

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

OCT 15 2015

RESPONDENT SC Court of Appeals

THE STATE,

v.

HAROLD BENNON CARTWRIGHT, III,

PETITIONER .

APPELLANT CASE NO. 2013-000894

Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

Opinion No. 2015-UP-466

PETITION FOR REHEARING

Petitioner requests rehearing pursuant to Rule 221 (a), SCACR because this Court apparently overlooked the many reasons why State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct.App. 2011) should be reconsidered. There was there was no South Carolina authority supporting admission of evidence of a suicide attempt as evidence of consciousness of guilt as this Court recognized in Orozco.

This Court, in its summary opinion, did not address the argument that the analogy of a suicide attempt to flight and guilty knowledge were deeply troubling for purposes well beyond the

defendant being aware of charges against him or that he is being sought by the police for purposes of arrest. Cf. State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006); (without proof that the accused was aware of the charges against him at the time of his flight, the evidence of flight was irrelevant and its admission was erroneous). State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982); See, also, State v. Brown, 528 A.2d 1098 (R.I.1987); Commonwealth v. Jones, 457 Pa. 563, 576, 319 A.2d 142, 150 (1974) (circumstances justify inference that accused's actions were motivated as result of his belief that officers were aware of his wrongdoing and *were seeking him* for that purpose), cited in State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999).

Beyond the nexus of attempted suicide to the awareness of an accusation or an arrest warrant or that police are looking for a person, *this evidence is troubling not only at as a legal matter but as a moral matter*. As defense counsel argued, Petitioner turned himself in to face the charges in this case. This indicated a belief in the criminal justice system, and a belief he would be exonerated. However, suicide is often a matter of despair rather than desperation. Meaning, it is *many times much more complicated than understanding the sad case of a suspect surrounded by armed police killing himself rather than being captured*. This case provides such an example. Petitioner thought that life was no longer living at “that time.”

Suicide, as in this case, is often attributable to the feeling that the sheer number of obstacles in one’s life have become too much to overcome. Here, Petitioner mourned the fact that his own daughter had turned on him.

To use a suicide attempt in a court of law in this state as evidence of guilt of a criminal offense to achieve a conviction should *most respectfully*, be distasteful and not allowed. This Court can take judicial notice that all Five Justices of the Supreme Court in Orozco voted to decide this very important legal and moral question before Petitioner Orozco decided to drop his appeal.

Petitioner does not want to repeat the arguments in the brief, and those made at oral argument. Suffice it to say that other jurisdictions have held such evidence inadmissible. See State v. Onorato, 171 Vt. 577, 762 A.2d 858 (2000); State v. Mann, 132 N.J. 410, 625 A.2d 1102 (1993); Pettie v. State, 316 Md. 509, 560 A.2d 577 (1989); People v. Foster, 56 Ill.App.3d 22, 371 N.E.2d 961, 13 Ill.Dec. 869 (1977); State v. Coudotte, 7 N.D. 109, 72 N.W. 913 (1897);

Photographs

The same argument against admission of this evidence applies to the two photographs corroborating the fact Petitioner attempted to commit suicide. Those photographs are on file with this Court. The Court is not engaging a “gruesome photographs analysis” in this case. Rather, the photographs simply drew further attention to the fact that Petitioner attempted suicide.

The solicitor mocked Petitioner’s testimony about his despondent feelings at the time he attempted to kill himself. R. p. 322. Defense counsel had correctly argued the suicide evidence diluted the presumption of innocence that is fundamental in a criminal case. This Court should respectfully address this argument.

Issue 3: Dr. Alicia Benedetto should not have been qualified as an expert in “child sexual abuse dynamics” which allowed her to give her opinion testimony.

Petitioner also requests rehearing on this issue because the Supreme Court in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499, n.5, (2011) noted that there was no objection to the qualifications of the witness *in that case*. However, the Court wrote it had previously observed that

the witness might not even need to be qualified as an expert. See, State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009).

The Supreme Court held that it could “envision no circumstance where their qualification as an expert at trial would be appropriate” in the “*forensic interviewer*” *type context*. Although it is difficult from the summary opinion to ascertain the application of the facts to the law, petitioner reiterates that the testimony of Benedetto here on “child abuse dynamics” was offered *for the same purpose, which was to imply to the jury that someone who worked in this “specialty” of abused children could offer expertise which allegedly would assist the jury in deciding whether the minors were being truthful*. Defense counsel correctly argued that Benedetto would simply have the jury conclude that the alleged minor victims in this case acted consistently or shared behavioral characteristics with other victims of sex abuse. As seen, Benedetto was unapologetic that she was a forensic interviewer and not a research professional. She should not have been qualified as an expert in this case. See, State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009).

Issue 4: The opinion testimony itself

Petitioner seeks rehearing on the opinion issue itself because State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), which *is cited by this Court in the opinion*, does not support the admission of this testimony about recantations not meaning sexual abuse did not occur, about abusers buying gifts for the abused, and about the abused being threatened about disclosure of the abuse. All of this supposed “expertise” certainly struck the jury as the **same evidence** was what occurred in this very case.

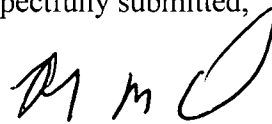
The same was true of Benedetto’s testimony that sexual abuse can cause minors begin drinking or using drugs which have a negative influence on their health. R. p. 225, ll. 9-13. Benedetto also added that minors “acting out” was also not unusual when they were being sexually

abused. R. p. 225, l. 14 – 226, l. 17. This Court is aware that solicitors are seeking to avoid allegations of bolstering by no longer putting up forensic interviewers as experts. *However, the same bolstering occurred here under the guise of “child abuse dynamics.”* State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).

Petitioner reiterates that this “child sexual abuse dynamics” evidence served the same evil that State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499, n.5, (2011), held can no longer exist. Again, State v. Weaverling and Kromah can no longer be reconciled and Weaverling should respectfully be overruled as it is the pre-gatekeeping case that is being used to justify impermissible bolstering such as occurred in this case. This Court cited State v. Schumpert, 312 S.C. 502, 505, 435 S.W.2d 859, 861 (1993) in its opinion, and Schumpert likewise should be overruled because it cannot be reconciled in an intellectual honest way with State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), and Kromah.

The jury in this case heard that the actions of the state’s complaining alleged child sexual abuse witnesses were on all fours with the actions and characteristics of other victims of child sexual abuse. The witness should not have been qualified as an expert and her testimony was extremely prejudicial. Rehearing should respectfully be granted on these issues.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 15th day of October, 2015.

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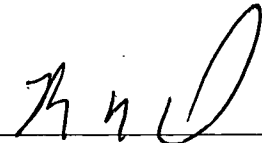
V.

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CERTIFICATE OF SERVICE

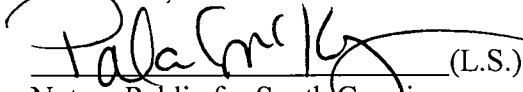
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of October, 2015.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of October, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.