

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Chester County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN HENRY LOWERY II,

APPELLANT

APPELLATE CASE NO. 2014-002653

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court erred reversibly by qualifying Margo Dixon as an expert in the “forensic interviewing of children,” thereby allowing Dixon to bolster Minor 1’s testimony, unfairly prejudicing Appellant.

II.

The trial court erred reversibly by admitting into evidence a report, completed by Minor’s treating pediatrician, Dr. Shaunese Singleton, which included the opinions of the forensic interviewer, statements made by Minor 1 beyond time and place of the alleged sexual assault, and determinations by Singleton that were not made for the purpose of medical diagnosis or treatment.

III.

The trial court erred reversibly by qualifying trainee SANE nurse Jennifer Propst as an expert “sexual assault nurse examiner” where she had not completed her SANE certification when she examined Minor 1 and by permitting Propst to testify as to her opinion that Minor 1 exhibited physical symptoms consistent with sexual abuse.

STATEMENT OF THE CASE

On February 18, 2014, the Chester County Grand Jury indicted Appellant John Lowery for one count of first degree criminal sexual conduct with a minor. R. 412-413.

On December 1, 2014, Appellant proceeded to trial before the Honorable R. Knox McMahon and a jury. R. 1. William Frick and Devon Nelson represented Appellant, and Assistant Solicitor Julie Hill represented the State.

The jury found Appellant guilty as charged. R. 377, ll. 2-11. The trial court sentenced Appellant to thirty years imprisonment. R. 393, ll. 19 - 394, ll. 3.

STATEMENT OF FACTS

Appellant was arrested after his girlfriend's twelve year old niece, Minor 1, claimed that he sexually assaulted her in the early morning hours of November 3, 2013 while Minor 1 and her sister, Minor 2, were spending the night her aunt's Chester County residence. R. 66 - 70. Minor 1 alleged that Appellant digitally penetrated her vagina and attempted to have sex with her. *Id.* At the time of his arrest, Petitioner lived with the girlfriend, Fatima Head.

Head and Minor 1's mother, Geamil Hardin, took her to a local hospital where a rape kit was administered. R. 78. Minor 1 also spoke with Investigator Tammy Levister while at the hospital and was examined by Jennifer Propst, a trainee sexual assault nurse. R. 78 - 79; R. 129. Propst believed that the child had minor genital bruising and irritation. R. 146 - 147. Propst also collected samples of the minor's clothes for DNA testing.

A forensic interview of Minor 1 was conducted by Margo Dixon from Palmetto Citizens Against Sexual Assault. R. 185 -187. Following the forensic interview, an arrest warrant was issued for Appellant. R. 160. On November 29, 2013, Minor 1 was then given a second medical evaluation by Dr. Shaunese Singleton also from Palmetto Citizens Against Sexual Assault. R. 210.

Unlike Propst, Singleton found no physical evidence of sexual abuse, but still concluded that Minor 1 had been sexually assaulted. R. 208 – 209.

Trial

Petitioner's three day trial opened with testimony from Minor 1, Minor 2, Head, and Hardin. Appellant moved pre-trial to sequester all witnesses except for Minor 1 and Investigator Levister. R. 16. The State objected to the sequestration and requested that Dixon, the forensic interviewer, be allowed to stay in the courtroom during Minor 1's testimony. *Id.*

The State assured that Dixon, “would not testify to anything she didn’t already know. And I think that it would be comforting for the child to know that [the] person who has been following her through this case would be allowed to be in the room during her testimony.” R. 17, ll. 4-9. The defense countered that having Dixon hear the minor’s testimony would allow her to craft her own testimony accordingly and if Dixon remained in the courtroom she should testify before Minor 1. R. 18.

The court acceded to the State’s argument and permitted Dixon to remain in the courtroom. R. 19 - p. 20. The State then requested that the trial court close the courtroom to the public during Minor 1’s and Minor 2’s testimony. R. 20 -21. The State argued that their testimony was “personal” and that they would “feel more comfortable” if only essential court personnel and parties were present. *Id.* The Court reserved ruling on the motion until Minor 1 was called to testify.

Trial Testimony Minor 1

Minor 1 was the State’s first witness. With Dixon present and the “all parties beyond the rail” excluded, Minor 1 testified that on the night of the alleged sexual abuse she and her sister were sleeping on couch cushions on the floor of their Aunt’s living room. R. 63 - p. 64. Minor 1 claimed that she woke up in the middle of the night to Appellant attempting digitally penetrate her. R. 69 - 71. She alleged that Appellant also attempted to have sex with her, “[h]e was trying to get his private part to go inside mine, but he couldn’t get it all the way in. So he did it as far as he could.” R. 70, ll. 1-3.

Minor 1 testified that, after the alleged assault, Appellant sat on the sofa and waited until she fell asleep. R. 70 - 71. She recollected that Appellant asked her not to tell anyone about what happened. *Id.* Minor 1 claimed that she told her Aunt about the alleged assault after Minor 2, who had apparently witnessed the alleged incident, threatened to tell their mom about it. R. 73 - 74.

After Minor 1 made her allegations, Fatima Head and Appellant began to fight. Appellant adamantly denied the allegations. R. 75 - 76. Head took Appellant to his mother's house. R. 77 - 78. She then took Minor 1 to the hospital and called the police. *Id.*

Testimony of Jennifer Propst

At the time of the alleged incident, Jennifer Propst was in training to become a sexual assault nurse examiner (SANE). R. 129 - 131. She had begun SANE training in September, 2013, only two months before she examined Minor 1 and had no specialized pediatric sexual assault training. *Id.* She would not complete the clinical portion of SANE certification until January, 2014 and did not undergo any pediatric training until March, 2014. *Id.*

In order to complete the SANE program, Propst had to conduct five "monitored sexual assault cases." R. 130, ll. 24-25. Minor 1 was Propst's fifth sexual assault case. R. 134. Despite her lack of experience or training, the State offered Propst as "an expert sexual assault examiner." R. 131, ll. 16-18. Appellant objected to her being qualified as an expert under Rule 702, SCRE. R. 177 - 178. The trial court overruled the objection. R. 133.

Propst testified that, because she was still in training, she had a male colleague supervising her. R. 130 - 132. However, this supervision was limited to her periodically leaving the examination room to consult with the unnamed colleague. *Id.* Propst stated that she took a series of swabs in the hopes of collecting DNA evidence of the assault. She also placed Minor 1's clothes in a sealed evidence bag which she gave to Investigator Levister. R. 140 -141.

Propst conducted a physical examination of Minor 1. R. 144 - 149. From her visual examination, Propst posited that the tissue of Minor 1's inner vaginal canal was "red in comparison to the other tissue." Additionally, Propst claimed that this area was more sensitive and may have had a "microtear." R. 146, ll. 20 - 147, ll. 3.

When prompted by the State, Propst opined that these injuries would be consistent with digital penetration. R. 147. Having testified about the examination she conducted, the State then motioned to put into evidence the “Sexual Assault Examination Protocol” report Propst had drafted. R. 148 - 149; R.406.

Testimony of Investigator Tammy Levister

Levister testified that, after meeting Minor 1 and her mother at the hospital, she scheduled Minor 1 for a forensic interview. R. 157 - 160. Levister stated that after the forensic interview, “I got the results, findings, from the forensic interview. Once I got those . . . I obtained an arrest warrant and we started searching for [Appellant].” R. 160, ll. 9-12.

To emphasize the importance of the forensic interview in the investigation, the State pressed Levister whether “based on the information that came out of that you got arrest warrants after the [forensic interview]?” R. 165, ll. 25 - 166, ll. 2. Levister further testified that police located Appellant hiding in his mother’s attic. R. 168 - 169.

Testimony of Margo Dixon

Dixon was offered as “an expert in forensic interviewing of children.” R. 184, ll. 16-18. Appellant objected, citing to *State v. Jennings*¹, that Dixon’s testimony was not a proper subject for expert testimony and that any opinion testimony would be cumulative to her testimony about the interview. *Id.* The State countered that it did not “intend to have her offer anything that would be cumulative or an opinion about any of the victim’s testimony . . . I just wanted her to be able to explain the interview process and what she did in this case.” R. 185, ll. 5-10. Defense counsel then noted that Dixon could do that without being admitted as an expert. R. 186.

¹ 394 S.C. 473, 716 S.E.2d 91 (2011) (error in admitting portions of forensic interviewer's written reports that contained improper vouching for credibility of minor child was not harmless).

The trial court admitted Dixon as an expert in “the field of forensic interviewing of children.” R. 186, ll. 6-9. First, Dixon testified on the RACTAC interview structure and the goals of forensic interviewing. R. 187 - 188. Dixon also testified extensively about the organizations that are invested in and conduct forensic interviews: Children’s Advocacy Center (CAC), Palmetto Citizen Against Sexual Assault, and the National Children’s Alliance. R. 189. Dixon asserted that as a result of the forensic interview she recommended that Minor 1 be seen for a follow-up appointment with Dr. Singleton. R. 190.

Testimony of Dr. Shaunese Singleton

The State offered Singleton as an expert in “sexual assault examination.” R. 198. Defense counsel objected, anticipating that Singleton would almost certainly give opinion testimony on what she believed happened to Minor 1. R. 198 - 199. The court overruled the objection and admitted Singleton as an expert. *Id.*

Singleton expounded on her interview and examination of Minor 1. R. 200 - 203. Singleton repeatedly emphasized that Minor 1 reported painful urination for the morning after the alleged assault. *Id.*; R. 208 - 209. She then reluctantly revealed that her ***examination of Minor 1 did not reveal any physical injuries***. R. 203 (*emphasis added*).

At the State’s prompting, Singleton explained that most genital injuries heal within 72 hours and even serious injuries will usually heal within five to seven days. R. 204. She then conjectured that Minor 1’s reported symptoms, which were limited to painful urination on the morning after the alleged assault, were consistent with sexual assault. *Id.* She reached this conclusion despite the lack of any physical injuries, but Singleton had already hypothesized that the absence of physical injuries was, somehow, also consistent with sexual assault. R. 203.

State's Exhibit No.: 2: Singleton's Report

The State motioned to place into evidence Singleton's report documenting her examination of Minor 1. R. 209. Defense counsel objected to the report, stating that it needed to be redacted to remove all statements that were not necessary for medical diagnosis and that went beyond time and place confirmation. R. 209 - 210. The court withheld publication of the report to the jury until the redactions were agreed on. *Id.*

After breaking for lunch, the trial court addressed the proposed redactions. R. 216 - 218. Defense counsel then moved to exclude the entirety of Singleton's report on hearsay grounds arguing that it went beyond time and place and exceeded information required for a medical diagnosis. *Id.* Without taking argument from the State, the trial court ruled the report was admissible under the hearsay exception for medical diagnosis: "I'm not allowing them under [Rule] 801. I would agree that they are hearsay, but the exception of the hearsay rule is [Rule] 803(4)." R. 218, ll. 7-11.

Defense counsel reiterated that the report "was coming in over my objection due to your ruling on the 803 hearsay exception." *Id.* at ll. 22-24. The court then speculated that Rule 801(D)(1) provided an additional sustaining ground. R. 219 - 220. The court then assured defense counsel, "we still have your objection." *Id.* A redacted version of Singleton's Report was then entered into evidence. R. 222; R. 395.

Additional Evidence

During the investigation DNA swabs were taken from Minor 1 and Appellant. Police also seized the clothes that Minor 1 was wearing when the alleged assault took place. SLED technician Samuel Stewart testified that all of the DNA swabs taken from Minor 1 either tested negative for

any foreign DNA profile or were of insufficient quantity to test. R. 249 - 251. However, a sample of Minor 1's underwear tested positive for Appellant's DNA. R. 252.

Defense's Case

The defense's first witness, Travis Gore, testified that he was with Appellant the day before the alleged assault. R. 276 - 277. Gore recounted that Appellant was smoking crack and drinking for most of the day. *Id.* After Gore, Appellant testified that when the incident allegedly occurred, he lived with girlfriend, Fatima Head - Minor 1's Aunt. R. 280.

Appellant stated that, on the day of the alleged incident, he and Head had an argument about Appellant's drug use. R. 281 - 282. Head kicked Appellant out of their bedroom. Appellant recalled that after smoking a cigarette he went to sleep on the couch in the living room. R. 283 - 284. Minor 1 and Minor 2 were asleep on the floor, using the couch cushions as makeshift beds.

Appellant awoke when Minor 1 laid on top of him and put her hands on his crotch. R. 285. Appellant testified that he immediately pushed Minor 1. *Id.* Appellant left the couch and went into Head's room. R. 286 - 287. He also recalled that his pants were wet and that he wiped himself off before going into Head's room. *Id.* Appellant stated that he has a medical condition that resulted in premature ejaculation. *Id.*

The State called Levister as a rebuttal witness. R. 306. On rebuttal, Levister repeated that Appellant was located in his mother's attic and had refused to talk to police once arrested. R. 307. Levister also claimed that Appellant made no effort to contact police or to explain his version of events. *Id.*

Jury Verdict and Sentencing

The jury found Appellant guilty of first degree CSC with a minor. R. 377. Appellant had a prior conviction in West Virginia for third degree CSC arising out of a consensual relationship with

the fifteen year old daughter of a pastor at the church where Appellant then worked. R. 386.

Because of his prior record, the trial court sentenced Appellant to thirty years imprisonment. R. 393

- 394.

ARGUMENT

I.

The trial court erred reversibly by qualifying Margo Dixon as an expert in the “forensic interviewing of children,” thereby allowing Dixon to bolster Minor 1’s testimony, unfairly prejudicing Appellant.

Appellant objected to the trial court qualifying Dixon as an expert in “the field of forensic interviewing of children.” R. 182 - 183. The trial court overruled the objection. R. 184, ll. 16-18. Dixon then testified that, as a result of her forensic interview with Minor 1, she referred Minor 1 to Dr. Singleton for a follow-up sexual assault examination. R. 190.

Discussion

There is no need to qualify a witness as an expert where the witness will only testify as to her experience and personal observations. *State v. Douglas*, 380 S.C. 499, 502-503, 671 S.E.2d 606, 608-609 (2009). Even once qualified as an expert, a witness may not comment directly or indirectly on the credibility of another witness. *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012), reh’g denied (May 21, 2012)(citing *Burgess v. State*, 329 S.C. 88, 495 S.E.2d 445 (1988)). To this end, a forensic interviewer may not bolster the testimony of a child. *McKerley*, 397 S.C. at 464, 725 S.E.2d at 141 (assessment of witness credibility is the sole province of the jury).

Moreover, this Court has ruled that forensic interviewing is not a recognized type of expertise. *State v. Anderson*, -- S.C. --, 2015 WL 4640424 (2015) (qualifying forensic interviewer as an expert in forensic interviewing constituted reversible error). Even prior to *Anderson*, this State’s appellate courts have paid special attention to the expert testimony of forensic interviewers and the problems arising therefrom. *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490, n. 4 (2013) (envisioning no circumstance where forensic interviewer’s qualification as an expert witness would be proper).

At trial, Dixon testified as both an expert in forensic interviewing and as the individual that conducted the forensic interview of Minor 1. South Carolina Courts have repeatedly warned against this practice as it frequently results in the interviewer vouching for the credibility of the minor. *Cf. State v. Brown*, 411 S.C. 332, 738 S.E.2d 246 (Ct. App. 2015). Despite being forewarned by this Court, the State deliberately sought Dixon’s opinion on Minor 1’s credibility by asking her what actions she took as a result of the forensic interview. R. 189 - 190.

Dixon responded that she referred Minor 1 to Dr. Singleton for a follow-up examination. *Id.* Obviously, the desired inference is that Dixon believed Minor 1’s disclosure to be truthful and compelling.² Thus, Dixon’s testimony is exactly the kind of forensic interviewer witness bolstering our Courts have judiciously found inadmissible. *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015) (expert witness testimony on her recommendation victim “not be around defendant for any reason” improperly bolstered credibility of victim, thus, was inadmissible).

Moreover, there was no need to qualify Dixon as an expert in the first place as she simply testified to her personal observations from the interview. *Douglas*, 380 S.C. at 499, 671 S.E.2d at 606. Appellant is entitled to the benefits of *State v. Anderson* and the Court’s qualification of Dixon as an expert was clear error.

Appellant was prejudiced by Dixon’s testimony because it lent impermissible weight to Minor 1’s story. In *Kromah*, the Supreme Court identified the obvious rationale for Dixon’s testimony: “[i]t is undeniable that the primary purpose for calling a ‘forensic interviewer’ is to lend

² Any ambiguity about whether Dixon believed Minor 1’s disclosure was resolved when Dr. Singleton’s report included the forensic interviewing notes where Dixon recorded that Minor 1 had made a “clear disclosure of abuse” on the “Child Maltreatment Protocol” report. R.* (State’s Exhibit No.: 2 p. 2).

credibility to the victim's allegations. When this witness is qualified as an expert the impermissible harm is compounded." 401 S.C. at 358, 737 S.E.2d at 499.

In Appellant's case, the physical evidence of the alleged sexual assault was minimal; Minor 1's credibility was central to the State's case. The damage done by Dixon's erroneous expert qualification was compounded by Dr. Singleton's testimony and by the improper admission of Singleton's report which explicitly stated that Dixon - in her report titled "**Child Maltreatment Protocol**" - found a "clear disclosure of abuse." R. 395. *Jennings*, 394 S.C. 473, 716 S.E.2d 91.

Accordingly, it cannot be said, beyond a reasonable doubt, that qualifying Dixon as an expert in the field of forensic interviewing had no impact on the outcome of the case. The trial court's improper grant of court sanctioned expertise to Dixon requires reversal. *Anderson*, 2015WL 4640424 at p. 3; *Kromah*, 401 S.C. 340, 737 S.E.2d 490, n. 4; *see also State v. Lee-Grigg*, 374 S.C. 388, 414, 649 S.E.2d 41, 55 (Ct. App. 2007) (for harmless error, courts must determine beyond a reasonable doubt the error complained of did not contribute to the verdict").

II.

The trial court erred reversibly by admitting into evidence a report, completed by Minor's treating pediatrician, Dr. Shaunese Singleton, which included the opinions of the forensic interviewer, statements made by Minor 1 beyond time and place of the alleged sexual assault, and determinations by Singleton that were not made for the purpose of medical diagnosis or treatment.

Appellant objected to Dr. Singleton's report on hearsay grounds. R. 209 - 210. Appellant specifically argued that the report contained information that went beyond corroborating the time and the place of the alleged abuse and that the report included conclusions by Singleton and Dixon that went beyond medical diagnosis and treatment. R. 216 - 217.

The trial court overruled the objection concluding that the report - once redacted - would be admissible under medical diagnosis hearsay exception in Rule 803(4), SCRE and, alternatively, that the report was admissible under Rule 801(D)(1), SCRE, as a statement as to time and place of the incident that was consistent with Minor 1's prior testimony. R. 218, ll. 7-11.

Discussion

The Rules of Evidence are designed to ensure a fair trial occurs. One of the most important Rules of Evidence is the rule against hearsay; however, many exceptions to hearsay exist. A statement is not hearsay if the declarant testifies at the trial, is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony in a criminal sexual conduct case ... where the declarant is the alleged victim and the statement is limited to the time and place of the incident." Rule 801(D)(1)(D), SCRE.

However, to be admissible the statement must be limited to describing the time and the place of the alleged incident. *Jolly v. State*, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994). If the statement goes beyond time and place, then it is hearsay and in order to be admissible, it must fall

within one of the exceptions to the general rule against hearsay. *State v. Burroughs*, 328 S.C. 489, 497, 492 S.E.2d 408, 412 (Ct. App. 1997) (citing Rule 802, SCRE).

One of those exceptions to the rule against hearsay is when a statement is “made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” *Id.* at 501, 492 S.E.2d at 414 (quoting Rule 803(4), SCRE). “The rationale for the exception is that a patient has a strong motivation to be truthful about information that will form the basis of his diagnosis and treatment, making statements in this regard inherently trustworthy.” Tracy A. Bateman, *Admissibility of Statements Made for Purposes of Medical Diagnosis or Treatment as Hearsay Exception under Rule 803(4) of the Uniform Rules of Evidence*, 38 A.L.R.5th 433.

This Court held that “a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim.” *Burroughs*, 328 S.C. at 501, 492 S.E.2d at 414. However, the testimony of a nurse that the alleged victim of a sexual assault told the nurse that her assailant asked for a hug before the assault “in no way can be viewed as ‘reasonably pertinent’ to the victim’s diagnosis or treatment.” *Id.*

This Court found the testimony of the nurse prejudicial to the defendant because it corroborated the victim’s testimony in an extremely important way – the prosecution had presented two witnesses to testify the defendant had assaulted them after asking for a hug. *Id.* at 414-415, 328 S.C. at 502-503. This Court recognized that “[w]hile the victim’s statement that Burroughs asked her for a hug might be an insignificant detail when considering her story alone, it becomes a very important detail after considering the stories of the other victims.” Therefore, the improper

corroboration of the alleged victim's testimony resulting from the erroneous admission of the testimony of the nurse was not harmless. *Id.* at 415, 328 S.C. at 503.

A patient's history as told to the doctor is admissible only as to the information upon which the doctor relied in reaching his profession opinion. *State v. Brown*, 286 S.C. 445, 446, 334 S.E.2d 816, 816-817 (1985)(citing *Gentry v. Watkins-Carolina Trucking Co.*, 249 S.C. 316, 154 S.E.2d 112 (1967)). In *Brown*, the doctor told the jury that the child-patient stated "Mr. Carl" performed certain sex acts on her. The Court held defense counsel's objection to the perpetrator's identity was not necessary for diagnosis or treatment should have been sustained. *Id.* at 446, 334 S.E.2d at 817.

"The perpetrator's identity would rarely, if ever, be a factor upon which the doctor relied in diagnosing or treating the victim." *Id.* at 447, 334 S.E.2d at 817. Therefore, "[a] doctor's testimony as to history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions. The doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses." *Id.*

In *Jolly v. State*, 314 S.C. 17, 19, 443 S.E.2d 566, 568 (1994), the South Carolina Supreme Court found trial counsel provided ineffective assistance by failing to object to testimony by an uncle that the alleged child victim told the uncle that Jolly had abused her. Trial counsel had objected to a social worker testifying that the alleged victim made a prior statement that Jolly had abused her, but failed to object to the uncle's testimony. *Id.*

On direct appeal, Jolly challenged the trial judge's decision to allow the social worker to testify to the hearsay statement. No decision was made as to the error of the ruling because no objection had been made to the uncle's testimony making the social worker's testimony cumulative to the uncle's testimony and the alleged victim's testimony. *Id.* The South Carolina Supreme Court reiterated the rule that in criminal sexual conduct cases, evidence from other witnesses that the

alleged victim complained of a sexual assault is admissible in corroboration limited to the time and place of the assault and excluding details or particulars. *Id.* at 20, 443 S.E.2d at 568.

The Court went on to hold that “[i]mproper 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.” *Id.* at 21, 443 S.E.2d at 569 (*emphasis in original*). Thus, the Court held that had an objection to the uncle’s testimony been properly lodged, the appellate court would not have held the social worker’s testimony was harmless and the outcome of the direct appeal would have been different. *Id.*

Inclusion of Forensic Interview Report Titled “Child Maltreatment Protocol”

Dr. Singleton’s report included Dixon’s assessment of Minor 1’s forensic interview. R. 398. Dixon’s report, titled “*Child Maltreatment Protocol*” recorded, in a bolded section titled “*Outcome of Forensic Interview,*” that Minor 1 had made a “[c]lear disclosure of abuse.” *Id.*(*emphasis added*). Including Dixon’s conclusions in Singleton’s report was a direct comment on the credibility of Minor 1 and constituted a clear error. *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (error in admitting portions of forensic interviewer's written reports that contained improper vouching was not harmless).

The inclusion of the forensic interviewer’s notes in Singleton’s report was not done for the purposes of a medical diagnosis. Instead, it was included in an effort to “prove facts properly proved by other witnesses,” namely that Minor 1 had been sexually assaulted. *Brown*, 286 S.C. at 446, 334 S.E.2d at 816-817.

Conclusions of Singleton's Report Exceeding Medical Diagnosis

Equally improper was the inclusion of Singleton's "**Diagnosis & Conclusion**" section that, despite its title, was not written for the purposes of a medical diagnosis, but rather to bolster Minor 1's credibility as a complainant:

[Minor 1] is a 12 year old pubertal female who **provided a history of genital-vaginal contact with [Appellant]**. She provided a history of genital discomfort during and after the alleged incident. **The result of her genital exam reveal . . . no current signs of genital injury**. Based on her history this could represent interval healing of an incurred genital injury. **This finding is consistent with her history provided based on evidence based medical literature. A normal exam does not confirm nor does it discredit her history.**

R. 404 (*emphasis added*); see *Jennings*, 394 S.C. at 479, 716 S.E.2d at 94. References to Minor 1's "history" were an effort to disguise witness bolstering language in the framework of a medical assessment. *Id.* Clearly, Singleton's identification of Appellant as the perpetrator was irrelevant to any medical diagnosis. In that respect, this report section is on all four corners with the inadmissible testimony from the doctor in *Brown* identifying "Mr. Carl" as the perpetrator. 286 S.C. at 446, 334 S.E.2d at 817 (identity of perpetrator not relevant to medical diagnosis).

Moreover, given the circumstances under which Minor 1's was assessed by Singleton it is unlikely that Minor 1 was providing any information to Singleton to assist in diagnosis and treatment. The wording of the section deliberately focuses on bolstering Minor 1's sexual assault claim, not on diagnosing her medical condition or mapping out a course of treatment. Therefore, the public policy basis and assurances of reliability underpinning Rule 803(4), SCRE – that a patient tells the doctor the truth in order to receive accurate treatment – are not present here.

Further, Singleton's actual medical diagnosis and recommended course of treatment were included in two other sections of the report. R. 405. In a bolded section titled, "**Recommendations and Treatment**" Singleton identified what medical treatment Minor 1 should receive. *Id.* Likewise

the facts recounted by Minor 1 to Singleton for diagnostic purposes were already included in an earlier section titled “*Child’s Statement.*” *Id.* at p. 3.

Prejudice

Petitioner was prejudiced by the admission of Singleton’s report because it bolstered Minor 1’s testimony and allowed the State to rationalize why Singleton found no physical evidence of any injuries. *Jennings*, 394 S.C. at 479, 716 S.E.2d at 94. In its closing argument, the State emphasized Singleton expertise and argued that her report proved that a sexual assault occurred:

“[w]e just read it in the report about it in the report. [Minor 1] again said what happened to her. And [Singleton] doesn’t see any injuries. But she says there [is] a healing process and thankfully for this kid, for all kids it heals fast. . . And this doctor said that a major tear would heal in five days . . . So I submit to you that’s why she didn’t find any injuries. ***However, she said everything [Minor 1] told her was completely consistent . . .***

R. 345, ll. 21 - 346, ll. 11 (*emphasis added*).

Accordingly, the trial court erred in admitting Singleton’s report as it contained hearsay statements made by Minor 1 that served to improperly corroborate Minor 1’s testimony and included Dixon’s conclusions from the forensic interview that impermissibly bolstered Minor’s 1 allegations of abuse. Ultimately, the admission of the report violated Appellant’s constitutional right to a fair trial.

III.

The trial court erred reversibly by qualifying trainee SANE nurse Jennifer Propst as an expert “sexual assault nurse examiner” where she had not completed her SANE certification when she examined Minor 1 and by permitting Propst to testify as to her opinion that Minor 1 exhibited physical symptoms consistent with sexual abuse.

Over Appellant’s objections, Propst was qualified as an expert “sexual assault nurse examiner” despite not having a SANE certification when she examined Minor 1. R. 129 - 131; R. 133. Propst opined that Minor 1 had mild bruising and redness on her vaginal wall consistent with attempted digital penetration. R. 146 - 147. Propst was the only witness that testified that Minor 1 exhibited physical symptoms of sexual abuse.

Discussion

Trial courts have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, SCRE, whether the evidence is scientific or nonscientific. *State v. White*, 382, S.C. 265, 274, 676 S.E.2d 684, 688 (2009). In the discharge of its gatekeeping role, a trial court must assess an expert’s qualifications before determining if the expert’s proposed testimony is sufficiently reliable. *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (reversible error to allow expert testimony without first assessing expert’s qualifications).

Rule 702, SCRE, imposes on the trial courts an affirmative and meaningful gatekeeping duty. *White*, 382 S.C. at 270, 676 S.E.2d at 686. However, a trial court's decision to admit or to exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

Competency to testify as an expert requires a witness to “have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.” *Gooding v. St. Francis*

Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997). An expert's testimony may not exceed the scope of her expertise. *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) (police officer, qualified as an expert in crime scene processing and fingerprint identification, exceeded the scope of his expertise when he testified to conclusions drawn from the location and position of the victim's body at the time of the shooting). Qualification as an expert "depends on the particular witness' reference to the subject." *Gooding*, 326 S.C. 248, 253, 487 S.E.2d 596, 598.

"[A]n expert is not limited to any class of persons acting professionally." *Gooding* 326 S.C. at 253, 487 S.E.2d at 598. While an expert witness is not necessary to testify to the existence of prior injuries; only a properly qualified expert may offer a conclusion that a child has been a victim of abuse. *State v. Lopez*, 306 S.C. 362, 366, 412 S.E.2d 390, 393 (1991) (diagnosis of victim's injuries and determination of the cause based on the symptoms is beyond the ability of the average trier of fact and a qualified expert opinion is essential to connect those injuries to a physical cause).

Nothing in Propst limited experience, training, and education suggested that she had the necessary, specialized medical background or professional qualifications to reliably determine that Minor 1 had sustained injuries consistent with digital penetration. R. 147. Accordingly, the trial court abused its discretion in ruling that Propst qualified as a "sexual assault nurse examiner". *Price*, 368 S.C. at 498, 629 S.E.2d at 365.

As an initial matter, Propst was merely a trainee SANE nurse when she examined Minor 1. R. 130 - 134. She had only begun the SANE certification process in September, two months before she examined Minor 1. *Id.* Propst did not complete her SANE certification until January, 2014. R. 133.

The only portion of the SANE certification that Propst had completed was the forty-hours of classroom instruction. *Id.* Prior to Minor 1, she had only conducted four supervised sexual assault

examinations. R. 134. Moreover, from her testimony it is unclear to what extent she was actually supervised during the examination. *Id.*; *Cf. Gooding*, 326 S.C. at 253, 487 S.E.2d at 598 (paramedic who had intubated over one thousand patients and been an instructor in the method was properly qualified.) Propst simply stated that she had conferred with an unnamed colleague at the hospital of the course of her examination. R. 134.

Crucially, Propst had no specialized training whatsoever in pediatrics, let alone any training in juvenile sexual assault cases. R. 131; (*emphasis added*); *see Lopez*, 306 S.C. at 366, 412 S.E.2d at 393. Nevertheless, Propst testified that Minor 1's injuries were consistent with a sexual assault and even went as far as to claim that she observed - with her unaided eye - that Minor 1 had sustained a microtear. R. 146 - 147.

Simply put, Proper did not have the professional background or the opportunity to acquire the necessary skills and experience to support a finding that she was an expert sexual assault nurse examiner. Thus, she was not properly qualified to opine that Minor 1 had been sexually abused.

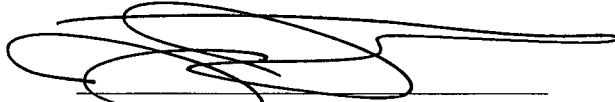
Appellant was prejudiced by the court's erroneous ruling on Propst expertise because she was the only witness that claimed to have observed Minor 1's alleged physical injuries. Her lack of training and experience coupled with the minor nature of the supposed physical injuries heightened the risk of misdiagnosis and made the gatekeeping role of the court all the more important.

Therefore, the trial court committed reversible error by qualifying trainee SANE nurse Jennifer Propst as an expert "sexual assault nurse examiner" when she had not completed her SANE certification and where, regardless of her lack of formal qualifications, she also lacked the necessary skill or practical experience required to give expert opinion testimony. *Gooding*, 326 S.C. 248, 253, 487 S.E.2d 596.

CONCLUSION

By reason of the foregoing arguments, Appellant's conviction should be reversed and this case remanded to the Chester County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'John H. Strom', written over a horizontal line.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of April, 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."

April 6th, 2016



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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chester County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN HENRY LOWERY II,

APPELLANT

APPELLATE CASE NO. 2014-002653

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 William N. Blich, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of April, 2016.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of April, 2016.

Uly (L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.

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