

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APR 20 2016

SC Court of Appeals

Appeal from Beaufort County
Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case Tracking No. 2013-002158

The State,

Respondent,

vs.

Gerald Barrett,

Appellant.

RETURN TO PETITION FOR REHEARING

On March 23, 2016, this Court properly affirmed Appellant's conviction and sentence. The Court properly held the testimony of the State's expert was admissible and did not impermissibly bolster or vouch for the victim. Further, this Court should find the issue is not preserved as the preliminary ruling was not final and Appellant never objected during the actual testimony of the expert. Finally, the Court correctly found Appellant was not entitled to know of the State's expert prior to trial and was not entitled to a continuance to try and find an expert that would provide undisclosed testimony.

Issue I

Preservation

First, the issue as raised on appeal is not preserved for review and this court should find it is not preserved for review. As discussed in the brief, no objections were made to any of the testimony provided by the State's expert. Further, the only two

objections made were to her being qualified as an expert in forensic interviewing—which the trial court agreed and she was never qualified as an expert in forensic interviewing; and a general objection to qualifying her as an expert in child sexual abuse characteristics and their behavior. The objection provided no basis for refusing qualification, and certainly did not try and tie the objection to Kromah or the best practices enunciated in Anderson. The issue as raised is blatantly not preserved for review on appeal.

Merits

Appellant next contends this Court erred in distinguishing State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), and allowing the State to “avoid the decision in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). The facts and circumstances as well as the testimony by the expert in this case are not similar to Anderson, and this Court correctly distinguished the case.

First, nothing in Kromah overruled either the Supreme Court’s prior case law or this Court’s case law regarding the admissibility and importance of expert testimony in regard to behavioral characteristics of victims of sexual abuse. Kromah did nothing more than reaffirm the longstanding rule that an expert may not impermissibly bolster or vouch for the testimony of a victim and reiterated the holding of State v. Douglas that a forensic interviewer should not be qualified as an expert in the field of forensic interviewing. The case did not address the behavioral testimony admitted in Schumpert or Weaverling. As a matter of fact, the ability to qualify a witness as an expert in a field such as child abuse characteristics and behavior was expressly upheld in Anderson when the Court stated: “Certainly we recognize that there is such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims.” Anderson, 413

S.C. at 218, 776 S.E.2d at 79. This one ruling in Anderson effectively eliminates the merits of the very broad, generic objection to qualifying the State's expert raised by trial counsel because the South Carolina Supreme Court has explicitly upheld the practice.

Additionally, the testimony in Anderson is vastly different from the testimony in the instant case. The testimony in the instant case does not impermissibly bolster or vouch for the victim. The testimony in the present case was a general discussion of universally accepted realities regarding delayed disclosure and the behavior of child abuse victims. The testimony was not tailored to the specific testimony of the child as it was in Anderson.

The State also relies on its Final Brief of Respondent for this issue. Based on the above, this Court properly affirmed Appellant's conviction and sentence and should deny the Petition for Rehearing.

Issue 2

Appellant next contends this Court's opinion was incorrect and the trial court should have allowed a continuance for him to obtain an expert. He then asserts this Court's opinion will invite "rampant discovery abuse by solicitors." Finally, he takes aim at the long-standing discovery rules in South Carolina, and apparently is imploring this Court to legislate what he believes the rules should be and not rule based on the existing rules in South Carolina.

First, as Appellant even acknowledges in his Petition, there is no general discovery in a criminal case in South Carolina. The State is bound by constitution, statute, or rule. In South Carolina, this means the solicitor must comply with Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (requiring the State to

divulge to a criminal defendant exculpatory or mitigating information), and Rule 5, SCRCrimP (requiring the State to disclose certain statements of the defendant, the defendant's prior record, certain documents and tangible objects, certain reports of examinations or tests, and witnesses to be called in response to an alibi defense).

Appellant, instead of trying to distinguish the one case directly on point in State v. Nicholson, 366 S.C. 568, 579, 623 S.E.2d 100, 105 (Ct. App. 2005), attempts to portray the criminal justice system as falling apart and all prosecutors in this state as persons who will “ambush” defense attorneys because this Court found the existing rules should apply in this case. Nothing in this Court’s opinion changes the rules that are applicable to prosecutors. Prosecutors will still be required to turn over all material required by Brady and Rule 5. There was no requirement the State provide the defendant notice of the expert’s testimony until such time as the expert took the stand and testified. This is not trial by ambush, and certainly not trial by ambush in a case involving CSC with a minor, which has been the subject of many decisions of this Court and the South Carolina Supreme Court. Appellant’s argument that the prior decisions of the appellate courts cannot elucidate a trial attorney on possible issues he or she will need to address during trial is arguing that they should be able to close their eyes and avoid what is directly in front of their face.

This Court correctly found this case was not one of the proverbial hen’s teeth requiring reversal for the failure to grant a continuance. Appellant could not provide any argument regarding what testimony an expert could provide, nor what benefit he would receive. Further, the bulk of the testimony he claimed he would have to rebut with an expert was only elicited by his counsel during cross-examination. As a result, he had

nothing to rebut with an expert and so was not prejudiced even if he was entitled to find one.

The State relies on its Final Brief of Respondent for any further discussion of the issue. The State asserts this Court completely and correctly addressed the issue and no rehearing is warranted. Accordingly, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for Rehearing be denied, and the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

A handwritten signature in black ink, appearing to read 'W. Blitch, Jr.', with a long horizontal flourish extending to the right.

WILLIAM M. BLITCH, JR.
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ATTORNEYS FOR RESPONDENT

April 20, 2016

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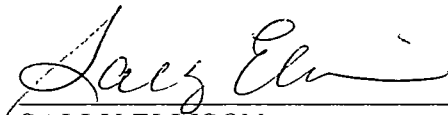
PROOF OF SERVICE

I, Sally Ellison, certify that I have served the Return to Petition for Rehearing on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

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

This 20th day of April, 2016.



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ALAN WILSON
ATTORNEY GENERAL

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VIA HAND DELIVERY

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Gerald Barrett
Appellate Case Tracking No. 2013-002158

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of a Return to Petition for Rehearing along with proof of service for filing in the above-referenced appeal.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General

Enclosures

cc: David Alexander, Esquire
Victim Services