

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Union County
Hon. John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2015-002580

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SC SUPREME COURT

The State,

Respondent,

v.

Stephen Douglas Berry,

Petitioner.

Opinion No. 5329 (S.C. Ct. App. filed July 15, 2015)

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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STATEMENT OF QUESTIONS PRESENTED

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STATEMENT OF THE CASE

Procedural History

The State agrees with Petitioner's procedural Statement of the Case.

Factual Background

The victim lived with her father and siblings after her parents divorced. She also spent time with her grandmother. (T.101-102; R. 28-29). The victim began attending New Life Baptist Church. Petitioner served as the youth pastor for the church. (T.102; 142; R. 29; 69). After the victim got to know Petitioner, he and his daughter, with whom the victim had become good friends, moved to a home very close to the victim's father.

After church one Sunday in May 2010, the victim intended to ride home with Petitioner. Instead, he took her to his previous residence telling her he had to pick up some items and make sure his daughter got everything. (T.107-108; R. 34-35). Once inside, the victim went to Petitioner's daughter's room and verified she got everything. (T.108-109; R.35-36). Petitioner then came up behind the victim, hugged her, and touched her behind. (T.109-110; R. 36-37). After a brief conversation, Petitioner again approached the victim, hugged her, and told her she was beautiful. He then began rubbing her legs and unbuttoned and unzipped her pants. The victim pushed him away, but he came right back and pulled her pants and underwear down. He then placed his finger inside her vagina. (T.110-111; R. 37-38).

After briefly walking away, Petitioner began walking toward the victim again while unbuttoning and unzipping his pants. Petitioner turned the victim around and

attempted to sodomize the victim. After the victim was able to prevent him from doing so on several occasions, Petitioner went to another part of the room and masturbated until he ejaculated. (T.112-113; R. 39-40).

On a second occasion, Petitioner lured the victim to his new house under the guise of showing her where all the bedrooms would be and letting her see the newly refurbished house. Once inside, they sat on the floor to talk about the boy the victim liked. Petitioner attempted to stick his finger inside the victim's vagina. She resisted several times and "eventually gave in because there was no use in even trying to stop it." (T.116-117; R. 43-44).

The victim testified to several more incidents of sexual battery by Petitioner at his house and at her house. (T.117-122; R. 44-49). She testified the incidents would occur at least once a week during the 2010-2011 school year. She further testified the incidents occurred in her room at her father's house, or over at Petitioner's house. (T. 122-125; R. 49-52). The victim then explained one incident went farther than Petitioner putting his finger inside her vagina. She explained while lying on the floor watching a movie, Petitioner came up behind her and put his penis inside her vagina. Later he told her that she "wasn't a virgin anymore." (T.129-131; R. 56-58).

After an in camera hearing, the victim continued testifying and explained Petitioner continued to put his finger in her vagina at various times after she turned sixteen. She explained the continuing incidents occurred at her house, in his house, or in his car. (T.141; R.68).

ARGUMENT

I. The trial court did not err in allowing the State's expert to testify regarding behaviors she observed in the victim and her concerns regarding those behaviors. The expert did not impermissibly bolster or vouch for the child and did not testify outside her area of expertise. Further, all of the cases cited by Petitioner are distinguishable from the instant case.

The Court of Appeals correctly found the trial court did not err in admitting testimony by the State's expert regarding observed behaviors and her concern caused by those behaviors. First, the issue is not preserved for review on appeal. Additionally, the testimony is properly admitted under long-standing case law. Finally, none of the cases cited by Petitioner altered the long-standing rule that observed behaviors are properly admitted into evidence.

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, Petitioner 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 merely 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

On the merits, the testimony by the State's expert was properly admitted. Initially, it should be noted the State's expert did not diagnose the victim with PTSD. She merely identified behaviors and characteristics witnessed in the victim during her treatment with the State's expert that caused the expert concern. This testimony did not indicate the **cause** of her trauma or behavioral changes, nor did it link those changes directly to the abuse perpetrated by Petitioner. Instead, the testimony merely indicated what the victim's new behaviors were and the expert's concern related to those behaviors.

The Courts of this state have examined behavioral testimony in several cases. Initially in State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987), this Court held expert testimony regarding common behavioral characteristics exhibited by child victims of sexual abuse was not admissible to establish abuse had occurred. The Court held this evidence admissible only to rebut a defense claim that the victim's response was inconsistent with such a trauma. Id. at 100-101, 359 S.E.2d at 61. This Court joined the majority of other jurisdictions in State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), holding trauma testimony of a rape victim is relevant to prove the elements of

criminal sexual conduct since such evidence makes it more or less probable that the offense occurred.

In State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), this Court considered expert testimony regarding rape trauma syndrome. The expert testified to characteristics commonly found in sexual assault victims. Id. at 505, 435 S.E.2d at 861. The Supreme Court overturned its holding in Hudnall, and specifically found: “both 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.”

The Court of Appeals had an opportunity to address similar behavior testimony in State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). In Weaverling, an expert testified regarding behavior and characteristics of a sexually abused victim. This Court stated: “Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible.” Id. at 474-475, 523 S.E.2d at 794 (citing Frenzel v. State, 849 P.2d 741 (Wyo.1993); State v. Lujan, 192 Ariz. 448, 967 P.2d 123 (1998) (opinion testimony describing behavioral characteristics outside jurors’ common experience is permitted as long as it meets other admissibility requirements)). The Court explained:

Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. Frenzel, *supra*. It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor. Id. See also Lujan, *supra* (when facts of case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—like reactions of child victims of sexual

abuse—expert testimony on general behavioral characteristics of such victims should be admitted).

Id. at 475, 523 S.E.2d at 794.

Numerous other states which have considered the issue have also found it admissible, finding the behavioral traits appropriate testimony for an expert. See State v. J.Q., 617 A.2d 1196, 1206 (N.J. 1993) (“There does not appear to be a dispute about acceptance within the scientific community of the clinical theory that CSAAS identifies or describes behavioral traits commonly found in child-abuse victims.”); State v. Reser, 767 P.2d 1277, 1282 (Kan. 1989) (“There are numerous cases from other jurisdictions where expert testimony regarding characteristics of sexually abused children has been held properly admitted as providing helpful background information to the jury.”); Keri v. State, 347 S.E.2d 236, 238 (Ga. App. 1986) (finding expert testimony assisted jury in understanding why sexually abused children are secretive, why they were frightened, why they act out and become disciplinary problems, and why the children could not give specific dates for the acts they say were committed by the defendant); see also John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol’y 1, 45-46 (2010).

The testimony by the State’s expert merely explained the common behaviors and characteristics of a trauma victim and in particular a sexual trauma victim. Such testimony is clearly proper under Schumpert and Weaverling. Her further testimony regarding behaviors **she witnessed** in the victim was also proper testimony as it was based on her **personal observations**. The expert’s concern that resulted from the behaviors is well within the gambit of Schumpert and is not impermissible. As a result, the testimony from the State’s expert was properly admitted.

Additionally, Petitioner contends the Court of Appeals 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).

Nothing in this Court's opinion in Kromah overruled either the prior 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 long-standing 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, nor did it prevent testimony similar to that presented in the instant case based on an individual's personal observations. Tellingly, this Court in Kromah specifically bullet pointed as admissible "any personal observations regarding the child's behavior or demeanor." Kromah, 401 S.C. at 360, 737 S.E.2d at 500.

Additionally, and most telling, while Petitioner cites to the recent opinion in State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), for other arguments, overlooked is this 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, 413 S.C. at 218, 776 S.E.2d at 79. Certainly if this 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.

Petitioner then maintains the testimony presented by the State's expert violates the South Carolina Supreme Court's recent opinion in Anderson. 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.

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 Petitioner. 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.

Further, this case is distinguishable from the final case cited by Petitioner, Mangal v. State, Op. No. 5372 (S.C. Ct. App. filed December 30, 2015). In Mangal, the Court of Appeals specifically held that the expert's testimony regarding the possible cause of the victim's injuries was explainable based on the expert's examinations—i.e., the expert's personal observations. The doctor also indicated she relied on the history provided by the victim. The doctor stated: "I based it on the information received by my patient, which is invaluable information any doctor receives when they are examining a patient." The Court of Appeals found error in allowing the testimony to be based on the victim's statements, finding the only way to interpret the doctor's testimony was to find the expert vouched for the victim. This testimony is completely different from the testimony of the expert in the instant case who did not directly connect the behaviors to abuse by Petitioner and also did not rely on statements by the victim, but instead relied on her own personal observations and experiences with the victim.

"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 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 Petitioner. Further, as discussed above, this testimony was specifically admitted under Alexander and Schumpert.

Additionally, the testimony regarding generally observed characteristics did not impermissibly bolster or vouch for the victim. The Georgia Court of Appeals found testimony about child sexual abuse syndrome admissible. McCoy v. State, 629 S.E.2d 493, 494 (Ga. Ct. App. 2006); see also, Keri v. State, 347 S.E.2d 236, 238 (Ga. App. 1986) (finding expert testimony assisted jury in understanding why sexually abused children are secretive, why they were frightened, why they act out and become disciplinary problems, and why the children could not give specific dates for the acts they say were committed by the defendant). The Court found:

The expert witness testified as **to common characteristics** of child sexual abuse syndrome, such as secrecy, delayed disclosure, helplessness, and accommodation. **He offered no opinion, however, as to whether the victims in this case were being truthful. He left that determination for the jury.** Since “[l]aymen would not understand this syndrome without expert testimony, nor would they be likely to believe that a child who denied a sexual assault, or who was reluctant to discuss an assault, in fact had been assaulted.”

McCoy, 629 S.E.2d at 494 (citations omitted) (emphasis added).

The Montana Supreme Court recently stated:

We have consistently upheld the use of experts to explain the complexities of child sexual abuse. Child sexual abuse is a topic that many or most jurors have no common

experience with. This is particularly so when the alleged victim and perpetrator are family members. Child sexual abuse victims often respond to the abuse with seemingly puzzling and contradictory behavior. **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) (emphasis added).

The information provided by the State's expert enables the jury to make an informed decision; it does not in any way remove the determination from the jury of whether the child is being truthful. Accordingly, nothing in the State's expert's testimony regarding the victim's behavior or the characteristics of PTSD removed the determination of credibility from the jury. The expert did not usurp the jury's role as fact finder and determiner of the truth. Accordingly, the trial court properly admitted the testimony as it did not vouch for or impermissibly bolster the victim's testimony.


CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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February 9, 2016

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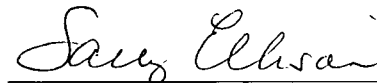
PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
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