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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE, RESPONDENT,

V.

WAYLAND PURNELL, APPELLANT

APPELLATE CASE NO 2014-001501

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF ISSUES ON APPEAL

1.

Did the court abuse its discretion by qualifying Allison Foster as an expert in the dynamics of child sexual abuse where there was insufficient evidence of the reliability of the subject matter of her testimony or whether those matters had ever been subjected to peer review?

2.

Did the court abuse its discretion by qualifying Allison Foster as an expert in the dynamics of child sexual abuse where the subject matter of her testimony would not assist the trier of fact as required by Rule 702, SCRE and improperly bolstered the minor complainants' credibility?

3.

Did the court err by admitting the videotaped forensic interviews of the minor complainants under S.C. Code Ann. § 17-23-175 since the statute is unconstitutional and violates the Confrontation Clause of the Sixth Amendment under *Crawford v. Washington*, 541 U.S. 36 (2004) and *Maryland v. Craig*, 497 U.S. 836 (1990)?

STATEMENT OF THE CASE

A Richland County Grand Jury indicted Appellant at the October 11, 2012 term of General Sessions for two counts of first degree criminal sexual conduct with a minor (CSCM), and at the February 20, 2014 term for lewd act upon a child. R. 345 His case was called to trial on July 7, 2014 before the Honorable Clifton Newman, and a jury. R. 1. Assistant Solicitors Margaret Bodman and John Steadman represented the state, and J. Taylor Bell and Jessamine Grice represented Appellant. R. 1.

On July 10, 2014, the jury acquitted Appellant of one count of first degree CSCM, but found him guilty of the other count as well as lewd act upon a child. R. 329, l. 21 – R. 330, l. 18. Judge Newman sentenced him to twenty-five years imprisonment for first degree CSCM and fifteen years concurrent for lewd act. R. 331, ll. 4-17.

This appeal follows.

STATEMENT OF FACTS

Relevant Facts

Appellant and Kia Muse began dating sometime during the year 2010. Their relationship consisted mostly of talking on Facebook and exchanging text messages. They also spent a few weekends together in Atlantic City. At some point during January 2011, Appellant came to live with Muse and her four children, B.M., Minor 1, Minor 2, and B.S, in New Jersey. He left to visit his family for several weeks shortly after he moved in with Muse, but returned to live with the family permanently after the couple married on March 18, 2011. R. 60, l. 24 – 61, l. 23.

The family eventually moved to Columbia, South Carolina on September 2, 2011. R. 63, l. 17-19. They moved into a four bedroom home. B.M., who was the oldest child, and B.S., the youngest child and only boy, both had their own bedrooms and Minor 1 and Minor 2 shared a bedroom. R. 65, l. 16 – 66, l. 7. Shortly after they moved, Appellant became employed as a barber and worked long hours seven days a week. R. 67, ll. 9-23. Muse also worked, but only part-time. The children were all enrolled in school and engaged in after school activities such as Girl Scouts and Boy Scouts. Minor 1 also attended a community reading literacy program three days a week after school because she was "having problems with reading." R. 67, l. 24 – 68, l. 11.

On April 30, 2012, Minor 1 attended the reading literacy program with her friend, D.H. R. 40, ll. 3-24. D.H.'s mother drove the children to and from the program that evening. Sometime after the program ended, Minor 1 allegedly told D.H. that she "knew what a male's private was." D.H. asked Minor 1 how she knew about a "male's private" and Minor 1 allegedly "told [D.H.] what happened." R. 40, l. 21 – 42, l. 20. D.H. shared

this information with her mother, Danielle Jackson, when they arrived home, and Jackson immediately called Muse and relayed the allegations to her. R. 43, ll. 8-15; R. 47, l. 4 – 49, l. 3. Later that evening, after Muse picked Minor 1 up from Jackson's home, she questioned B.M., Minor 1, and Minor 2 about alleged sexual abuse by Appellant. Minor 1 and Minor 2 both claimed Appellant had improperly touched them and Muse immediately reported the allegations to law enforcement. R. 69, l. 11-21.

Appellant was interviewed that evening by an investigator and was given permission to travel to Delaware to care for his father who had been diagnosed with stage four cancer. R. 162, l. 2 – 164, l. 14. He was instructed to stay in touch with the investigator and did so regularly. R. 173, ll. 4-24. On June 21, 2012, Appellant was asked to return to South Carolina to further discuss the case with law enforcement. When he arrived in Columbia, an investigator picked him up, interviewed him, and eventually served him with arrest warrants. R. 164, l. 15 – 165, l. 9.

On May 22, 2012, Minor 1 and Minor 2 went to the Assessment Resource Center (ARC) for a forensic interview. R. 179, l. 23 – 180, l. 5; R. 230, ll. 12-18. Videotaped recordings of their forensic interviews were played for the jury over Appellant's objection. See R. 186, ll. 3-30 and R. 231, ll. 4-15. The girls were also physically examined by a licensed pediatrician for signs of sexual abuse on that same day. Dr. Susan Luberoff testified that neither child had any signs of trauma, injury, or scarring in their vaginal or anal region. R. 142, l. 13 – 143, l. 8; R. 145, l. 4 – 146, l. 13.

Minor 1, who was eleven years old at the time of trial, testified that when she was between eight and nine years old Appellant had anal sex with her once at their home in New Jersey and multiple times at their house in South Carolina. R. 106, l. 13 – 109, l. 20. Minor

2, who was ten years old at the time of trial, likewise testified that when she was between seven and eight years old Appellant had anal sex with her once at their home in New Jersey and multiple times at their house in South Carolina. R. 126, l. 25 – 127, l. 25. Surprisingly, both Minor 1 and Minor 2 indicated that it did not hurt. R. 108, ll. 7-8; R. 119, l. 23 – 120, l. 3; R. 51, l. 25 – 130, l. 1.

Kia Muse admitted during her testimony that she discovered Appellant was having an affair with a woman in Chicago over the Internet and telephone. However, she claimed she did not find out about this affair until the day of Appellant's arrest on June 21, 2012 while she was looking through Appellant's cell phone. R. 73, l. 15 – 74, l. 24. Defense counsel suggested through his questioning that Muse discovered the affair before Appellant's arrest after Appellant sought to send Girl Scout cookies to an address in Chicago earlier in the year. However, Muse denied this. Muse also denied searching through Appellant's cell phone and discovering the affair before the allegations surfaced despite having access to his passcode. R. 86, l. 13 – 89, l. 6. Appellant's defense was that Muse knew about the affair and sought revenge by fabricating the allegations against Appellant. R. 311, l. 4 – 312, l. 10. Muse did admit to calling the woman in Chicago the day after Appellant was arrested and informing her of the allegations. R. 87, l. 19 – 88, l. 13.

As stated above, there was absolutely no physical evidence of sexual abuse. The jury ultimately acquitted Appellant of the first degree CSCM charge related to Minor 2, but found him guilty of the first degree CSCM charge related to Minor 1 and the lewd act charge related to Minor 2. R. 329, l. 21 – 330, l. 18.

In Camera Testimony of Allison Foster

Appellant sought pretrial to exclude the qualification of Allison Foster as an expert in child sexual abuse assessment or the dynamics of child sexual abuse. R. 332. The nature of Appellant's specific objections is discussed *infra*. However, Appellant's main objections were that (1) Foster's testimony would not assist the trier of fact as required by Rule 702, SCRE; (2) her testimony would improperly bolster the complainants' testimony which is prohibited by State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2009); and (3) the subject matter of her testimony is unreliable. Judge Newman qualified Foster as an expert in "the dynamics of child sexual abuse" over defense counsel's objection and found her testimony admissible. R. 260, ll. 5-15.

Foster testified in camera before the court made its ruling. Appellant also proffered the testimony of Julie Buck to counter Foster's testimony and discuss the unreliability of the subject matter.

Foster testified in camera that she is the "chief psychologist" at the Assessment Resource Center (ARC) in Columbia, South Carolina and also has her own private practice. R. 193, ll. 3-7. She discussed her educational background, which included an undergraduate degree from Emory University and a Ph.D. in Clinical Psychology from the University of South Carolina. R. 195, ll. 1-7. She testified that the vast majority of her practice and experience has been working with children who are the alleged victims of physical or sexual abuse. R. 195, ll. 12-18. Foster was also the director of the ARC for seventeen years and was responsible for conducting forensic interviews and providing therapy and counseling for physically and sexually abused children. R. 193, ll. 8-11; R. 194, ll. 9-25.

When prompted by the solicitor, Foster gave a generalized opinion that it is important to understand the dynamics of child sexual abuse and that such testimony would assist the trier of fact. She maintained that it was "a specialized area of knowledge and not something that a typical person understands." R. 196, l. 5 – 197, l. 15.

Foster testified about the "process of disclosure," including delayed disclosure and "piecemeal disclosure." She maintained that "this phenomenon is robustly identified in our field." R. 197, l. 16 – 198, l. 9. However, she did admit that the "process of disclosure" is a "very active area of research" and that it is not "settled science." R. 199, ll. 6-15. She also discussed how chronic abuse can affect a child's memory. Specifically she explained that chronic abuse may cause a child to only remember certain incidents, but not others. Foster likewise maintained, without citing any specifics, that her testimony on memory is supported by research that is peer reviewed. R. 196, l. 18 – 197, l. 8; R. 198, l. 10 – 199, l. 5.

Additionally, Foster testified about "child sexual abuse accommodation syndrome." The "phenomenon" has five components: secrecy, helplessness, "entrapment in accommodation," "delayed tentative unconvincing disclosure," and recantation. She maintained that these five characteristics are not seen in every child of chronic sexual abuse, but they are characteristics that are commonly seen in "different combinations." R. 201, l. 22 – 202, l. 2. Foster explained that this was a "descriptive" syndrome as opposed to a "diagnostic" syndrome and that the "phenomenon" is currently taught in "forensic interview academies" as "part of what investigative teams ought to understand about the dynamics of child sexual abuse." R. 200, ll. 9-25; R. 201, ll. 5-9.

On cross-examination, Foster admitted that child abuse assessment is a hard topic to research because the population studied consists only of individuals who have previously made an allegation or disclosed sexual abuse and cannot account for individuals who have been abused but never disclosed. R. 204, l. 19 – 205, l. 5.

When questioned further about "child sexual abuse accommodation syndrome," Foster testified that not all children go through all five stages outlined in the syndrome. For example, she maintained that not all children go through a stage of recantation, but almost all go through a stage of secrecy and delay in disclosing alleged abuse. R. 207, ll. 8-17. Foster admitted that there was no way to provide a percentage of the number of individuals or children who delay in disclosing alleged abuse because it is impossible to know the number of individuals who never disclose at all. R. 207, l. 18 – 208, l. 15. She conceded it "is an imperfect analysis." R. 209, ll. 9-20.

Foster also described some of the five stages further. "Secrecy" is essentially delayed disclosure. "Helplessness" is when the child feels unable to change or stop the abuse. "Entrapment and accommodation" is "the state that the child finds him or herself in when they feel helpless to change the bargain. The child molestation has begun, it is ongoing and essentially the child still had to get along with the business of life . . . [I]t's accepting and living with something you cannot change." R. 212, ll. 8-24. She explained that some children accommodate by being "on their best behavior" or being very obedient while others act out or show signs of violence. R. 212, l. 25 – 213, l. 11. Other forms of accommodation are behaviors that are "inappropriate for [the child's] age" such as bed wetting or biting. R. 213, ll. 15-21. Foster admitted that it is difficult to know whether a

child's behavior is actually "symptomatic of abuse" since "healthy children who have never experienced any kind of abuse" also exhibit such behaviors. R. 213, l. 22 – 214, l. 22.

Lastly, Foster conceded that the "dynamics of chronic child sexual abuse are complex" and that the field still has "a substantial amount of mystery and error." R. 220, ll. 11-19.

In response to Foster's testimony, defense counsel called Julie Buck to testify in camera. Buck has a Master's Degree in Research Psychology from the University of Tennessee-Chattanooga and a Ph.D. in Psychology from Florida State University. She is currently a full time consultant in the field of eyewitness memory, which is her specialty. Her focus is on research and teaching and thus she has not done any clinical work with children. However, Buck testified that she is familiar with the research on "child sexual abuse accommodation syndrome" and has conducted her own research in the field. R. 225, ll. 2-18.

Buck explained that "child sexual abuse accommodation syndrome" is not supported by research and that "[s]ome researchers have gone so far as to call it junk science." She testified that there are a lot of "limitations" on the studies and research on the subject and that "the research community as a whole is not likely to support it because the research isn't there." R. 234, l. 23 – 235, l. 12.

Foster's Testimony Before the Jury

Foster's testimony before the jury was similar to her testimony in camera, but more detailed. She discussed a child's memory and how it relates to chronic abuse. She explained that "memory is often talked about in terms of three stages." One must code it, meaning "be alert to take it in at some level through your five senses," retain it, and then be

able to retrieve it. She maintained that children who suffer chronic sexual abuse suppress memories of the abuse and have difficulty with retrieving them, especially given their undeveloped brains. She also said that some children will only be able to recall certain instances of abuse, ones that "stick out" for whatever reason, and not recall others. Further, she claimed that it is very difficult for children to remember specific dates and times of the alleged abuse. R. 261, l. 11 – 267, l. 15. Foster also discussed the "child sexual abuse accommodation syndrome" and the five factors discussed during her in camera testimony. She explained delayed disclosures, purposeful and accidental disclosures, accommodation, and helplessness in detail. R. 267, l. 16 – 271, l. 23.

Defense counsel renewed her objection to Foster's qualification as an expert before the jury. R. 260, ll. 5-9.

ARGUMENT

1.

The court abused its discretion by qualifying Allison Foster as an expert in the dynamics of child sexual abuse where there was insufficient evidence of the reliability of the subject matter of her testimony or whether those matters had ever been subjected to peer review.

Relevant Facts

Defense counsel objected to the qualification of Allison Foster as an expert in the field of child sexual abuse dynamics arguing the state failed to provide sufficient evidence of the reliability of the subject matter of her testimony under State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). Counsel argued that the field is based on "junk science" and is not widely recognized. R. 245, l. 16 – 246, l. 1.

Additionally, counsel argued that the studies and research in the field are unreliable because it is impossible to control the population studied due to the nature of the subject. For example, counsel asserted that there was no way to study the subject in a laboratory setting or to compare the differences in a control group versus a study group. Defense counsel also argued that the population studied in the field is always skewed because it consists of individuals who have already disclosed alleged sexual abuse. Moreover, Foster's personal experience is working with individuals or children who are referred to the ARC by law enforcement or the Department of Social Services on suspicion of abuse. Therefore, the group of individuals she deals with on a regular basis is not an accurate representation of the population and leads to unreliable conclusions. R. 246, ll. 2-25.

In her response, the assistant solicitor did not specifically address defense counsel's arguments on the lack of reliability of Foster's testimony. Instead, the state focused on counsel's other objections to the admissibility of her testimony. See R. 250, l. 14 – 252, l. 23.

Judge Newman ultimately held: "Though the whole field of behavioral characteristics of children who may have been sexual assault victims, child sexual abuse victims, it's difficult to place a scientific knowledge test to evaluate the reliability of the testimony based on the fact that it involves a particularized area of expertise. But I believe that from what I've heard I believe the testimony to be offered is sufficiently reliable that it meets the test for the Court in its gatekeeper function." The court went on to recognize that the subject matter of Foster's testimony has been accepted in some states and rejected in others, but refused "to weigh in on" the matter in this case. R. 252, l. 24 – 254, l. 14.

Discussion

"All expert testimony must satisfy the Rule 702 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, 446, 699 S.E.2d 169, 175 (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.

In White, our Supreme Court held that nonscientific expert testimony, as well as scientific expert testimony, must pass a threshold reliability determination by the trial court prior to its admission into evidence. 382 S.C. at 273, 676 S.E.2d at 688. The Court cleared up any misunderstanding that the reliability determination required by Rule 702 only applied to scientific expert testimony. Id.; See State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012). Moreover, the Court said "the *Council* factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony." Id. at 274, 676 S.E.2d at 688; See State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). However, the Court acknowledged that it did not "know the myriad of Rule 702 qualification and reliability challenges that could arise with respect to nonscientific expert evidence," and thus did not offer a "formulaic approach that will apply in the generality of cases." Id. at 274, 676 S.E.2d at 688-689; See State v. Chavis, 412 S.C. 101, 108, 771 S.E.2d 336, 339 (2015).

Our Supreme Court last addressed an expert in child abuse dynamics in Chavis, 412 S.C. 101, 771 S.E.2d 336, which focused on the reliability element of White, 382 S.C. 265, 676 S.E.2d 684. 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 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 "expert" in Chavis, there was no evidence that Foster's statements and conclusions were reliable. The subject matter of her testimony is not supported by the research community and has been called "junk science" by some researchers in the field. See R. 235, ll. 4-12. While Foster claimed that her statements and conclusions were supported by research that was peer reviewed, she failed to cite to any specific studies or explain the methods of peer review that were used. She admitted that the "dynamics of chronic child sexual abuse are complex," that some of the conclusions in the field are based on "an imperfect analysis," and that "it's certainly not settled science." See R. 209, ll. 9-20 and R. 220, ll. 11-13.

Because there was no evidence of the reliability of Foster's conclusions and statements, the court failed to properly execute its gatekeeping function by qualifying her as an expert in "the dynamics of child sexual abuse." Respectfully, this Court should find the trial judge abused his discretion, reverse Appellant's convictions and sentence, and remand for a new trial.

2.

The court abused its discretion by qualifying Allison Foster as an expert in the dynamics of child sexual abuse where the subject matter of her testimony would not assist the trier of fact as required by Rule 702, SCRE and improperly bolstered the minor complainants' credibility.

Relevant Facts

Appellant sought pretrial to exclude the qualification of Allison Foster as an expert in child sexual abuse assessment or the dynamics of child sexual abuse. Defense counsel argued that the state's use of such so called "experts" is a "backdoor attempt to go around State v. Kromah."[1] R. 189, ll. 16-20. She said, "[I]t's the State's intention that she [Foster] speak generally about research of what you might typically see in a child's behavior following allegations of abuse. Counsel argued that the only inference the jury could make from Foster's testimony was that she believed the children were telling the truth and that she found their allegations compelling. R. 190, l. 1 – 191, l. 2. She later clarified, "[U]nder Kromah we believe that this testimony about behavior that a child exhibits . . . is improperly being offered to bolster the credibility of the children." R. 240, ll. 15-22.

Defense counsel also argued that Foster should not be qualified as an expert under Rule 702, SCRE, because the subject matter of her testimony would not assist the trier of fact. R. 191, l. 2 – 192, l. 3; R. 240, l. 25 – 241, l. 8.

The assistant solicitor argued in response that under 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), expert testimony "regarding behavioral characteristics of sexual assault victims

[1] 401 S.C. 340, 737 S.E.2d 490.

and the range of responses encountered" is admissible. She also argued that such testimony "is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assaults." Moreover, she maintained that such testimony is helpful when the defendant has attacked the credibility of the complainants and claimed Appellant had done so by arguing that the mother had fabricated the allegations. Lastly, the solicitor argued that under Rule 702, Foster was qualified because she has "specialized knowledge" and that the probative value of her testimony outweighs any prejudicial effect. R. 250, l. 15 – 252, l. 23.

The court found Foster was "qualified in the field of evaluating child sexual abuse cases and the behavioral characteristics of abused children." Judge Newman also found the subject matter of Foster's testimony "involved matters that would be helpful to the jury in understanding issues in this case" and would not bolster the complainants' testimony. He specifically ruled that no testimony "would be allowed that would broach upon vouching for a witness." Therefore, the court found the testimony admissible and that the qualification of Foster as an expert in the dynamics of child sexual abuse was proper. R. 252, l. 24 – 254, l. 14.

Discussion

"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.

As noted above, 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.

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 169, 175 (internal citations omitted).

Here, Foster should not have been qualified as an expert or been permitted to testify because the subject matter of her testimony would not "assist the trier of fact to understand the evidence" as required by Rule 702. The critical determination in this case was the credibility of Minor 1 and Minor 2. Foster's generalized statements and conclusions on the memory and behavior of child sexual abuse victims could not properly assist the jury in determining whether Minor 1 and Minor 2 were telling the truth and, instead, more likely confused the jury. 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 Foster's "expert" testimony was to improperly bolster Minor 1 and Minor 2's credibility. 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 knew about the case. Id. at 466, 725 S.E.2d at 142. This Court determined that 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. The Court 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." Jennings, 394 S.C. 473, 716 S.E.2d 91; see State v. Dawkins, 297 S.C. 386, 393–94, 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, the "expert" forensic interviewer 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 had 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 an "expert" witness who had **not met** with the complainants, but who was familiar with the case as a result of discussions with the solicitor's office. While Foster did not meet with Minor 1 or Minor 2, the state still used her to **indirectly comment on their credibility** and provide greater weight to their testimony.

Foster's testimony was very likely interpreted by the jury to express that they should believe Minor 1 and Minor 2 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 a similar manner as other victims of sexual abuse they must be telling the truth. Her testimony also

improperly made an excuse for Minor 1 and Minor 2's lack of memory regarding specific incidents of the alleged abuse and the lack of detail in their accounts. 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)).

Foster's testimony was also prejudicial to Appellant because there was no physical evidence presented in the case and the sole issue was the credibility of Minor 1 and Minor 2. Because the complainants' credibility was the "most critical determination of this case" and Foster's testimony improperly bolstered 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 compelled 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 Foster's in this case is admissible. However, a petition for writ of 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 "expert" opinions vouching for the credibility of witnesses. The state has simply renamed forensic interviewers as experts in spurious fields like "the

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.

3.

The court erred by admitting the videotaped forensic interviews of the minor complainants under S.C. Code Ann. § 17-23-175 since the statute is unconstitutional and violates the Confrontation Clause of the Sixth Amendment under *Crawford v. Washington*, 541 U.S. 36 (2004) and *Maryland v. Craig*, 497 U.S. 836 (1990).

Relevant Facts

Appellant objected pretrial to the admissibility of the audio and video recordings of Minor 1 and Minor 2's forensic interviews pursuant to S.C. Code Ann. § 17-23-175 arguing the statute was unconstitutional under Crawford v. Washington, 541 U.S. 36 (2004) and Maryland v. Craig, 497 U.S. 836 (1990). Defense counsel filed a written motion in addition to making arguments on the record. See R. 335. Counsel maintained that the statements made by Minor 1 and Minor 2 during the forensic interview are hearsay elicited from law enforcement in an interview setting and would not be admissible except for the statute. He argued that in order to be constitutional under Craig, "testimony of the child witness occurring outside the presence of the defendant must be under oath with the opportunity for contemporaneous cross-examination." He further argued in the alternative that if such out of court statements are admissible then under Craig the court should be required to make a finding of necessity before admitting them. Moreover, defense counsel maintained that since the minor witnesses are available to testify in court, admitting their taped forensic interviews violates Crawford. R. 6, l. 22 – 50, l. 19.

The court ultimately ruled that the forensic interviews of Minor 1 and Minor 2 were admissible pursuant to the statute thereby making an implicit finding that the statute was constitutional. Judge Newman said, "I deny the motion in limine to exclude the

videotape[s]. In both instances I find that pursuant to section 17-23-175, that the proper procedure was adhered to in the interviewing process, that the interview was professionally done by a person qualified to do it. That assuming the proper foundation is made through testimony by witnesses leading up to the introduction of the videotape that the videotape is admissible." R. 29, ll. 16-24.

Discussion

A. S.C. Code Ann. § 17-23-175 is unconstitutional because it violates the Confrontation Clause of the Sixth Amendment to the United States Constitution as interpreted by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36 (2004).

The Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "The constitutional right to confront and cross-examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." State v. Hill, 394 S.C. 280, 291, 715 S.E.2d 368, 374 (Ct. App. 2011) (citing State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987)). Cross-examination has been called by the United States Supreme Court the "greatest legal engine ever invented for the discovery of the truth." Kentucky v. Stincer, 482 U.S. 730, 736 (1987) (quoting California v. Green, 399 U.S. 149, 158 (1970)).

"Generally, a prior consistent statement is not admissible unless the witness is charged with fabrication or improper motive or bias." State v. Whitner, 399 S.C. 547, 558, 732 S.E.2d 861, 867 (2012) (citing Rule 801(d)(1)(B), SCRE). However, in 2006 our legislature enacted S.C. Code Ann. § 17-23-175 which makes allowances for such hearsay

statements of children under certain circumstances. Id. The statute permits the admission of out-of-court statements by a child under the age of twelve if the statements were made in response to questioning conducted during an investigative interview of the child and the child testifies at trial and is subject to cross-examination. The statute reads in relevant part:

> (A) In a general sessions court proceeding or a delinquency proceeding in family court, an out-of-court statement of a child is admissible if:
>
> (1) the statement was given in response to questioning conducted during an investigative interview of the child;
>
> (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means . . . ;
>
> (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
>
> (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

S.C. Code Ann. § 17-23-175.

This statute is in direct conflict with the provisions of Crawford v. Washington, 541 U.S. 36 (2004) and therefore violates the Confrontation Clause. In Crawford, the United States Supreme Court discussed the admissibility of out-of-court hearsay statements of a witness and concluded that the right of confrontation is violated by admission of such statements except in very limited circumstances. The limited circumstances for admission of such statements exist only when the witness is **unavailable**, the out-of-court statement is testimonial, and the defendant had a **prior** opportunity to cross-examine the witness. Id. at 68.

In contrast, S.C. Code Ann. § 17-23-175 permits the admission of out-of-court hearsay statements if the statements were made in response to questioning conducted during an investigative interview of the child (making the statements testimonial) and when the child is **available** to testify at trial and subject to cross-examination. S.C. Code Ann. § 17-23-175(A). The requirement that the child be available to testify directly contravenes the Crawford requirement that the witness be unavailable before out-of-court hearsay statements can be admitted.

The United States Supreme Court in Crawford interpreted the Confrontation Clause to be violated when out-of-court testimonial hearsay statements of an **available witness** are admitted. 541 U.S. at 68. If the child is available to testify, Crawford simply does not allow admission of her out-of-court testimonial statements made during the pretrial forensic interview. Because the statute violates Crawford, it is unconstitutional and the forensic interviews of Minor 1 and Minor 2 should have been excluded.

B. The "particularized guarantees of trustworthiness" enumerated in S.C. Code Ann. § 17-23-175(B) are not adequate to protect a defendant's right of confrontation under Crawford.

As noted above, one of the four requirements for the admissibility of out-of-court statements of a child pursuant to S.C. Code Ann. § 17-23-175(A) is that the court finds "that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness." Subsection (B) of the statute states:

> (B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, but is not limited to, the following factors:
>
> (1) whether the statement was elicited by leading questions;
>
> (2) whether the interviewer has been trained in conducting investigative interviews of children;

(3) whether the statement represents a detailed account of the alleged offense;

(4) whether the statement has internal coherence; and

(5) sworn testimony of any participant which may be determined as necessary by the court.

Prior to Crawford, the United States Supreme Court in Ohio v. Roberts, 448 U.S. 56 (1980), conditioned the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception, or bears "particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66; See Crawford, 541 U.S. at 42. Under the Roberts test, the "particularized guarantees of trustworthiness" enumerated in S.C. Code Ann. § 17-23-175 perhaps could have been found constitutional. However, the United States Supreme Court abrogated Roberts in the Crawford decision, finding that the Roberts test was too broad in that it "applies to the same mode of analysis whether or not the hearsay consists of *ex parte* testimony," yet at the same time too narrow in that it "admits statements that do consist of *ex parte* testimony upon a mere finding of reliability." Crawford, 541 U.S. at 60. The Court stated, "This malleable standard often fails to protect against paradigmatic confrontation violations." Id.

The particularized guarantees of trustworthiness that render firmly rooted hearsay exceptions reliable do not exist with regard to the videotaped forensic interviews in this case. Almost all the firmly rooted hearsay exceptions recognized in our jurisprudence apply to non-testimonial statements, with the exception of certain dying declarations that might be made in a testimonial context. Id. at 56, fn. 6. The Court in Crawford stated the following about the fallacy of using the "reliability" determination when dealing with testimonial statements such as the videotaped interview at issue here:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. **Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.** To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. **It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.** The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Crawford, 541 U.S. at 61 (internal citations omitted) (emphasis added).

Under the reasoning of Crawford, the "particularized guarantees of trustworthiness" factors listed in S.C. Code Ann. § 17-23-175(B) cannot suffice to allow admission of the out-of-court testimonial hearsay statements contained in the videotaped forensic interviews of Minor 1 and Minor 2. Without a prior opportunity for **contemporaneous** cross-examination, admission of the videotaped interviews clearly violated Appellant's right of confrontation.

C. S.C. Code Ann. § 17-23-175 violates Maryland v. Craig, 497 U.S. 836 (1990) because it does not require the child to be under oath or subject to contemporaneous cross-examination.

S.C. Code Ann. § 17-23-175 is also unconstitutional under Maryland v. Craig, 497 U.S. 836 (1990). In Craig, the United States Supreme Court, while indicating that face-to-face confrontation is best, held the testimony of a child witness via closed circuit television did not violate the right of confrontation. The Court stated:

> Maryland's statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial. We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and **must testify under oath**, the defendant retains full opportunity for ***contemporaneous* cross-examination**; and the judge, jury,

> and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition.

Id. at 851 (citing Mattox v. United States, 156 U.S. 237, 242 (1895) and California v. Green, 399 U.S. 149, 179 (1970)) (emphasis added).

The Court in Craig noted that the majority of states had approved procedures for child witnesses to testify via closed circuit television or videotaped testimony. The Court concluded, "[T]he Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." Id. at 857. The Court held that **without an oath** and ***contemporaneous* cross-examination**, there cannot be effective confrontation. Id.

The videotaped forensic interviews in this case are not similar to videotaped testimony that occurs outside the presence of the defendant (which was found constitutional in Craig) because during the forensic interview the child is **not under oath** and there is no opportunity for ***contemporaneous* cross-examination**. Because S.C. Code Ann. § 17-23-175 allows for the admission of a child's hearsay statements **without an oath** and **without contemporaneous cross-examination**, it is unconstitutional.

D. Even if constitutional, the application of S.C. Code Ann. § 17-23-175 to admit out-of-court videotaped statements should be limited to situations where the court makes specific findings regarding the necessity of admitting the evidence.

Even if this Court determines that S.C. Code Ann. § 17-23-175 does not violate the Confrontation Clause, it respectfully should require all trial judges to consider the necessity of admitting videotaped forensic interviews in addition to the criteria enumerated in the statute, as is required when a court determines whether to allow testimony of children via closed circuit television. In Craig, the United States Supreme Court held that the Confrontation Clause does not prohibit a child witness from testifying by closed circuit television, but that a case specific finding of necessity for the use of the procedure was required. Id. at 855-856.

If a finding of necessity is required in the circumstances where a child is actually testifying **under oath** during a trial **and** is subject to **contemporaneous cross-examination**, certainly the same finding should be made for the admission of an out-of-court testimonial statement in which the child witness was not subject to contemporaneous cross-examination. As noted in Craig, the denial of a physical, face-to-face confrontation at trial is permitted "only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Id. at 850.

In Craig, the United States Supreme Court held that the public policy of protecting child witnesses from the trauma of giving testimony in child abuse cases could be sufficiently important in some cases to outweigh the defendant's right of confrontation. Id. at 853. However, the Court also held that the importance of protecting child witnesses outweighs the defendant's right of confrontation only "if the State makes an adequate showing of necessity." Id. at 855.

To make a showing of necessity: (1) the state must present case specific evidence from which the trial court can determine whether admission of videotaped evidence is necessary to protect the welfare of the particular child witness; (2) the trial court must find that the child witness would be traumatized by the presence of the defendant; and (3) the trial court must find that the trauma suffered by the child witness in the presence of the defendant is more than "mere nervousness or excitement or some reluctance to testify." Id. at 856.

South Carolina courts agree that a particularized showing of necessity is needed before videotaped or closed circuit testimony can be used to avoid face-to-face confrontation with a defendant. Although S.C. Code Ann. § 16-3-1550(E) does not preclude the use of videotaped testimony for certain witnesses, the judge must make proper findings before such procedures can be used.[2] In State v. Murrell, 302 S.C. 77, 393 S.E.2d 919 (1990), our Supreme Court affirmed the trial court's ruling allowing videotaped testimony of a child witness where the judge heard expert testimony that the child would be significantly harmed by an in-court confrontation. In Murrell, the child witness was placed in a courtroom setting and the defendant was in an adjacent room viewing the child on video. The defendant's attorney was present in the courtroom for direct and cross-examination and the attorney's law partner was in the room with the defendant with three way communication available at all times between the attorneys and the defendant. Id. at 71, 393 S.E.2d at 920-921.

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[2] S.C. Code Ann. § 16-3-1550(E) reads: "The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate. The prosecuting agency or defense attorney must notify the court when a victim or witness deserves special consideration."

In State v. Bray, 342 S.C. 23, 535 S.E.2d 636 (2000), our Supreme Court determined that although the record contained sufficient evidence to support a finding that testimony of a child witness should be given by closed circuit television, reversal was required because the trial judge failed to make specific findings for its ruling allowing testimony outside the presence of the defendant, specifically failing to cite to testimony that the child would be traumatized if required to testify in the presence of the defendant. Id. at 31-32, 535 S.E.2d at 641.

These requirements for case specific findings of necessity for admission of videotaped or closed circuit television testimony should limit S.C. Code Ann. § 17-23-175 in a similar manner. Because S.C. Code Ann. § 17-23-175 does not require a finding of necessity for admission of videotaped forensic interviews, it contravenes the provisions of Craig and therefore violates Appellant's constitutional right of confrontation. Because the statute is unconstitutional, the trial court should have excluded the videotaped forensic interviews of Minor 1 and Minor 2.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

This 4th day of February, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

February 4, 2016

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE, RESPONDENT,

V.

WAYLAND PURNELL, APPELLANT

APPELLATE CASE NO 2014-001501

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 V. Henry Gunter, Jr., Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of February, 2016.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of February, 2016.

(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.