

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

SEP 21 2015

Appeal from Union County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2013-000435

SC Court of Appeals

The State,

Respondent,

vs.

Stephen Douglas Berry,

Appellant.

RETURN TO PETITION FOR REHEARING

On July 15, 2015, this Court properly affirmed Appellant's conviction and sentence. The Court properly held the testimony of the State's expert was admissible and did not impermissibly bolster or vouch for the victim. Further, this Court should find the issue is not preserved as the basis for the objection is not clear from the record when counsel made an objection shortly before the testimony which is on a completely different basis from the one being argued on appeal.

Preservation

First, the issue as raised on appeal is not preserved for review and this court should find it is not preserved for review. The State explored the symptoms of trauma seen in child victims, and possible PTSD. At this point, Appellant objected in an off the record conference. (T.475-476; R. 130-131). Later, counsel placed her objection on the record, indicating her objection went to the **qualification of the State's expert** to discuss

PTSD because she was a social worker and not a medical doctor. (T.522; R.140). Nothing in her objection addressed vouching, bolstering, or Kromah. In making his next objection, counsel mere stated: “Your Honor, I’m going to object.” This objection is just as likely to be on the basis of the lack of qualification as it is any other ground, especially since an objection based on Kromah or bolstering and vouching had not previously been raised as to this testimony. As a result, the issues related to vouching and Kromah are not preserved for review on appeal because a party may not argue one ground at trial and another on appeal. State v. Brockmeyer, 406 S.C. 324, 355, 751 S.E.2d 645, 661 (2013); see also, State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (same).

Merits

Appellant next contends this Court erred in relying on the cases of 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). He contends these cases were overruled by State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). He then maintains the testimony presented by the State’s expert violates the South Carolina Supreme Court’s recent opinion in State v. Anderson, ___ S.C. ___, 776 S.E.2d 76 (2015). The testimony by the expert in this case is not similar to the testimony found in Anderson and does not impermissibly bolster or vouch for the victim.

First, nothing in Kromah overruled either the Supreme Court’s prior case law or this Court’s case law regarding the admissibility and importance of expert testimony in

regard to behavioral characteristics of victims of sexual abuse. Kromah did nothing more than reaffirm the longstanding rule that an expert may not impermissibly bolster or vouch for the testimony of a victim and reiterated the holding of State v. Douglas that a forensic interviewer should not be qualified as an expert in the field of forensic interviewing. The case did not address the behavioral testimony admitted in Schumpert or Weaverling.

Additionally, and most telling, while Appellant cites to the recent opinion in Anderson for what may or may not be bolstering and vouching, overlooked is the Supreme Court's clear reaffirmation of the Schumpert line of cases. In Anderson, the Court specifically stated:

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. See, e.g., State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct.App.1999); see also State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004) (such witness may be more crucial where alleged victim is a child).

Anderson, supra. Certainly if the Supreme Court intended Kromah to overrule Schumpert and Weaverling, it would not have cited those cases for approval of the admission of expert testimony regarding the behavioral characteristics of sex abuse victims. Accordingly, Appellant's first argument has been decided already by Anderson and so this Court should deny the petition for rehearing and certainly has no need to grant *en banc* review of this issue.

As to Appellant's second contention, the testimony in Anderson is vastly different from the testimony in the instant case. The testimony in the instant case does not impermissibly bolster or vouch for the victim.

In Anderson, the expert testified regarding delayed disclosure and why a child would not disclose. She was the same person who conducted the forensic interview with the child and so was intimately aware of the child's allegations. Her testimony of delayed disclosure did not list all the reasons possible for delayed disclosure, but instead tailored her testimony to the characteristics alleged by the victim.

Here the testimony was only of personally observed behavioral characteristics, not repeating allegations made by the victim. The expert in this case testified extensively to observed behaviors—testimony specifically allowed under Kromah. 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”). At no time did the State's expert indicate the child was telling the truth regarding her victimization at the hand of Appellant. In Anderson, the expert relied solely on the allegations made by the victim to determine the basis for the delayed disclosure. Here, the expert relied on personally observed behavioral characteristics to educate the jury about the behaviors and the possible correlation with the characteristics of PTSD.

“The expert's testimony educates and enlightens the jury. The jury can then make a more informed decision when it assesses the victim's credibility.” State v. Robins, 297 P.3d 1213, 1217 (Mont. 2013). The same can be said for the testimony by the State's expert. It did not invade the province of the jury in determining whether the victim was telling the truth, instead it educated the jury regarding the behavioral characteristics seen and their significance. The expert did not have to rely on the accuracy of the victim's allegation to render her opinion; instead, she was able to see the behaviors and testify regarding those behaviors as is specifically allowed under Kromah and Anderson.

The State also relies on its Final Brief of Respondent for this issue and any other issue addressed in the Petition for Rehearing not specifically addressed. No issues raised in the Petition for Rehearing warrant *en banc* review as the issues have already been addressed by the South Carolina Supreme Court or this Court. Based on the above, this Court properly affirmed Appellant's conviction and sentence and should deny the Petition for Rehearing.

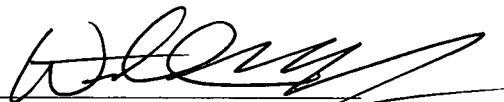
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for Rehearing be denied, and the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 21, 2015

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the Return to Petition for Rehearing on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to:

League B. Creech, Esquire
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I further certify that all parties required by Rule to be served have been served.

This 21st day of September, 2015.



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ALAN WILSON
ATTORNEY GENERAL

September 21, 2015

VIA HAND DELIVERY

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Stephen Douglas Berry.
Appellate Case Tracking No. 2013-000435

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of a Return to Petition for Rehearing along with proof of service for filing in the above-referenced appeal.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General

Enclosures

cc: League B. Creech, Esquire
Robert M. Dudek, Esquire
Victim Services