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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROY LEE JONES,

APPELLANT

APPELLATE CASE NO. 2014-001639

FINAL BRIEF OF APPELLANT

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1.

Did the court abuse its discretion by qualifying Shauna Galloway-Williams as an expert in child sex abuse dynamics where there was insufficient evidence of the reliability of the subject matter of her testimony and whether those matters had ever been subjected to peer review?

2.

Did the court abuse its discretion by qualifying Shauna Galloway-Williams as an expert in child sex abuse dynamics where the subject matter of her testimony was well within the realm of lay knowledge, was highly prejudicial to Appellant, and improperly bolstered the complainants' credibility?

STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant at the June 24, 2014 term of General Sessions for two counts of first degree criminal sexual conduct (CSC) with a minor, four counts of second degree criminal sexual conduct with a minor, two counts of lewd act upon a child, and one count of second degree criminal sexual conduct. R. 264-271. His case was called to trial on July 16, 2014 before the Honorable Robin B. Stilwell, and a jury. R. 1. Assistant Solicitor Kristie B. Hodge represented the state, and Alex R. Stalvey represented Appellant. R. 1.

At the conclusion of the trial on July 17, 2014, the jury found Appellant guilty of one count of first degree CSC with a minor, one count of second degree CSC with a minor, and two counts of lewd act . The jury acquitted Appellant of the remaining five indictments. R. 247, l. 18 – 248, l.19. Judge Stilwell sentenced Appellant to life without parole for first degree CSC with a minor and for second degree CSC with a minor, and fifteen years concurrent for each count of lewd act.[1] R. 251, ll. 5-23.

This appeal follows.

[1] Before trial, the state served Appellant and his counsel with notice of its intent to seek life without parole (LWOP) due to Appellant's 1985 conviction for second degree criminal sexual conduct. R. 250, ll. 2-5.

STATEMENT OF FACTS

Evidence at Trial

Appellant lived with his longtime girlfriend, Tammy Foster, and her two daughters, Shanira Foster and Teyana Foster, from approximately 2004 until 2009. During this period, the family lived in three different houses in Greenville County. Tammy worked for the school district as a custodian and later for a nursing home. Appellant received disability benefits because he suffers from sickle cell anemia, arthritis, and carpel tunnel syndrome. R. 201, ll. 17-23. However, Appellant still worked odd jobs whenever he could and was paid "under the table." R. 203, l. 22 – 204, l. 3. Between his disability benefits and the money he earned doing odd jobs, Appellant was a large financial contributor to the family.

Shanira Foster, who was twenty-six years old at the time of trial, testified that shortly after Appellant moved in with her family in 2003 when she was fifteen years old, he began making sexual comments to her.[2] For example, she claimed Appellant told her she "was getting thick," which was a compliment and meant that her breasts and butt were getting bigger. Shanira said this was not a comment you would normally hear from a stepfather. R. 21, ll. 8-24. In addition to the uncomfortable comments, Shanira claimed Appellant began "groping" her. She maintained that he would touch her breasts, the front of her thighs, and her "bottom." R. 20, l. 8 – 21, l. 2. According to Shanira, eventually the sexual abuse progressed to oral sex and vaginal intercourse. R. 22, ll. 4-22; R. 25, ll. 8-10. She claimed the abuse continued until Appellant moved out of the family home in 2009 when

[2] The year Appellant began dating Tammy Foster and moved in with the family is disputed. Tammy and Shanira claimed Appellant moved in sometime during 2003. R. 19, ll. 3-6; R. 81, ll. 16-17. Appellant, on the other hand, maintained he was not released from federal prison until June 23, 2004 and did not begin dating Tammy until that time. R. 200, l. 18 – 201, l. 4.

she was twenty-one years old.[3] R. 27, l. 24 – 28, l. 1. She also maintained that over one hundred sexual batteries occurred during this five to six year time period. R. 27, ll. 21-23.

Shanira admitted Appellant paid for her cell phone, her car payments, and often gave her spending money on a weekly basis. Appellant helped financially support Shanira until 2012 even though he ended his relationship with her mother, Tammy, and moved out in 2009. These allegations surfaced in June 2012 when Appellant caught Shanira stealing four thousand dollars from him and called Tammy to complain. R. 42, l. 21 – 46, l. 9.

Teyana Foster, who was nineteen years told at the time of trial, testified that when she was going into the sixth grade, which was a couple of years after her mother and Appellant began dating, Appellant began "fondling" her by touching her breasts.[4] She claimed this sexual abuse quickly progressed to vaginal intercourse. R. 54, l. 21 – 57, l. 18.

Teyana also claimed that when she "wouldn't let him [Appellant] take advantage of [her]," Appellant would "whup" her with a belt as punishment. R. 58, ll. 2-10. She testified that on one occasion when she was still in the fifth grade her mother came home and found Appellant "whupping" her.[5] When her mother asked her why Appellant was "whupping" her, Teyana told her mother that Appellant "had been molesting" her. R. 58, ll. 11-20; R. 60, ll. 3-4. However, her mother "just let it go" and continued to allow Appellant to live

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[3] Appellant was arrested in 2009 for assault and battery of a high and aggravated nature (ABHAN) after he and Shanira allegedly got into a physical altercation. Appellant spent over a year in jail. This is essentially when his relationship with Tammy Foster ended. R. 27, l. 24 – 30, l. 5.

[4] Teyana also testified that she thought she was ten years old when this abuse started. R. 57, ll. 11-12.

[5] Teyana first testified that the sexual abuse started when she was going into the sixth grade. As seen, she later testified that she first disclosed the alleged abuse to her mother when she was still in the fifth grade. See R. 55, ll. 5-6 and R. 60, ll. 3-4.

with them. R. 59, ll. 13-23. Teyana claimed that she never told anyone else about the alleged abuse because she thought "if my mom doesn't believe me," no one else will either. R. 60, ll. 21-24.

Teyana also testified that in September 2008 she had to have a physical to play basketball at school. When she went to the doctor for her physical, she tested positive for Trichomoniasis, a sexually transmitted disease (STD). She maintained that she was thirteen or fourteen years old at this time and had to take medication to treat the STD. The doctor asked Teyana in the presence of her mother, whether she was sexually active or whether "anyone [had] ever forced sex on [her]." She allegedly told the doctor "no." R. 61, l. 17 – 63, l. 7. Teyana claimed that when she and her mother got home, her mother confronted Appellant about the diagnosis and the two got into an argument. However, Appellant continued to live in the home and date her mother. R. 64, l. 23 – 65, l. 5.

Like Shanira, Teyana testified that Appellant would buy her "anything [she] needed," including clothes. R. 66, ll. 6-7. Appellant eventually moved out of their house, but he and her mother continued dating. Teyana did not indicate when Appellant moved out. R. 65, ll. 11-21. She explained that it was not her idea to go to the police and report the allegations, but that they eventually did so after Shanira was caught stealing money from Appellant. R. 67, l. 22 – 68, l. 11.

Tammy Foster, Shanira and Teyana's mother, testified that she began dating Appellant in 2003 and that he moved in with her and the girls shortly thereafter. R. 81, l. 14 – 82, l. 11. She said Appellant was home alone with the girls often when she was at work. R. 83, l. 22 – 84, l. 14. Tammy maintained that she and Appellant had a healthy and regular sexual relationship. R. 85, l. 1-10.

One day, Tammy remembered Shanira called her at work and told her she needed to come home. When she got home, Teyana told her Appellant "had been touching us." Teyana allegedly said Appellant "has been touching me, fondling me, sometimes he was having sexual relations with me." R. 85, l. 22 – 86, l. 17. Tammy confronted Appellant about the allegations and he strongly denied it. R. 86, l. 23 – 87, l. 1. She admitted she was "afraid to believe it" and she continued to allow Appellant to live in the house. Tammy said "it was hard for [her] to believe that he [Appellant] would do something like this because we really loved each other." R. 88, ll. 1-9.

Tammy also testified about Teyana's physical for basketball and her Trichomoniasis diagnosis. She admitted she was in the room when the doctor asked Teyana about whether she was sexually active and Teyana denied it. R. 89, l. 12 – 90, l. 12. Tammy claimed when they got home from the doctor she confronted Appellant about the diagnosis and Appellant again denied sexually abusing Teyana. Appellant asked Tammy how he could have given Teyana an STD, but not given it to Tammy as well since he was obviously having sex with Tammy. Appellant supposedly said Teyana likely got the STD from a boyfriend. R. 90, l. 13 – 91, l. 15. Tammy testified that she believed Appellant and again continued to allow him to live with the family. R. 92, ll. 8-13.

Appellant eventually moved out in 2009 after he and Shanira got into a physical altercation and Appellant went to jail. R. 94, ll. 6-9; R. 95, ll. 5-21. Tammy continued to see Appellant even after he moved out. R. 96, ll. 1-3. She also knew that Shanira continued to see him and was caught stealing money from him. They went to the police with these allegations shortly after Shanira was caught stealing money from Appellant. R. 97, l. 3 -- 99, l. 23.

Appellant later took the stand in his own defense. He denied having ever improperly touched Shanira or Teyana or having sexual intercourse with either. R. 201, ll. 9-16. He testified that he was a large financial provider for the family and would give them all of his money. He signed over his entire disability check to Tammy every month and she often would not have her half of the money to help pay the bills. Appellant testified that he eventually "got tired of it" and moved out. R. 203, ll. 1-21. After he broke up with Tammy, he moved from Greenville to Spartanburg. However, Tammy, Shanira, and Teyana would still drive up to visit him often. They would go out to eat when they visited and he continued to give them money. He cosigned a loan with Shanira so that she could purchase a car and he helped her make the car payments.

Appellant and the family eventually had a falling out when Appellant caught Shanira stealing four thousand dollars from his dresser drawer. R. 205, l. 1 – 206, l. 8; R. 212, ll. 4-7.

There was absolutely no physical evidence of sexual abuse presented by the state.

Jury Deliberations

The jury began its deliberations on July 17, 2014 at 3:55 pm. At 8:55 pm, the court gave the jury an Allen charge. See Allen v. United States, 164 U.S. 492 (1896). Despite the late hour, the judge told the jury during this instruction that it would not be permitted to go home until a verdict was reached. R. 246, ll. 1-18. Specifically, the court stated:

> I recognized that it is late. I didn't want to stay here this late and I know y'all didn't either. The problem is **I can't send you home** once you begin your deliberations except in very exceptional circumstances. Because if y'all were to go home while you were in your deliberations, there is the possibility that you might begin talking to your spouse or your significant other about it and that would be deliberating.
>
> Also understand that if one of you, just one of you, failed to show up for court tomorrow then I would have to call a mistrial because we

> must have all twelve jurors. So, **we must stay, we must reach a verdict.** So, I ask you respectfully, please return to your jury room and continue trying to reach a verdict. Thank you.

R. 246, l. 19 – 247, l. 4 (emphasis added).

At 12:54 am, the jury finally reached a verdict after nearly nine hours of deliberating. The jury acquitted Appellant of five of the nine counts against him, but found him guilty of the remaining four counts. During deliberations, the jury sent out **eight** notes to the court. While these notes were included in the record as court's exhibits, there was no mention of them on the record nor did the court reporter indicate at what time these notes were sent out by the jury.

The first note asked, "Can we have the text testimony of witnesses: (1) Shanira Foster [and] (2) Tyana [sic] Foster?" The court responded by writing on the note, "I do not have the ability, the technology, to produce a written transcript in this short time." R. 254. (Court's Exhibit No. 1). The second note asked, "What were the birthdays of both victims?" The court responded by writing on the note, "You must use your recollection of the testimony evidence." R. 255. (Court's Exhibit No. 2). The third note asked, "Can we use the whiteboard poster/easel with a marker to write with on paper?" The court responded by writing on the paper, "Yes." R. 256. (Court's Exhibit No. 3). **The fourth note asked, "If we cannot reach a unanimous decision on either counts what are our options?" The court responded by writing on the note, "You must reach a unanimous decision as to each charge. Please clarify your question if this is not responsive."** R. 257. (Court's Exhibit No. 4).

The fifth note asked, "Can we take a smoke break or make a call?" There was no response from the court on this note. R. 258. (Court's Exhibit No. 5). **The sixth note**

indicated, "We are at a road block and do not see any way around it. At this point we do not for see coming to an unanimous decision on all charges. Can we return a 'hung jury' on any one of the charges or all of the charges?" The court responded by asking, "Have you reached a unanimous verdict on any of the charges? If so, how many?" The jury wrote back, "0." R. 259-260. (Court Exhibit No. 6). It was presumably after this sixth note that the judge issued an Allen charge, but it is unclear from the record.

The seventh note read, "What were the reasons for the separation of dates for Teyana (2 counts)? (1) August 1, 2006 & January 3, 2009 [and] (2) January 4, 2009 & January 3, 2011." The court responded by writing on the note, "The dates correspond to the allegations in the indictments. If you need further clarification, please specify." R. 261-262. (Court's Exhibit No. 7). The eighth and final note stated, "We have decided on 2 accounts [sic] & are trying very hard to move forward on the other 7." The court did not have a written response to this note. R. 263. (Court's Exhibit No. 8).

Galloway-Williams' Proffered Testimony and the Objection

At defense counsel's request, the court required the state to proffer Shauna Galloway-Williams' testimony regarding her qualifications.

Galloway-Williams is the executive director of the Julie Valentine Center in Greenville, South Carolina. The center works with children and adults who have been impacted by sexual or physical abuse and neglect. R. 155, l. 13 – 156, l. 2. Galloway-Williams is a licensed "professional mental health worker" in South Carolina and has a Bachelor's Degree in psychology and a Master's Degree in counseling. She testified that she has conducted more than seven hundred and fifty forensic interviews throughout her career and has counseled over eight hundred other children and adults. R. 156, ll. 3-18.

Throughout her career, Galloway-Williams has obtained more than one hundred and sixty hours of skill-based training and earned more than one hundred and twenty-five hours of continuing education credits. R. 157, ll. 3-9. She is also a member of several professional organizations, including the South Carolina Children's Advocacy Centers, the Silent Tears Foundation, and the South Carolina Professional Society on the Needs of Children. R. 156, l. 19 – 157, l. 2.

Lastly, Galloway-Williams is a professor in the Child Advocacy Program at the University of South Carolina (USC) Upstate. She normally teaches a course called Child Maltreatment. R. 157, ll. 10-13. She also speaks or provides training at conferences. R. 157, ll. 13-17. She recently presented at a conference for the National Association of Attorneys General. R. 158, ll. 9-13.

Without being specific, Galloway-Williams maintained that her organization "participate[s] in a statewide peer review as well as a national peer review." R. 157, ll. 21-22. She also claimed that she stays current with research, publications, and articles in the field. R. 158, ll. 16-18.

Moreover, Galloway-Williams testified that the topic of her testimony, including delayed disclosure and the response of non-offending caregivers, has been the subject of many articles published in professional journals and trade publications. She claimed these articles have been subjected to peer review and uniformly accepted and recognized by child sex abuse experts and professionals. Counselors also rely on these principles when treating children who have been sexually abused. R. 160, ll. 11-23; R. 165, ll. 10-19.

On cross-examination, defense counsel asked Galloway-Williams whether she could provide any specific examples of peer reviewed articles or other publications on delayed

disclosure or the response of non-offending caregivers. She could not name **any** specific publications. She also could not name **any** studies that have looked into whether this subject or evidence is reliable. R. 167, ll. 10-17. However, she maintained that the textbook she uses for the Child Maltreatment course she teaches discusses both delayed disclosure and the response of non-offending caregivers. This textbook is called Child Maltreatment and was written by Stefanie Keen, one of the professors at USC Upstate. R. 167, ll. 17-22.

Galloway-Williams also testified that most of the research in the field is conducted by "asking survivors questions or asking those who have now disclosed." R. 168, ll. 9-11. However, she admitted that the Julie Valentine Center does not track the number of the children or adults they see who have delayed a disclosure nor do they track the number of false allegations. R. 168, ll. 12-20; R. 170, l. 18-21.

At the conclusion of Galloway-Williams' in-camera testimony, defense counsel argued she should not be qualified as an expert in child sexual abuse dynamics because her testimony (1) is not outside the realm of lay knowledge as required by Rule 702, SCRE and Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010); (2) its probative value is substantially outweighed by its prejudicial effect to Appellant under Rule 403, SCRE; (3) its sole purpose is to bolster the complainants' credibility, which is prohibited under State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), and (4) the subject matter of her testimony is unreliable. R. 174, l. 3 – 176, l. 5.

As to reliability, defense counsel argued that Galloway-Williams could not name or provide any studies or peer reviewed publications on the subject or did she discuss any methods that have been used to show this evidence is reliable. R. 174, l. 5 – 175, l. 2.

The Court's Ruling

The court held that the testimony was admissible. Judge Stilwell stated "that generally speaking the state of South Carolina has accepted that expert testimony and behavioral evidence are admissible in cases of this nature." R. 177, ll. 12-14. Noting our Supreme Court's holding in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the court concluded that Galloway-Williams' testimony was not being offered "as a fact expert commenting on the credibility of the victims, but rather" her testimony was being offered to explain "delayed reporting and caregiver reporting." The court found both of these topics to be "outside of the common knowledge generally in the public and the jury pool." R. 177, ll. 17-22. Judge Stilwell also found the probative value of Galloway-Williams' testimony outweighed the prejudicial effect to Appellant and thus there was no violation of Rule 403, SCRE. R. 177, ll. 14-16.

Moreover, the court stated:

> I will also tell you that the proposition that this isn't scientific testimony is well-received. But even if of course you consider this scientific within the ambit of an academic discipline and you review it in accordance with the holding in Jones,[6] I think that there is sufficient publications and peer reviews which is evidenced by the fact [that it is] a part of an academic curriculum which teaches this field of study.
>
> And also that the methods have been applied at this time, that's evidence that the method is consistent with the recognized scientific laws or academic disciplinary laws or proceedings that are routinely applied to this field of study.
>
> I think the questions that were posed suggest that perhaps the methodology should be perfect. That's not the analysis because in any field of science or academic knowledge there must be a certain tolerance for imperfection, and we all acknowledge that.

[6] State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979).

> The threshold is reliability. And I find in this instance there is a threshold reliability that would give this court reason to believe that she's qualified to testify in the particulars of which her testimony has been offered. The questions that were posed to her I think are appropriate to determine whether in fact she as a witness is credible and goes to the value of her testimony to the jury.

R. 177, l. 23 – 178, l. 14.

Galloway-Williams' Testimony Before the Jury

Galloway-Williams repeated her qualifications before the jury and was qualified by the court as an expert in "child sex abuse dynamics." R. 180, l. 6 – 186, l. 5. Galloway-Williams explained delayed disclosure and maintained that it was common for children to delay disclosing sexual abuse. She testified that the main reason a child would delay disclosure is fear of the perpetrator or fear of the consequences of disclosing. The perpetrator may also be someone who the child loves and trusts and that may make it harder for the child to disclose. R. 186, l. 8 – 190, l. 10.

Galloway-Williams also discussed how disclosure is a gradual process and partial disclosures are typical. R. 194, l. 16 – 195, l. 2. Moreover, she explained purposeful and unintentional disclosures and their causes. R. 192, l. 21 – 193, l. 11.

Lastly, Galloway-Williams explained the response of the non-offending caregiver and the reasons for their behavior. For example, she maintained that many parents are initially in denial and respond improperly. She said, "[S]ometimes parents get stuck in that denial and disbelief and they don't believe their children and they don't make a report and don't do anything. Sometimes parents do believe their children, but they don't have the resources or knowledge or skills or ability to do anything about it." R. 193, l. 12 – 194, l. 15.

On cross-examination, Galloway-Williams admitted that she had never met with Shanira, Teyana, or Tammy Foster or talked to law enforcement about this case. She claimed her only knowledge was from discussions with the solicitor's office. R. 196, ll. 5-17.

State's Closing Argument

During her closing argument, the assistant solicitor used Galloway-Williams' testimony to bolster her case. She argued:

> You heard Shauna Galloway-Williams talk about that this is unfortunately a common theme or thread that you see. They have classes at the Center. People come and attend those classes and it helps them. And they have come voluntarily to say yes, I acted this way and I need help. It is true it is an unfortunate response by a non-offending caregiver, not knowing what to do. And the entire reason that we called Shauna Galloway-Williams is because I needed to understand how could this mom not say anything, how could she not do anything, how could these girls not talk about it. So, she was called to help educate me and you so you can understand this situation when you get back to the jury room to start deliberating.

R. 233, ll. 3-11.

ARGUMENT

1.

The court abused its discretion by qualifying Shauna Galloway-Williams as an expert in child sex abuse dynamics where there was insufficient evidence of the reliability of the subject matter of her testimony and whether those matters had ever been subjected to peer review.

"All expert testimony must satisfy the Rule 702, SCRE, criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009); See Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010) (holding "the trial court must evaluate the substance of the testimony and determine whether it is reliable."). Rule 702, SCRE, provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Our Supreme Court last addressed an expert in child abuse dynamics or "child abuse assessment" in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), which focused on the reliability element of White, 382 S.C. 265, 676 S.E.2d 684, wherein it was held that the trial court had to perform a gatekeeping function for non-scientific, as well as scientific evidence. Appellate counsel in Chavis argued that the "child abuse assessment" label and other similar titles were simply ways of getting around the holdings of State v. Kromah, 401 S.C. 340,

737 S.E.2d 490 (2009), State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct App. 2012), and State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011).

The Court in Chavis found that one of the "expert" witnesses should not have been qualified as an expert because there was no evidence that her conclusions or impressions taken from the forensic interviews she conducted were accurate and her only peer review was another interviewer reviewing her work to ensure she was using the RATAC protocol. 412 S.C. at 108, 771 S.E.2d at 339. The Supreme Court also found the testimony of the other so called "expert" that the child should not be allowed around Chavis anymore, for any reason, could only be interpreted as the "expert" believing the victim's claim that Chavis sexually abused her. 412 S.C. at 109, 771 S.E.2d at 340.

Like the "experts" in Chavis, there was no evidence that Galloway-Williams' conclusions and claims were accurate or reliable. As defense counsel pointed out, Galloway-Williams could not identify or name a single publication or study that supported her statements nor whether any of the articles, publications, or studies she relied on had been peer reviewed.

Because there was no evidence of the reliability of Galloway-Williams' conclusions and statements, the court failed to properly execute its gatekeeping function by qualifying her as an expert in child sex abuse dynamics. This Court should thus find the trial judge abused his discretion and remand for a new trial.

2.

The court abused its discretion by qualifying Shauna Galloway-Williams as an expert in child sex abuse dynamics where the subject matter of her testimony was well within the realm of lay knowledge, was highly prejudicial to Appellant, and improperly bolstered the minor complainants' credibility.

"The label of expert should be jealously guarded by the court and never loosely bandied about." Kromah, 401 S.C. at 357, 737 S.E.2d at 499. As our Supreme Court noted in Kromah, "although 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." Id.

In Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169, our Supreme Court specified the following three-prong test for expert testimony:

> [E]xpert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, **the trial court must find that the subject matter is beyond the ordinary knowledge of the jury**, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, **the trial court must evaluate the substance of the testimony and determine whether it is reliable.**

Id. at 446, 699 S.E.2d at 175 (internal citations omitted) (emphasis added).

The first prong of the three prong test outlined in Watson was not met in this case because the subject matter of Galloway-Williams' testimony was not beyond the ordinary knowledge of the jury. Her testimony focused on delayed disclosure and the response of

a non-offending caregiver. However, Shanira and Teyana both testified why they delayed in disclosing and what eventually lead each to disclose. For example, Shanira and Teyana testified that Appellant made repeated threats and told them no one would believe them if they told. Teyana also testified she was afraid she would be taken away from her mother. Furthermore, Tammy testified why she reacted the way she did when her daughters disclosed to her. Specifically, Tammy stressed her disbelief in the truth of the allegations, her love for Appellant, and her fear of losing custody of her children to the Department of Social Services (DSS). Because Shanira, Teyana, and Tammy had already explained their thoughts and actions to the jury, expert testimony was not required for the jury to understand why the complainants delayed in disclosing and why Tammy responded the way she did. Moreover, the jury did not need expert knowledge to explain this subject matter as it did not involve scientific, technical, or other specialized knowledge. See Rule 702, SCRE.

The **only** purpose of Galloway-Williams' testimony was to improperly bolster the complainants' testimony. This Court held in State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012), that it is improper for a witness to bolster the testimony of other witnesses. See Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (finding a "forensic interviewer's . . . opinion testimony improperly bolstered the Victim's credibility").

In McKerley, the trial court allowed a witness to testify as an expert in "forensic interviewing and child abuse assessment." 397 S.C at 463, 725 S.E.2d at 141. The expert had interviewed the alleged victim twice and concluded that both interviews were compelling for sexual abuse. She also determined that the victim's statements were

consistent with other information she had on the case. Id. at 466, 725 S.E.2d at 142. This Court determined there was no other way to interpret the language used in the expert's testimony other than to mean she believed the victim was being truthful. It further held, "In light of [the expert's] extensive inadmissible testimony bolstering the credibility of the victim . . . we cannot say the erroneous admission of [the expert's] testimony did not contribute to the jury's decision," therefore finding harmful error. Id. at 467, 725 S.E.2d at 143.

Our Supreme Court has also held that it is improper "for an expert to comment on the veracity of a child's accusations of sexual abuse." State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); see State v. Dawkins, 297 S.C. 386, 393-394, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper); see also State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000) (finding therapist's testimony children were being truthful in ninety-five percent of instances in which sexual abuse was alleged was improper vouching for child).

In Jennings, Shauna Galloway-Williams, the **same** witness at issue in this case, interviewed the three alleged victims of sexual abuse and issued a separate report for each child that was admitted into evidence. She concluded in her reports that each child provided a compelling disclosure of abuse by the defendant and that the children provided details that were consistent with the background information received from their mother, the police report, and the other children. 394 S.C. at 476-481, 716 S.E.2d at 92-95. Our Supreme Court held that the conclusions in the reports improperly vouched for the children's veracity and, thus, the trial court abused its discretion by admitting the reports into evidence. It further held the error was **not** harmless because there was no

physical evidence presented at trial and, therefore, the children's credibility was the sole issue in the case. Id. at 94-95, 716 S.E.2d at 480.

It is clear from the record that the state in this case attempted to circumvent recent case law by presenting a witness who had **not met** with the complainants, but who was familiar with the case, and presumably the complainants' testimony and specific allegations, as a result of discussions with the solicitor's office. While Galloway-Williams did not meet with the complainants, the state still used her to **indirectly comment on the complainants' credibility** and provide greater weight to their testimony.

Galloway-Williams' testimony was very likely interpreted by the jury to express that they should believe the complainants because their behavior is typical, expected, and complies with the behavior of the majority of other victims of sexual abuse. Her testimony strongly implied that because the complainants acted in the same manner as other victims of sexual abuse they must be telling the truth. Therefore, qualifying her as an expert and allowing her to testify was error for "[t]he assessment of witness credibility is within the exclusive province of the jury." McKerley, 397 S.C. at 464, 725 S.E.2d at 141 (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)).

Not only was Galloway-Williams' testimony used to bolster the complainants' testimony, it was also highly prejudicial to Appellant and cumulative. Under Rule 403, SCRE, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." Because the complainants had already testified as to why they disclosed when they did and what caused them to disclose, among other details, Galloway-Williams'

testimony was merely cumulative. It was used solely by the state to reinforce and reiterate the reasoning for the complainants' actions and behavior. See Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) ("Improper corroboration testimony that is ***merely cumulative to the victim's testimony***, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.") (emphasis in original).

Galloway-Williams' testimony was also prejudicial to Appellant because there was no physical evidence presented in the case and the sole issue was the credibility of Shanira, Teyana, and their mother. Because the witnesses credibility was the most critical determination of this case and Galloway-Williams' testimony was used solely to bolster their credibility, Appellant was clearly prejudiced and should be granted a new trial. See Jennings, 394 S.C. at 480, 716 S.E.2d at 94-95 ("Because the children's credibility was the most critical determination of this case, we find the admissibility of the [forensic interviewer's] written reports was not harmless.").

Appellant is constrained to point this Court to its recent decision in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015). Appellant acknowledges that this Court in Brown held that testimony like Galloway-Williams' in this case is admissible (indeed, Gallway-Williams was the expert in Brown). However, a petition for writ certiorari is currently pending before our Supreme Court in Brown. 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. The state has simply renamed forensic

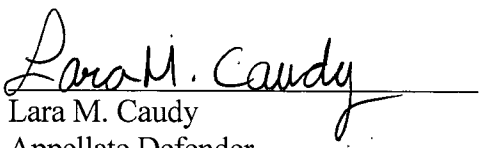
interviewers as experts in spurious fields like "dynamics of child sexual abuse." This testimony does not aid the trier of fact, but instead it invades the province of the jury.

For these reasons, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing arguments, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of September, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

September 30, 2015

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Greenville County
Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROY L. JONES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of September, 2015.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of September, 2015.

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