RECEIVED
JAN 28 2015
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARLOS ROBERTO LOPEZ,

APPELLANT

APPELLATE CASE NO. 2014-000828

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting the testimony of an expert in the evaluation, examination, and treatment of child abuse where its only purpose was to bolster the credibility of the complainant and it did not aid the trier of fact?

STATEMENT OF THE CASE

During its June 2012, term, an Horry County grand jury indicted Carlos Roberto Lopez for first degree criminal sexual conduct with a minor. R. 196. During its March 2014, term, the grand jury indicted appellant for lewd act. R. 198. On April 14, 2014, appellant was tried before the Honorable Benjamin H. Culbertson and a jury. R. 1. Martin D. Spratlin represented the State. R. 1. Edward Chrisco represented appellant. R. 1. The jury convicted appellant. R. 190, ll. 9 – 23. Judge Culbertson sentenced appellant to concurrent terms of thirty-five years' imprisonment for CSC and fifteen years' imprisonment for lewd act. R. 193, l. 22 – 194, l. 6. This appeal follows.

ARGUMENT

The trial court erred in admitting the testimony of an expert in the evaluation, examination, and treatment of child abuse where its only purpose was to bolster the credibility of the complainant and it did not aid the trier of fact.

At the time of the alleged abuse, Minor lived with her grandmother, Susan Hostetter ("Hostetter"). R. 60, ll. 10 – 11. Minor would visit her mother's house three or four times a week. R. 61, ll. 17 – 21. Appellant lived with Minor's mother. R. 60, ll. 20 – 21. Mother had two other children both from different fathers. R. 70, ll. 2 – 14. Minor's mother denied that other boyfriends or anyone else lived at the house, but said that some people were "hanging around." R. 78, l. 25 – 79, l. 8. She denied that a man named Virgil lived with her and called Virgil her "mechanic." R. 79, ll. 18 – 22. Minor testified that Virgil "periodically" lived with her mother during the time of the alleged abuse. R. 83, ll. 15 – 22.

Minor's aunt lived across the street from her and her grandmother. R. 63, ll. 3 – 25. One day, Minor's aunt came to the grandmother's door "hysterical" and said Minor was doing inappropriate things to her son. R. 63, ll. 10 – 25. Minor's aunt said that Minor was sitting on her cousin's face. R. 63, ll. 20 – 25. Minor's grandmother began questioning her about where she had seen or learned this kind of behavior because she "wouldn't have just come up with it." R. 64, ll. 1 – 11. "And so then she told me that Carlos had been touching her where he shouldn't be." R. 64, ll. 1 – 11. Minor's grandmother called the police. R. 64, ll. 12 – 13.

Minor described several instances in which she claimed appellant sexually abused her. She claimed appellant performed digital and oral sex on her while her mother was

out of the house. R. 84, l. 21 – 87, l. 5. She claimed appellant performed anal sex on her while her mother was in the next room giving her younger sister a bath. R. 87, l. 11 – 90, l. 17. She also said that once when her mother left to go to the store to get cigarettes, appellant attempted to perform vaginal sex on her. R. 90, l. 18 – 91, l. 17. Minor said she did not tell her mother what was going on because she was scared that a villain from a horror movie would come kill her while she was asleep. R. 92, ll. 19 – 25.

The State called Dr. Carol Rahter who was "the Medical Director of the Children's Recovery Center." R. 127, ll. 12 – 15. She described the Children's Recovery Center as "a child advocacy center." R. 127, ll. 16 – 20. Without objection, the court qualified Dr. Rahter as "an expert in the field of child evaluation and examination regarding abuse." R. 129, l. 19 – 130, l. 16.

Dr. Rahter then testified regarding the concepts of delayed disclosure and grooming. R. 130, l. 20 – 131, l. 17. She opined that children commonly do not disclose abuse immediately. R. 130, ll. 20 – 24. She also testified regarding how children act when they report abuse. R. 131, l. 18 – 132, l. 13. According to Dr. Rahter, there is no particular demeanor or attitude children have when they disclose abuse. R. 131, l. 18 – 132, l. 13. Specifically, she said that the fact that a child would not be crying or overly emotional when discussing the abuse had "no relevance on whether the abuse happened." R. 132, ll. 10 – 13. She testified that the most common occurrence was that children disclosed "in a piecemeal fashion." R. 132, ll. 1 – 3.

Admission of Dr. Rahter's testimony was error. The only reason for Dr. Rahter's testimony was to bolster Minor's credibility. The trial judge should have recognized the error and *sua sponte* excluded her testimony. The State sought to circumvent State v.

Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), with Dr. Rahter's testimony. In State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012), the Supreme Court held that a forensic interviewer's testimony was properly limited to the foundation necessary to introduce a video recording of a child's interview. See also State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding there is no need to qualify a forensic interviewer as an expert and Pleicones, J., calling forensic interviewers "human 'truth detectors'" in dissent). The Court stated that it had "confronted instances where the State has abused the statute and sought to have the forensic interviewer, improperly imbued with the imprimatur of an expert witness, invade the province of the jury by vouching for the credibility of the alleged victim." Id. Discussing the qualification of the forensic interviewer in Kromah, the Supreme Court said, "[W]e state today that we can envision no circumstance where [a forensic interviewer's] qualification as an expert at trial would be appropriate." Id. at 357 737 S.E.2d at 499 n.5. The Court further noted that the "label of expert should be jealously guarded by the court and never loosely bandied about." Id. at 357, 737 S.E.2d at 499.

Rule 702 prohibits testimony that does not aid the trier of fact and the trial court failed in its gatekeeping role to exclude such evidence. Rule 702, SCRE. State v. White, 382 S.C. 265, 272-273, 676 S.E.2d 684, 687-688 (2009). In Mitchell v. Commonwealth, 777 S.W2d 930 (Ky. 1989) the Supreme Court of Kentucky excluded evidence regarding "Child Sexual Abuse Accommodation Syndrome." This syndrome involved delay of disclosure in abuse, secrecy, helplessness, entrapment and accommodation, and retraction. The alleged victim in Mitchell told Richard Welch, who held a masters degree in clinical social work, that she did not report the sexual abuse immediately because she was afraid.

The Kentucky Supreme Court held that the state had failed to prove that the "so called Sexual Abuse Accommodation Syndrome" had attained a scientific acceptance. Mitchell, 777 S.W.2d at 932. The Court noted there was no testimony that sexual abuse by persons other than the accused could have produced the same symptoms in the victims.

The Kentucky court noted there was no testimony that all children who are sexually abused exhibited these symptoms, nor was there testimony that children who have not been sexually abused do not exhibit similar elements of the syndrome. The court found reversible error because: (1) there was no medical testimony that the syndrome is a generally accepted medical concept and, (2) the testimony had no substantial relevance to the issue of the defendant's guilt or innocence. Id. at 933.

Dr. Rahter's testimony was very similar to the evidence excluded in Mitchell. She gave only vague descriptions of commonsense concepts that are well within the realm of lay jurors. The thrust of her testimony was that children delay reporting abuse because they are afraid or feel they have done something wrong. These ideas are not beyond the ken of a juror. Dr. Rahter's testimony regarding the demeanor of children who disclose abuse was meant to excuse inconsistencies between Minor's testimony and Minor's forensic interview. Her testimony was a thinly veiled attempt to bolster Minor's testimony and was tailored to generally discuss the specifics of this case.

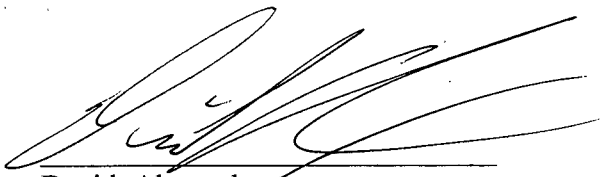
Appellant is constrained to point this Court to its recent decision in State v. Brown, ___ S.C. ___, 2015 WL 80630 (Ct. App. Jan. 7, 2015). Appellant acknowledges that the Brown court held that such testimony is admissible. However, a petition for certiorari is currently pending before our Supreme Court on a very similar issue in State v. Mark Stanley Peters, 2014-UP-187 (Ct. App. May 7, 2014). On information and belief, appellate counsel

in Brown will seek rehearing in this Court. Respectfully, appellant urges this Court to reconsider its decision in Brown as it applies to this case. Brown reads Kromah too narrowly. The intent of Kromah and the line of cases that preceded it was to limit opinions vouching for the credibility of witnesses. This testimony does not aid the trier of fact. It invades the province of the jury. This Court should reverse and remand this case for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand the case for a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of January, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JAN 28 2015
SC Court of Appeals

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARLOS ROBERTO LOPEZ,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Carlos Lopez states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Benjamin H. Culbertson, which was held on April 15, 2014, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Carlos Lopez.

Respectfully submitted,

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of January, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

JAN 28 2015

SC Court of Appeals

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARLOS ROBERTO LOPEZ,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment(s);
(2) Trial transcript

I certify that this designation contains no matter which is irrelevant to this appeal.

January 28th, 2015

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 28th, 2015

David Alexander
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
JAN 28 2015
SC Court of Appeals

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARLOS ROBERTO LOPEZ,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Carlos Lopez, #359617 at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 28th day of January, 2015.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of January, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.