the victim first alleged Vincent committed the abuse. She said she was so upset by the whole situation that she was in general disbelief. When pressed, Ms. Commissiong explained she believed the victim had been touched but did not believe it was by Vincent. She insisted she did not discuss the allegations with the victim when they drove home from school and she maintained Vincent was never alone with the victim. (R.p.54, line 17-p.61, line 9). On re-direct Ms. Commissiong said the victim stated on the drive home that the rape took place in Marion, which was not consistent with what she said at school. She said the victim also gave a reason her story had changed. Commissiong testified she did not tell the victim what to tell the employees at the Care House and did not tell the victim to change her story and say the perpetrator was not Vincent. (R.p.61, line 14-p.66, line 12).

Next, Captain Cindy Barr of the Marion Police Department took the stand. She conducted the police investigation following the victim's interview at the Care House. Captain Barr secured and executed a search warrant for the Thompson house in Marion, where she took photographs and collected various pieces of evidence including sheets, blankets, hair grease, petroleum jelly, and deep penetrating lotion. She also secured an arrest warrant for Appellant and placed him under arrest. (R.p.69, line 1-p.83, line 20).

The State then called the victim, who was eight years old at the time of trial, to the stand. She gave the names and relationships of her immediate family members and their friends including her cousin Faye, and Faye's boyfriend "Bear." She said Bear's real name was Jimmy and identified him sitting in the courtroom. The victim testified that when she went to Faye's house, Bear "bothered" her by touching her "in her private parts." She said he made her touch his private parts and he "put my private part with his private part." The victim said Bear made her put his private part in her mouth. She also testified Bear put his private part in between her legs and in her bottom and he used grease. The victim admitted she first told Ms. Wardy that Vincent did it, but testified this was because she was scared of Bear. She said Bear told her if she didn't say it was Vincent, he would kill her. The victim said she later told both her mother and Ms. Sally [Williamson] from the Care House that it was Bear who bothered her because Bear is the one who actually hurt her. (R.p.91, line 5-p.102, line 10).

The following day, before the State called Ms. Williamson as its next witness, Appellant raised an objection to her testimony. Counsel argued he had dealt with Ms. Williamson as a witness before and based on that experience would object to her offering any testimony that it was "normal" or "not unusual" for a child to change her story about sexual abuse. He noted that the changed story and the issue of "coaching" were central to the case and argued any similar testimony to what he heard before which might suggest the victim had not been coached would amount to Ms. Williamson, a forensic interviewer, impermissibly "vouching for the credibility of the child." Appellant objected to the testimony under several recent cases including State v. Kromah.¹ The solicitor responded that he would not be qualifying Ms. Williamson as an expert in

¹ 401 S.C. 340, 737 S.E.2d 490 (2013).

forensic interviewing and noted that unlike in Kromah, the victim here took the stand and testified about the abuse. He also argued that testimony regarding coaching from an expert in the field of child sexual abuse and treatment was permissible pursuant to State v. Schumpert,² State v. Hill,³ and State v. Douglas.⁴ (Tr.p.133, line 22-p.142, line 20).

Relying primarily on language from Hill, the trial court decided Ms. Williamson would be permitted to testify about the types of things she looks for to determine whether a child has been coached, but would not be permitted to give an opinion on whether the victim was being truthful or that she had not, in fact, been coached. The court noted the State could call Ms. Williamson as a witness but would have to abide by the ruling limiting her testimony as described. (R.p.119, line 21-p.122, line 14).

The State then called Ms. Williamson to the stand. After covering her qualifications, the State offered her as expert in “child sexual abuse assessment and treatment.” Appellant objected and argued he would only agree to her being qualified as a forensic interviewer. The trial judge found Ms. Williamson qualified as offered by the State and admitted her as an expert. (R.p.123, line 5-p.130, line 25). Following the ruling, the State proceeded to question Ms. Williamson about common behavioral characteristics associated with child sexual abuse. She explained “active disclosure” and “delayed disclosure” and opined, over Appellant’s objection, that these were fairly common in her line of work. (R.p.131, line 1-p.134, line 6).

Ms. Williamson then testified about her forensic interview of the victim on behalf of the Care House. She said the victim disclosed she had been sexually abused at a cousin’s home during the beginning of the school year in 2011. Ms. Williamson said she

² 312 S.C. 502, 435 S.E.2d 859 (1993).

³ 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011).

⁴ 380 S.C. 499, 671 S.E.2d 606 (2009).

made a video recording of the interview and after hearing arguments about its admissibility outside the presence of the jury, the trial court admitted that video into evidence and it was played for the jury. (R.p.134, line 7-p.142, line 16). Ms. Williamson resumed her testimony and described two anatomical drawings that were used during the victim's interview. Those drawings were admitted into evidence. Next, she was asked if, as an expert in child abuse assessment and treatment, she looks for things during interviews to see if a victim has been coached or influenced by any sort of third party. Appellant renewed his objection and it was overruled by the trial court. Ms. Williamson proceeded to describe the things she considers when assessing whether a child has been coached. (R.p.142, line 17-p.145, line 20).

The following exchange then took place:

Q: As a result [of] [the victim's] disclosure that she had been assaulted, what if any recommendations, did you make?

A: I made a recommendation of therapy as I always do when a child discloses any form of abuse and typically that's trauma focused therapy of some sort, it's evidence based and also no contact with the alleged perpetrator.

MR. WOODSON: Your Honor, I would object to that last question same grounds.

THE COURT: Overruled.

Q: So in essence you recommend therapy for her?

A: I did, yes.

(R.p.145, line 21-p.146, line 7) (emphasis added). The jury was then excused and Appellant moved for a mistrial. He argued the last question about the recommendation bolsters the child's credibility because by making recommendations Ms. Williamson was "basically telling the jury I found something, then this child's credible." The solicitor

responded that Ms. Williamson never gave an opinion that she believed the victim and argued her testimony was not bolstering. After hearing arguments, the trial court found Ms. Williamson “didn’t state any opinions at all,” overruled the objection, and denied the motion for a mistrial. (R.p.146, line 10-p.148, line 25). Following brief cross-examination, the State rested. Appellant renewed his motion for a mistrial and also moved for a directed verdict. Those motions were denied. (R.p.149, line 4-p.152, line 17).

Appellant then presented his defense. He first called the victim’s pediatrician, Dr. Patrice Minter, to the stand. She conducted a physical examination of the victim sometime after the alleged sexual abuse. Dr. Minter testified both the victim’s anus and her vagina were within normal limits and she did not notice any injuries to the victim; however, on cross-examination she agreed this did not indicate one way or another that trauma had occurred. She also agreed that use of any kind of lubricant would make trauma less likely. (R.p.169, line 7-p.179, line 6). Appellant then re-called Ms. Wardy and called Florence County Sheriff’s Deputy Vincent Hanna to the stand, both in an attempt to elicit testimony about the victim’s initial claim that the abuse was committed Vincent; however, most of the testimony in this regard was excluded as hearsay. (R.p.179, line 10-p.193, line 14). Finally, Appellant called Faye Thompson and Janie Mae Thompson in an attempt to cast doubt on the victim’s testimony that the abuse took place at their house in Marion. (R.p.193, line 18-p.223, line 23). After resting, Appellant renewed his previous motions and those motions were denied. (R.p.224, lines 4-21).

The parties proceeded with closing arguments and the trial court then charged the jury on the law. The trial judge charged the State’s burden of proof, the presumption of

innocence, reasonable doubt, direct and circumstantial evidence, the roles of the judge and the jury, the jury's duty to determine the facts and the credibility of witnesses, expert witnesses, and the elements of the offenses. (R.p.230, line 13-p.258, line 8). After deliberating for approximately two hours, which included re-watching the video of the victim's interview, the jury convicted Appellant as indicted. (R.p.259, line 9-p.264, line 12). He was sentenced to life imprisonment for first-degree CSC with a minor and fifteen (15) years' concurrent imprisonment for lewd act. (R.p.271-274; R.p.270, lines 9-21).

ARGUMENT

I.

The trial court properly allowed a witness qualified as an expert in child abuse assessment to testify that, consistent with her standard practice “when a child discloses any form of abuse,” she recommended therapy for the child and recommended that the child have no contact with the “alleged perpetrator.”

Appellant argues the trial court erred in allowing a forensic interviewer qualified as an expert in “child abuse assessment” to testify that, as a result of the victim’s disclosure of sexual abuse, she recommended no contact with Appellant and referred the child for therapy. He contends “this testimony could only convey the expert’s opinion that the child was telling the truth” and therefore improperly bolstered the victim’s credibility. Appellant argues our Supreme Court’s recent decision in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), “compels reversal” of his conviction. (Brief of Appellant). The State disagrees and submits Appellant’s argument is entirely without merit. The trial court exercised appropriate discretion in allowing Ms. Williamson’s testimony regarding her recommendation for therapy and no contact with Appellant. Her testimony did not constitute improper bolstering of the victim’s credibility and was not unfairly prejudicial because it simply described Ms. Williamson’s standard recommendations in regard to any allegations of abuse. Additionally, because the testimony related to her standard practice, any conceivable error in admitting testimony about applying those that practice to the victim in this case was harmless. Appellant’s convictions should be affirmed.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The conduct of a criminal trial is left largely to the sound discretion of the presiding judge and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Commander, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982)). Thus, the admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. Kromah, 401 S.C. at 349, 737 S.E.2d at 494-95; State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012); State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. Kromah, 401 S.C. at 349, 737 S.E.2d at 495; Douglas, 369 S.C. at 429-30, 632 S.E.2d at 848; Lee v. Suess, 318 S.C. 283, 457 S.E.2d 344 (1995).

Law / Analysis

While experts may give opinions, they are not permitted to offer an opinion as to the credibility of others. Chavis, 412 S.C. at ____, 771 S.E.2d at 340. Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter. Id. (quoting Kromah, 401 S.C. at 358-59, 737 S.E.2d at 500). In Chavis, our Supreme Court considered testimony from Mrs. Robin Griggs, a forensic interviewer who had interviewed the Victim and was qualified at trial as an

expert in child abuse assessment. The Court held: “Mrs. Griggs’s recommendation that Appellant not be around Victim for any reason, can only be interpreted as Mrs. Grigg’s believing Victim’s claim that Appellant sexually abused her. This type of testimony is improper.” Id. Although the Court ultimately found the error in admitting the testimony was harmless in light of the other evidence of guilt, it did so only after concluding: “Mrs. Griggs’s recommendation that Appellant not be around Victim for any reason improperly bolstered Victim’s credibility.” Chavis, 412 S.C. at ___, 771 S.E.2d at 341.

Appellant argues the conclusion in Chavis, “compels reversal” of his conviction; yet, the testimony elicited from Ms. Williamson is markedly different from what was found objectionable in Chavis. Unlike the starkly specific testimony from Mrs. Griggs that she recommended “Appellant not be around Victim for any reason,” Ms. Williamson qualified both of her recommendations by way of a clear explanation that she always recommends therapy and “no contact” when there has been a disclosure of sexual abuse. Rather than suggesting Ms. Williamson believed the victim’s claim of sexual abuse, this testimony implies exactly the opposite, that Ms. Williamson had no opinion whatsoever about the victim’s credibility. Ms. Williamson did not testify she would have declined recommending therapy and no contact if she did not believe the victim. Instead, she said she recommends therapy and no contact irrespective of any belief in, or assessment of, the child’s credibility. In addition, Ms. Williamson referred to Appellant as the “alleged perpetrator”, which appropriately recognizes the child’s disclosure as precisely what it was prior to Appellant’s conviction—a mere allegation. Ms. Williamson’s use of the word “alleged” demonstrates an absence of any opinion as to the credibility of the victim. The State submits the trial court exercised appropriate discretion in allowing Ms.

Williamson's testimony and that it was not unfairly prejudicial because it simply did not constitute improper bolstering of the victim's credibility. Rather than compelling reversal, Chavis seems to compel affirmance.

Appellant's case is likewise distinguishable from Kromah and other cases which involved testimony of a non-scientific "forensic interviewer" who offered either: (1) a "direct opinion as to the child's veracity," (2) a statement that "indirectly vouches for the child's believability," (3) a statement "to indicate to a jury that the interviewer believes the child's allegations in the current manner," or (4) "an opinion that the child's behavior indicated the child was telling the truth." Kromah, 401 S.C. at 360, 737 S.E.2d at 500. As explained above, Ms. Williamson did not opine on the victim's veracity, either directly or indirectly. Furthermore, she was not admitted as an expert "forensic interviewer." Accordingly, Kromah and other cases where expert testimony was found to be unfairly prejudicial to the defendant also fail to support reversal. See State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding the admission of the forensic interviewer's written report into testimony to be error because the reports stated that each child "provided a compelling disclosure of abuse by appellant."); State v. McKerley, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding the forensic interviewer's "opinion as to whether she thinks something happened [was] nothing other than her inadmissible opinion as to whether the victim was telling the truth").

Further, given the victim's clear trial testimony, the video tape from the forensic interview, the corroborating testimony regarding her disclosure of the time and place of the sexual abuse, and the trial court's charge to the jury to give no greater weight to the testimony of the expert (R.p.252, line 17-p.253, line 9), any error from admission of Ms.

Williamson's testimony was harmless. See State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial); Douglas, 380 S.C. at 503, 671 S.E.2d at 609 (finding Douglas suffered no prejudice from a witness' unnecessary qualification as an expert because "[t]he fact that [the witness] was qualified as an expert did not require the jury to accord her testimony any greater weight than that given to any other witness"); see also Foye v. State, 335 S.C. 586, 590, n.1, 518 S.E.2d 265, 267 n.1 (1999) ("A jury is presumed to follow instructions."). For all of these reasons, Appellant's convictions should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the conviction and sentence of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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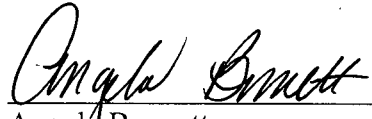
JIMMY TURNER,APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated July 29, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

David Alexander, Appellate Defender
S.C. Commission on Indigent Defense
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I further certified that all parties required by Rule to be served have been served.
This 29th day of July, 2015.



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SC Court of Appeals

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Re: The State v. Jimmy Turner
Appellate Case No. 2013-000335

Dear Mr. Alexander:

I am enclosing two (2) copies of the Final Brief of Respondent in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original & 9 copies enclosed)
Victim Services