

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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AUG 19 2015

Appeal from Richland County
Honorable Deandra G. Benjamin, Circuit Court Judge
Appellate Case Tracking No. 2012-212905

S.C. Supreme Court

The State,

Respondent,

vs.

Isaac Antonio Anderson,

Appellant.

PETITION FOR REHEARING

On August 5, 2015, this Court reversed the conviction of Isaac Anderson for first degree criminal sexual conduct with a minor. The Court found the trial court improperly qualified Heather Smith as an expert in forensic interviewing and criminal abuse assessment. The Court further found Smith's testimony constituted impermissible vouching for the child victim. This Court then concluded the errors were not harmless. Finally, this Court provided a purely advisory statement regarding the "best practice" for presenting experts¹ and in particular the type of testimony to be provided by forensic interviewers both *in camera* and at trial in front of the jury. In making its ruling, this Court overlooked the facts of the case, including the testimony provided and the actual objections made by counsel. Further, this Court conflated the concepts of corroboration and vouching, such that any time an expert merely testified similarly to the testimony of another individual the expert's testimony can be considered impermissible vouching.

¹ Whether this best practice is limited solely to this one field of expertise and no other throughout South Carolina jurisprudence will have to be determined.

Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing; find no error in qualifying Smith as an expert in child abuse assessment; find her testimony did not impermissibly bolster or vouch for the child, but instead merely corroborated her testimony; find any error in the qualifications or testimony of Smith was harmless; and affirm Appellant's conviction and sentence.

In discussing the objections to Smith's qualifications, this Court initially indicated Appellant objected and "[t]he trial judge declined to hold a hearing on the existence of this expertise, much less whether Smith possessed the necessary qualifications." The Court continued: "The trial judge's refusal to determine Smith's qualification as a 'child abuse assessment' expert was patent error." State v. Anderson, Op. No. 27558 (S.C. Sup. Ct. filed August 5, 2015) (Shearouse Adv. Sh. No. 30 at 44). This finding by the Court is directly contrary to the actual facts appearing in the Record on Appeal.

Appellant never requested a hearing to determine whether Smith was qualified as an expert in child abuse assessment. Appellant's objection after learning Smith would be qualified as an expert in child abuse assessment stated:

I am going to have to separately object to the qualification, then, as a child abuse assessor, because I don't think that that is what was previously discussed, so I have another objection to her being qualified as an expert in child abuse assessment. I'm not even aware that is really a field.

Forensic interviewing I know we discussed before, but child abuse assessment is separate. So I am going to have to make a whole separate objection to that, that she be qualified to that as well.

(T.543; R.247). Appellant never requested a separate hearing. He only acknowledged the trial court previously ruled on the qualification as an expert in forensic interviewing. Further, he questioned whether the field existed.

Just prior to the qualification, Smith provided all of her qualifications to the jury. This Court overlooked her extensive background, which was provided both to the jury and the trial court to assess her qualification as an expert in child abuse assessment. Specifically Smith testified she worked for the Assessment and Resource Center (ARC), a Child Advocacy Center in Richland County, for nine years being involved in over 1000 cases with children. She operates as a forensic evaluator and helps coordinate treatment services for children. (T.539; R. 243). Smith has a bachelor's degree in psychology and a master's degree in counseling. She is also a licensed professional counselor in South Carolina. (T.540; R. 244). Further, she has worked with the FBI and Department of Justice, and at the time of trial was working with the National Center for Missing and Exploited Children to develop protocol for assisting victims of sex trafficking.

Smith's qualifications as an expert in child abuse assessment were well established through her background, education, and experience. The trial court noted Appellant's objection, but found: "She will be qualified as an expert in forensic interviewing and child abuse assessment" thereby ruling on his two objections. No further hearing was necessary to make the determination as the trial court had her qualifications already presented.

As to Appellant's objection regarding whether the field is actually a field of expertise, the trial court ruled it was by qualifying her and this Court correctly and succinctly affirmed that ruling stating: "Certainly we recognize that there is such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims." Anderson, at 44. As a result, the trial court properly ruled on whether the field of expertise existed, and had before it sufficient evidence to

rule Smith was qualified as an expert in the field. This Court's ruling the "trial court's refusal to determine Smith's qualification as a 'child abuse assessment' expert was patent error" is clearly in error and against the evidence in the record.

Additionally, this Court incorrectly concluded Smith's testimony vouched for the minor victim by equating her corroborative testimony with impermissible vouching. "[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the **credibility** of others." State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) (emphasis added). "For an expert to comment on the **veracity** of a [victim's] accusations of sexual abuse is improper." State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (emphasis added). Smith's testimony merely indicated under what circumstances delayed disclosure occurs. It did not reference the credibility of the child, vouch for the veracity of the child, or indicate in any manner she believed the child.

Any time an expert testifies or provides evidence which supports the underlying charge levied by the victim, it does not result in improper or impermissible bolstering or vouching. It is only improper when the testimony invades the province of the jury and makes a comment on the credibility or veracity of the victim.

Smith never testified she believed the child or that the child was telling the truth. She testified to the structure of the interview conducted with the victim. (T.545-555; R. 249-259). Smith testified the victim disclosed sexual abuse during the interview, and explained the victim stated the abuse occurred from second grade through fifth grade and at two different locations where the victim's family resided. (T.555-556; R. 259-260). Smith indicated the interview was video recorded. The State introduced a copy of the

video recording into evidence and played it for the jury.² (T.556-560; 573; 577; R. 260-264; 277; 281).

After discussing the video, Smith testified regarding the behavioral characteristics of child sex abuse victims including delayed disclosure and the process of disclosure. This testimony was to educate the jury and was admissible for the purpose of disabusing a jury of misconceptions it might hold about how a child reacts to molestation. Nothing in this testimony indicated she believed the child or that the child's story was credible. It merely explained the behaviors of children which are generally different from the behaviors expected to be seen.

The fact the expert's testimony was favorable to the victim and had the impact of supporting the child because the general fact presented by the expert was consistent with the behavior of the victim in this case does not render it impermissible bolstering. Otherwise, all medical testimony favorable to a victim would be impermissible because it is expert testimony supporting the victim's claim. For example, under the holding of this case, a medical doctor who treated the plaintiff in an automobile accident case could not testify to the injuries, such as whiplash or soft tissue injuries, the doctor diagnosed and then indicate those injuries are commonly seen in automobile accidents. The doctor's testimony would be impermissible vouching. A doctor testifying in an intentional infliction of emotional distress case could not diagnose a patient with PTSD and then indicate PTSD as a likely outcome of trauma inflicted. Either this Court's opinion has established the requirement that the "better practice" in all cases involving an expert making a diagnosis is to get one expert to give the diagnosis and another to explain

² The State redacted the video recording to remove portions of the video.

possible causes, or this Court has improperly singled out one type of expert to place an additional requirement not found throughout the law in South Carolina.

It is clear this Court seeks to limit the testimony of a forensic interviewer, however, that limitation should not be such that a properly qualified expert, who happened to interview the child, cannot testify to educate the jury on issues within their expertise. This Court's majority ruling puts the State to additional expense in requiring a second individual to testify. As the concurrence notes, nothing in the Rules of Evidence or the prior decisions of this Court prohibit testimony by an otherwise qualified expert just because the expert saw the subject of their testimony. An appraiser should be allowed to testify to the factors which contribute to a higher appraisal even if the appraiser valued the real estate in question. A medical doctor should be allowed to testify certain injuries frequently result from certain types of events, such as petechia in the eyes after a strangling, even if the same doctor saw the victim and diagnosed the injuries.

Further, this Court's majority opinion seems to indicate the exact testimony given in this case by a second expert, who had not seen the child, would not be improper vouching; it is only because the expert saw the child that the testimony is found to be improper. It should not be who says something at trial, but what they say that determines whether testimony is impermissible vouching. The fact an expert who has never seen the child can educate the jury in the exact same manner as Smith regarding delayed disclosure indicates the testimony by Smith was not improper and was properly admitted.

Finally, this Court erred in finding any error by the trial court was not harmless. This Court pieces together broad statements of the State's conduct to find prejudice occurred. Many of the times objections were raised, it occurred before a full statement or

question was made in front of the jury and the objection discussion took place at the bench. The trial court sustained objections, preventing testimony from coming in, and if testimony was elicited it found improper, the court struck the testimony from consideration. (T.571; R.275). As a result, the Court should not be considering testimony that, in effect, never occurred to find prejudice resulted from the qualification of Smith as an expert.

In addition, the trial court charged the jury regarding expert testimony. The court explained the jury was to give the expert's testimony "the weight you think it deserves." The trial court also told the jury they could disregard the opinion of the expert entirely and were not required to accept the expert's opinion even if it is not contradicted. Finally, the trial court explained: "An expert witness's testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert." (T.814; Supp.R.7).

Additionally, as discussed above, while the expert's testimony supported the minor victim's testimony it never vouched for her credibility or indicated a belief in her statements. Any error in the qualification³ is entirely harmless in light of Smith's proper qualification in child abuse assessment and the fact she never impermissibly bolstered or vouched for the victim's testimony. See State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.").

³ The State concedes the qualification as an expert in forensic interviewing was error.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find Smith's testimony properly admitted as expert testimony which did not impermissibly bolster or vouch for the victim, and affirm Anderson's convictions and sentences.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

BY: 

William M. Blich, Jr.
S.C. Bar No. 15608
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Petition for Rehearing by depositing copies of the same in the United States mail, postage prepaid, addressed to:

Joshua S. Nasrollahi, Esquire
Law Office of Joshua S. Nasrollahi
209 Waller Avenue
Greenwood, South Carolina 29646

Robert M. Dudek, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 19th day of August, 2015.


SALLY ELLISON
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727