

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Case No. 2011-GS-44-0413

RECEIVED

AUG 14 2015

SC Court of Appeals

The State of South Carolina,.....Respondent,

v.

Stephen Douglas Berry,.....Appellant.

**APPELLANT’S PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING *EN BANC***

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant Stephen Douglas Berry respectfully petitions the Court for Rehearing and/or to Alter its Opinion number 5329 of July 15, 2015.¹ This Opinion affirmed the trial court’s decisions to admit subsequent bad act testimony and expert testimony regarding the victim’s behavior and how that behavior evidenced symptoms of Post-Traumatic Stress Disorder. Appellant also respectfully petitions and suggests the desirability of rehearing by this Court *en banc* because the proceeding involves questions of exceptional importance.

¹ Appellant requested, and was granted by Order of this Court, an extension of time until August 14, 2015 to file and serve his Petition for Rehearing and Suggestion for Rehearing *En Banc*.

Specifically, the Opinion's ruling on the issue of expert testimony regarding the victim's behavior is fundamentally flawed and will have ramifications to many other cases beyond the one at bar. Concerning the limitations of the scope of expert testimony, the Opinion deviates from binding case law.

I. The Opinion Misapplies the Specific Holdings of *State v. Kromah* that Limit the Scope of Testimony Provided by an Expert Witness

While "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, 737 S.E.2d 490 (2013). 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.* at 358, 727 S.E.2d at 499 (citing *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011)). After *Kromah*, it is no longer acceptable for an expert witness to indicate in any way that he or she believes the victim. The *Kromah* Court specifically discussed the impropriety of this type of testimony and how it attempts to "convert the interviewer into a human truth-detector whose opinions of the truth are valuable and suitable for the jury's consumption." *Id.* at 356, 727 S.E.2d at 498.

As discussed during the oral argument of this case, after *Kromah*, the old line of cases addressing the proper scope of testimony by a forensic interviewer are no longer good law. In Mr. Berry's case, the Court's Opinion relies altogether on *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993) and *State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999).

Schumpert held that "expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect." 312 S.C. at 506, 435 S.E.2d at 862. The

Weaverling court also found that expert testimony “concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible.” *Weaverling* at 474-75, 523 S.E.2d at 794 (citing *Frenzel v. State*, 849 P.2d 741 (Wyo. 1993); *State v. Lejun*, 967 P.2d 123 (Ariz. 1998)).

It is impossible to reconcile these findings with the specific holding of *Kromah* that it is improper to admit “any statement to indicate to a jury that the interviewer believes the child’s allegations in the current matter; or an opinion that the child’s behavior indicated the child was telling the truth.” *Kromah* at 360, 727 S.E.2d at 500.

In Mr. Berry’s trial, Kim Roseborough, a psychotherapist and social worker, was deemed qualified to testify as an expert in the field of child sexual abuse assessment and treatment. During her testimony, she was allowed to state, first, that there are specific trauma symptoms that children would tend to show following a sexual assault; second, what some of those symptoms are; third, that the alleged victim exhibited some of those symptoms, and; finally, Ms. Roseborough began listing those symptoms exhibited by the alleged victim. The sole purpose of this portion of Ms. Roseborough’s expert testimony was to illustrate her expert opinion that the alleged victim’s behavior indicated truthfulness, exactly what *Kromah* seeks to prevent because of its potential for prejudice.

The relationship between *Kromah* and the line of cases referenced above is of utmost importance and should be reconsidered by the Court. In cases like Mr. Berry’s, where the sole basis of conviction is the believability of the victim, all the prosecution will need to do to secure a conviction is present testimony from an “expert” who interviewed that alleged victim and who will aver that the alleged victim appeared to be distressed. While “an expert’s testimony theoretically is to be given no more weight by a

jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts.” *Kromah* at 357, 737 S.E.2d at 499.

In Mr. Berry’s case, Ms. Roseborough was the only witness deemed qualified to provide expert testimony. There can be no other conclusion than that her testimony prejudiced him.

This issue is also critical because it is another example of how the law does, and must, change with the times. When *Schumpert*, *Weaverling*, and their progeny were decided, the Court did not possess the gatekeeping function now required of it. This mindset of the 1980s and 1990s that science was not necessary and that experts did not necessarily need to be educated to any precise degree in order to give opinion testimony changed dramatically in recent years. *Kromah* seeks to specify in precise detail what constitutes permissible expert testimony, and this Court must follow the terms it provides. This is another reason an *en banc* hearing is essential in this matter. This Court, while it cannot overrule these older cases, must acknowledge that they no longer embody the appropriate standard for expert testimony in cases involving alleged sexual abuse.

II. The Opinion Contradicts Recent Supreme Court Precedent

Since the Court issued the Opinion in Mr. Berry’s case, the Supreme Court addressed this issue again in the case of *State v. Anderson*, Op. No. 27558 (S.C. Sup. Ct. filed August 5, 2015) (Shearouse Adv. Sh. No. 30 at 39). In *Anderson*, the Court held that a forensic interviewer vouched for a minor when she testified only to those characteristics which she observed in the minor. *Id.* at 44.

This is exactly what happened in the current case. In fact, this is the identical rationalization that the Court employed in Mr. Berry's Opinion when it found that Ms. Roseborough's testimony was admissible: "Roseborough testified to observed behaviors; testimony which is specifically allowed under *Kromah*, 401 S.C. at 360, 737 S.E.2d at 500 (allowing witness to testify to 'any personal observations regarding the child's behavior or demeanor'). Roseborough never indicated in her testimony whether she believed the victim was telling the truth regarding the sexual abuse." See, Opinion, p.12.

In actuality, Ms. Roseborough's testimony went beyond just discussing observed behavior and also contained testimony that the behavior demonstrated the medical condition of Post-Traumatic Stress Disorder, a medical opinion that only a medical doctor should have been allowed to assert; however, according to *Anderson*, even if Ms. Roseborough truly did solely relate her observations regarding the alleged victim's behavior to the jury, it is nevertheless improper. The *Anderson* Court held that:

To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility.⁴ Compare *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) (distinguishing improper bolstering cases because in *Brown* the behavioral expert did not examine the victim). Here, Witness Smith vouched for the minor when she testified only to those characteristics which she observed in the minor.

⁴The separate writing erroneously equates the testimony of an expert who offers his opinion on a fact in issue, such as whether a product was defectively designed or manufactured, with that of an expert whose testimony may intrude upon the jury's sole province to determine the credibility of a witness. E.g., *State v. Taylor*, 255 S.C. 268, 178 S.E.2d 244 (1970).

Anderson, Opinion No. 27558, p. 44, n.4.

Additionally, as in the current case, *Anderson* is one in which the outcome “turned solely on the credibility of the minor and of the Appellant.” *Id.* at 45. This was plainly stated during the oral argument for Mr. Berry’s case.

CONCLUSION

With regard to the issue of the proper scope of expert testimony, the Opinion radically contradicts the new, binding precedent on this subject. Especially in light of the new Supreme Court decision in *State v. Anderson*, filed 21 days after Mr. Berry’s Opinion, this Court must reconsider its position on this point. No longer can the litigants, lawyers, and the bench afford not to acknowledge that, after *Kromah*, the older cases of *Schumpert* and *Weaverling* do not set forth the appropriate boundaries for expert testimony in cases involving sexual abuse. The Opinion in Mr. Berry’s case, through its misapplication of *Kromah*, creates potential for further misunderstanding and confusion if it stands without reconsideration.

The Court should reconsider the Opinion and alter it to follow the correct, binding precedent. Furthermore, due to the far-reaching implications of the Opinion, Mr. Berry respectfully requests rehearing *en banc*.

Respectfully submitted,

By: R M C

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ATTORNEYS FOR APPELLANT

August 14, 2015
Hampton, South Carolina

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John C. Hayes, III, Circuit Court Judge

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STATE OF SOUTH CAROLINA,

RESPONDENT,

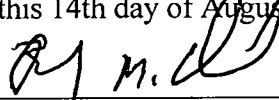
V.

STEPHEN DOUGLAS BERRY,

APPELLANT

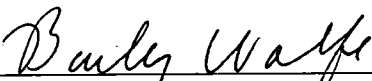
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of appellant's petition for rehearing and suggestion for rehearing *en banc* in the above referenced case has been served upon Suzanne H. White, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 14th day of August, 2015.



Robert M. Dudek
Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 14th day of August, 2015.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021