

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

RECEIVED

MAR 03 2016

S.C. SUPREME COURT

The State of South Carolina,.....Respondent,

v.

Stephen Douglas Berry,.....Petitioner.

PETITIONER'S CORRECTED REPLY

League B. Creech
Peters, Murdaugh, Parker
Eltzroth & Detrick, P.A.
Post Office Box 457
Hampton, South Carolina 29924
Telephone: (803) 943-2111
Facsimile: (803) 943-3943

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on
Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

ATTORNEYS FOR PETITIONER

INTRODUCTION

Petitioner Stephen Douglas Berry respectfully submits this Reply Brief in response to the issues raised by Respondent's Return to Petition for Writ of Certiorari of February 9, 2016.

ARGUMENT

The Opinion below, in its ruling on the trial court's allowance of forensic expert testimony in a case involving criminal sexual conduct with a minor, begs for review by this Court, for the benefit of the Bench and Bar. As discussed at length through previous briefs, the Opinion below clearly conflicts with existing precedent.¹

The trial court found Kim Roseborough, a psychotherapist and social worker called by the State, qualified to testify as an expert in the field of child sexual abuse assessment and treatment. During Ms. Roseborough's testimony, Berry's counsel objected to any statements relating to Ms. Roseborough's opinion that the circumstances of the victim's disclosure were consistent with a disclosure of sexual abuse. The trial court overruled an objection by Berry's counsel that Ms. Roseborough, who is not a medical doctor, was not qualified to diagnose the victim with Post-Traumatic Stress Disorder.

During Ms. Roseborough's testimony, she was allowed to opine as follows: first, that there are specific trauma symptoms that children would tend to show following a sexual assault; second, as to what some of those symptoms are; third, that the alleged victim exhibited some of those symptoms, and; finally, Ms. Roseborough began listing those symptoms exhibited by the alleged victim. The sole purpose this testimony by Ms.

¹ Petitioner specifically incorporates by reference those previous arguments. However, for the sake of brevity, only portions of Respondent's Return are addressed in this limited Reply.

Roseborough's was to illustrate her expert opinion that the alleged victim's behavior indicated truthfulness. Several recent cases directly prohibit this kind of expert bolstering of a child victim, but especially *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013).

Respondent's argument that this issue is not preserved for review is wholly without merit. The South Carolina Rules of Evidence provide that an objection must state a specific ground "**if the specific ground was not apparent from the context,**" SCRE 103(a)(1) (emphasis added). Here, the specific ground was apparent from the context, given the line of questioning contained in the above exchange and the previous in-depth discussion of *Kromah*. Allowing Ms. Roseborough to testify first as to examples of specific trauma symptoms that children would tend to show following a sexual assault, and then to testify as to which of those symptoms the victim exhibited, constitutes an improper bolstering of the victim's allegations. The above testimony is tantamount to allowing Ms. Roseborough to testify that she believes the victim. Such expert testimony directly violates *Kromah*'s disallowance "for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *Kromah* at 358, 727 S.E.2d at 499 (citing *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011)).

Respondent's arguments on the merits are also unfounded. First, Respondent argues that Ms. Roseborough's testimony was proper because she did not indicate a cause of the victim's PTSD, when in fact that is precisely what she did. It is impossible to distinguish between listing all the characteristics of PTSD that the victim showed, and an actual diagnosis of PTSD. Furthermore, the whole reason this testimony was offered was to support the State's claim that the victim had been sexually abused.

Respondent relies heavily on *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). However, after *Kromah*, the old line of cases addressing the proper scope of testimony by a forensic interviewer is no longer good law. *Schumpert* held that “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.” *Id.* at 506, 435 S.E.2d at 862. *Weaverling* found that expert testimony “concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible.” *Weaverling* at 474-75, 523 S.E.2d at 794 (citing *Frenzel v. State*, 849 P.2d 741 (Wyo. 1993); *State v. Lejun*, 967 P.2d 123 (Ariz. 1998)). It is impossible to reconcile these findings with the specific holding of *Kromah* that it is improper to admit “any statement to indicate to a jury that the interviewer believes the child’s allegations in the current matter; or an opinion that the child’s behavior indicated the child was telling the truth.” *Kromah* at 360, 727 S.E.2d at 500.

Respondent’s attempt to distinguish the present case from this Court’s recent cases fails. In *State v. Anderson*, Op. No. 27558 (S.Ct. filed August 5, 2015) (Shearouse Adv. Sh. No. 30 at 39), the Court held that a forensic interviewer vouched for a minor when she testified only to those characteristics which she observed in the minor. *Id.* at 44. Respondent argues that *Anderson* is distinguishable because the expert in that case tailored her testimony to the characteristics alleged by the victim. This is precisely what happened in the present case. While Ms. Roseborough testified during the trial, the following exchange occurred:

BY SOLICITOR ANTHONY:

Q: All right. And moving on, are there any typical symptoms of trauma that are exhibited by people who have been – by children who have been sexually assaulted?

A: Yes.

Q: Okay. And what are those?

A: There are certain symptoms of trauma that must be present in order to diagnose someone with a traumatic response or post-traumatic stress disorder, and those include certain things – there are certain categories and the way that it is written in the Diagnostic Statistical Manual, you have to have a certain number under each category. The first category is that there has to have been some type of traumatic event where someone was harmed or felt like that they were in danger in some way and that that caused them a significant amount of distress.

MS. INZERILLO: Your Honor, I'm going to object. May we approach at this point?

(SIDE BAR CONFERENCE OFF THE RECORD OUT OF THE HEARING OF THE JURY AT 11:39 A.M.)

BY SOLICITORY ANTHONY:

Q: Okay. Are there any specific trauma symptoms that children would tend to show following a sexual assault?

A: Yes.

Q: And what are those or some of those?

A: Some of those would be hyper-vigilance. A very exaggerated, startled response. There could be distressing intrusive thoughts about the event that occurred. These can sometimes cause really significant problems with concentration because they are having intrusive thoughts and they are not able to get the event out of their mind. A lot of people can have and one of the symptoms certainly is agitation, outbursts of anger. They also can have

feelings of detachment that lead to very significant depression and anxiety and the symptoms that would go along with both of those; lack of sleep, problems with appetite. Those types of things.

Q: And in regards to any of your treatment of Morgan Williams, did you make observations and form opinions as to specific symptoms of trauma suffered by her?

A: Yes.

Q: And what were those?

A: Over time Morgan became much more agitated and had a lot of feelings of guilt and separation and detachment from her family. She became increasingly more angry and had some ---

MS. INZERILLO: Your Honor, I'm going to object.

THE COURT: I overrule your objection. Go ahead.

A: Thank you. Had some very violent outbursts toward people in her family, her dad and her brothers. And she became more withdrawn. She had a lot of feelings of loneliness and detachment. She became so clinically depressed that I was concerned about her and referred her to a psychiatrist.

(App. p. 132, line 15 – p. 134, line 21)

Ms. Roseborough first states that there are specific trauma symptoms that children would tend to show following a sexual assault and then starts listing those symptoms exhibited by the alleged victim. The sole purpose of this portion of Ms. Roseborough's expert testimony was to illustrate her expert opinion that the alleged victim's behavior indicated truthfulness, in direct violation of *Anderson*, as well as *Kromah*.

Respondent further argues that the present case is distinguishable from the Court of Appeal's decision in *Mangal v. State*, Op. No. 5372 (Ct. of App. filed December 30, 2015) (Shearouse Adv. Sh. No. 51 at 10). This argument is also misplaced.

In *Mangal*, the Court of Appeals reversed the trial court's dismissal of Petitioner's PCR application and remanded the case for a new trial.

During Mangal's trial, "Pediatrician Nancy Henderson testified as an expert 'in the examination, diagnosis, and treatment of child sexual abuse.'" *Id.* at 12. Dr. Henderson opined that, based on her examination of the victim, the victim's injuries were consistent with sexual abuse. *Id.* at 17. The Court found this opinion proper pursuant to the parameters of Dr. Henderson's expert qualification, but went on to hold:

However, she stated her opinion was based not only on her examination, but also "on the history that [Victim] shared with [her]." Directly after this comment, Dr. Henderson opined that Victim had been sexually abused. On cross-examination, Dr. Henderson elaborated on these statements and testified that "based on the history that [Victim] shared, and she denies any other kind of trauma to that area...my conclusion is...as I stated."

When asked whether she based her decision on possibly untrue information from Victim, Dr. Henderson stated, "I based it on the information received by my patient, which is invaluable information any doctor receives when they are examining a patient." When asked whether she assumed Victim's information was true, Dr. Henderson responded, "Based on the way she shared it and all the information that she shared, yes."

We believe there is no other way to interpret these comments other than to mean that Dr. Henderson believed Victim was truthful. *See State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (finding a child abuse assessment expert's recommendation that the defendant should not be around the victim for any reason was improper because it could only be interpreted as the expert's believing the victim's sexual abuse claims); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding an expert's reports were erroneously admitted when there was "no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful"); *Dawkins*, 297 S.C. at 393-94, 377 S.E.2d at 302 (holding a

psychologist's testimony indicating he believed a victim's allegations were genuine was improper). Accordingly, Dr. Henderson's testimony was improper bolstering, and trial counsel was deficient for failing to object to it or otherwise bring it to the trial court's attention. *Id.* at 17.


In the present case, Ms. Roseborough also relied on information received from the victim in generating her opinions. The entire exchange set forth above shows the reliance by Ms. Roseborough on statements from the victim. Specifically, the victim described altercations with her family as well as her feelings. The potential prejudice in a jury hearing testimony like this from an expert who is indicating that he or she believes what an alleged child victim is reporting to that person is beyond measure.

As the Court of Appeals correctly held in *Mangal*, that becomes impossible in cases where the child's credibility is the most important determination the jury must make.

CONCLUSION

The South Carolina Bench and Bar would be well served by having this Court give guidance regarding the allowed scope of testimony provided by an expert witness in cases involving child sexual abuse. Berry therefore respectfully requests that this Court grant the relief sought herein, inquire further into these matters, and reverse the Court of Appeals.

(signature page to follow)



League B. Creech
Peters, Murdaugh, Parker
Eltzroth & Detrick, P.A.
Post Office Box 457
Hampton, South Carolina 29924
Telephone: (803) 943-2111
Facsimile: (803) 943-3943

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on
Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

ATTORNEYS FOR PETITIONER

February 29, 2016
Hampton, South Carolina

RECEIVED

MAR - 3 2016

SC SUPREME COURT

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

The State of South Carolina,.....Respondent,

v.

Stephen Douglas Berry,.....Petitioner.

PROOF OF SERVICE

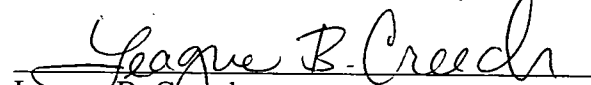
This is to certify that I, *League B. Creech*, with the Law Firm of PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P.A., Attorneys for the Petitioner, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within *Petitioner's Corrected Reply* to the following:

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Salley W. Elliott, Esquire
William M. Blich, Jr., Esquire
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.

By:


League B. Creech

Post Office Box 457

Hampton, South Carolina 29924

Telephone: 803-943-2111

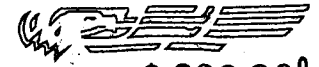
Facsimile: 803-943-3943

ATTORNEYS FOR PETITIONER

February 29, 2016
Hampton, South Carolina



U.S. POSTAGE»PITNEY BOWES



ZIP 29924 \$ 006.80⁰
02 1W
0001388445 FEB. 29. 2016

First Class Mail

LAW OFFICES
PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK
PROFESSIONAL ASSOCIATION
POST OFFICE BOX 457
HAMPTON, SOUTH CAROLINA 29924

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

PRIORITY
★ MAIL ★

TRACKED
★ ★ ★
INSURED
★

 **UNITED STATES**
POSTAL SERVICE®

For Domestic Use Only

Label 107, July 2013