STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5395 (S.C. Ct. App. filed 3/23/2016)

12-GS-07-001633

THE STATE,

RESPONDENT,

V.

GERALD BARRETT,

APPELLANT

APPELLATE CASE NO. 2013-002158

APPENDIX

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Gerald Barrett, Jr., Appellant.

Appellate Case No. 2013-002158

Appeal From Beaufort County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5395
Heard November 10, 2015 – Filed March 23, 2016

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton, for Respondent.

GEATHERS, J.: Gerald Barrett appeals his conviction for a lewd act upon a minor, arguing the trial court erred in (1) qualifying Kendra Twitty as an expert "mental health professional, specifically in the area of child sexual abuse characteristics," and (2) failing to grant a continuance for him to obtain an expert to dispute her testimony. We affirm.

FACTS/PROCEDURAL HISTORY

A grand jury indicted Barrett for criminal sexual conduct (CSC) with a minor, lewd act upon a minor, and kidnapping for acts he allegedly committed upon Victim. Barrett proceeded to trial and immediately before a Monday morning pretrial motions hearing, he moved for a continuance to obtain an expert in Child Sexual Assault Accommodation Syndrome, arguing the State did not disclose its intention to introduce evidence regarding Child Sexual Assault Accommodation Syndrome until the prior Thursday. The trial court denied the motion because Twitty was previously named as the forensic interviewer assigned to this case. Barrett also moved to prohibit the qualification of Twitty as an expert, use of the term "forensic interviewer," and Twitty's testimony in its entirety, arguing the testimony would amount to vouching or bolstering Victim's testimony. The trial court withheld ruling until after hearing testimony from Victim.

After Victim's testimony, outside the presence of the jury, the State sought to qualify Twitty as an "expert regarding the behavior of and trauma of child sexual abuse victims." The State offered to avoid using the term "Child Sexual Abuse Accommodation Syndrome" as it believed avoiding the term would alleviate any potential confusion by the jury. After additional arguments, the State explained it did not intend to offer her as an expert regarding the syndrome; instead, it sought to offer her as an expert "practitioner of mental health specifically dealing with children [victimized by] child sexual assault." Over Barrett's objection, the trial court ruled Twitty could discuss general behavioral evidence regarding delayed disclosure. The State noted it would first question Twitty regarding the *Kromah*[1] factors for Victim's forensic interview, and then it would seek to qualify Twitty as a mental health expert and offer her expert testimony.

In the presence of the jury, Twitty testified she was a forensic interviewer and counselor/therapist at a children's advocacy and rape crisis center. She described the forensic interview she conducted with Victim. She also summarized her education, training, and experience in the mental health field. The State sought to admit her as an expert "mental health professional working with victims of child sexual abuse and trauma." Barrett objected and proceeded to voir dire. Following voir dire, Barrett again objected to Twitty's qualification. Ultimately, the trial court qualified her as an expert "mental health professional, specifically in the area of child sexual abuse characteristics."

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[1] *State v. Kromah*, 401 S.C. 340, 360, 737 S.E.2d 490, 500–01 (2013) (outlining the parameters for testimony from forensic interviewers).

A jury found Barrett guilty of a lewd act upon a minor. The jury found Barrett not guilty of kidnapping and was unable to reach a unanimous decision as to the CSC with a minor charge. The trial court sentenced him to twelve years' imprisonment, suspended upon nine years' imprisonment and four years' probation. The trial court also subjected him to mandatory GPS monitoring, required him to complete a sexual offender treatment program, and placed him on the sex offender registry. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in qualifying an expert witness and admitting her testimony?

2. Did the trial court err in failing to grant a continuance?

LAW/ANALYSIS

I. Expert Witness

Barrett argues the trial court erred in qualifying Twitty as an expert mental health professional in the area of child sexual abuse characteristics and admitting her testimony. We disagree.

Initially, despite the State's contentions otherwise, we find the issue is preserved. During trial, immediately before Twitty's testimony, the State noted it would seek to qualify Twitty as a mental health expert after Twitty addressed the *Kromah* factors related to Victim's interview. Barrett clarified his understanding that the qualification "is only related to delayed disclosure." Thereafter, pursuant to the trial court's directive, Barrett objected to the proffered qualification, questioned Twitty during voir dire, and objected again. *See State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("[M]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced. However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection." (citation omitted)).

As to the merits, we find no reversible error. "The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "The

trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion." *Id.* "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Douglas*, 369 S.C. 424, 429–30, 632 S.E.2d 845, 848 (2006).

In support of his argument that the trial court erred in qualifying Twitty as an expert, Barrett relies on *State v. Brown*, 411 S.C. 332, 342, 768 S.E.2d 246, 251 (Ct. App.), *cert. denied*, (Aug. 6, 2015), and *State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015), for the proposition that trial courts are prohibited from qualifying a person as an expert mental health professional in the area of child abuse characteristics and admitting that individual's expert testimony if that individual also conducted the alleged victim's forensic interview.

In *State v. Brown*, this court held the State's expert testimony on child abuse dynamics and delayed disclosures was not inadmissible as being within the ordinary knowledge of the jury; and, the court further held the expert's specialized knowledge of behavioral characteristics of child sex abuse victims was relevant and crucial in assisting the jury's understanding of why children might delay disclosing sexual abuse. 411 S.C. at 341–42, 768 S.E.2d at 251. Although the *Brown* court held the expert's testimony was properly admitted, the court distinguished improper bolstering in cases involving experts who themselves conducted the forensic interview from cases involving independent mental health experts who addressed general behavioral characteristics. *Id.* at 343–45, 768 S.E.2d at 252–53.

After *Brown*, our supreme court addressed this issue in *Anderson*, 413 S.C. at 218, 776 S.E.2d at 79. In *Anderson*, during an *in camera* hearing prior to trial, the trial court found the witness to be an expert in forensic interviewing. *Id.* However, when the State called the witness at trial, after reviewing her expert qualifications, the State offered the witness as "'an expert in forensic interviewing *and* child abuse assessment.'" *Id.* (emphasis added). Over Anderson's objection, the trial court found the qualification was "'as a forensic interviewer in child abuse assessment.'" *Id.* Anderson renewed his objection, arguing there had been no previous determination that the witness possessed expertise in child abuse assessment. *Id.* The trial court refused to hold a hearing to determine the existence of this expertise and whether the witness held the necessary qualifications. *Id.* The *Anderson* court held the trial court erred in qualifying the witness as an expert in "'child abuse assessment'" and as an expert in forensic interviewing. *Id.* at 218–19, 776 S.E.2d at 79. The court held the trial court erred in qualifying the witness as an expert in child abuse assessment because of its failure to hold a hearing on

the existence of this expertise and determine whether the witness possessed the necessary qualifications. *Id.* at 218, 776 S.E.2d at 79.

Further, our supreme court noted a trial court *may* qualify a person as a child abuse assessment expert, stating, "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." *Id.* at 218, 776 S.E.2d at 79 (citing *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993), *State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999), and *State v. White*, 361 S.C. 407, 605 S.E.2d 540 (2004)). Yet, the *Anderson* court went on to caution:

> The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims *runs the risk* that the expert will vouch for the alleged victim's credibility.

Id. at 218–19, 776 S.E.2d at 79 (emphasis added).

Under the specific facts of this case, we affirm as we find no error in Twitty's qualification as an expert mental health professional, the testimony she offered regarding general behavioral characteristics was admissible, and she did not improperly vouch for Victim's credibility. *Cf. Anderson*, 413 S.C. at 218–19, 776 S.E.2d at 79 (holding the trial court's refusal to determine the forensic interviewer's qualification as a child abuse assessment expert was patent error and the appellant suffered prejudice as the result of the expert vouching for the alleged victim's credibility).

We note that although the *Anderson* court offered cautionary advice, it did not prohibit outright the practice of qualifying the forensic interviewer who conducted the alleged victim's forensic interview as an expert in child abuse assessment. Barrett would have this court issue a blanket rule prohibiting trial courts from qualifying forensic interviewers as expert mental health professionals related to child abuse characteristics *solely* because the interviewer also conducted the forensic interview in the case. However, the *Anderson* court did not issue such a prohibition.

Furthermore, the present case differs significantly from *Anderson*. In *Anderson*, the witness was qualified as an expert in forensic interviewing and child abuse assessment. Here, even though Twitty conducted Victim's forensic

interview, she was not qualified as both an expert forensic interviewer and expert mental health professional. Whereas in *Anderson*, the trial court refused to hold a hearing to determine whether the witness held the necessary qualifications; here, the trial court properly found Twitty met the necessary qualifications to offer expertise in the area of behavioral characteristics displayed by child abuse victims. Twitty testified she was a licensed professional counselor, with a master's degree in clinical psychology. She stated most of her training included working specifically with children in situations where there were allegations of abuse. She attended training seminars and education courses regarding sexual abuse and worked on multiple cases involving sexually abused children.

Finally, unlike in *Anderson*, we find Twitty's testimony did not vouch for Victim's veracity or improperly bolster her testimony. The assessment of witness credibility is within the exclusive province of the jury. *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977). Therefore, witnesses are generally not allowed to testify whether another witness is telling the truth. *See Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (stating it is improper for a solicitor to ask a defendant "to comment on the truthfulness or explain the testimony of an adverse witness" and "the defendant is in effect being pitted against the adverse witness"). Similarly, witnesses may not improperly bolster the testimony of other witnesses. *See Smith v. State*, 386 S.C. 562, 564, 569, 689 S.E.2d 629, 631, 633 (2010) (stating a forensic interviewer's opinion that she found the victim's statement believable "improperly bolstered the [v]ictim's credibility"). "For an expert to comment on the veracity of a child's accusations of sexual abuse is improper." *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011).

In *Kromah*, our supreme court held forensic interviewers should avoid (1) stating the child was told to be truthful; (2) providing a direct opinion as to the child's veracity or tendency to tell the truth; (3) indirectly vouching for the child's believability, such as stating the interviewer has made a compelling finding of abuse; (4) suggesting the interviewer believes the child's allegations; or (5) opining the child's behavior indicated the child was telling the truth. 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013). Further, the *Kromah* court held forensic interviewers may testify regarding, among other things, the following: (1) the time, date, and circumstances of the interview; (2) any personal observations regarding the child's behavior or demeanor; or (3) a statement as to events that occurred within the personal knowledge of the interviewer." *Id.*

Barrett argues Twitty's testimony circumvented the mandates outlined in *Kromah*. We disagree. Although Twitty conducted Victim's forensic interview, she was not qualified as an expert forensic interviewer and her testimony fell

within the parameters of *Kromah*. Regarding the forensic interview Twitty conducted, she testified as to the date, time, and place of the interview and her personal observations of Victim's demeanor. In fact, Twitty never directly or indirectly commented on the credibility of Victim's accounts of the alleged sexual assault. Moreover, she never addressed the veracity of Victim or opined whether Victim was being truthful.[2] Conversely, on cross-examination, Twitty admitted children lie, she could not give a diagnosis, and she was "certainly not a human lie detector." She elaborated that the focus of her interview was to assess overall child safety and she was "not going in there looking for fact details to prove or not prove child sexual abuse."

Importantly, Twitty did not limit her testimony to explaining the exact behavioral characteristics Victim exhibited. *Cf. Anderson*, 413 S.C. at 219, 776 S.E.2d at 79 (holding the forensic interviewer "vouched for the minor when she testified only to those characteristics [that] she observed in the minor"). Although Twitty explained some of the behavioral patterns Victim exhibited—i.e., delayed reporting and sequence of reporting to peers before adults—she also explained additional characteristics that Victim did not display.

Moreover, we disagree with Barrett's argument that Twitty's expert testimony regarding general behavioral characteristics of sexually abused children was irrelevant and inadmissible. Twitty's expert testimony as a mental health professional was in line with our current jurisprudence. *See Schumpert*, 312 S.C. at 506, 435 S.E.2d at 862 ("[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect."); *State v. White*,

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[2] *See State v. Douglas*, 380 S.C. 499, 503–04, 671 S.E.2d 606, 609 (2009) (finding a forensic interviewer did not vouch for the victim's veracity where she never stated she believed the victim and gave no other indication concerning the victim's veracity); *Brown*, 411 S.C. at 344, 768 S.E.2d at 252 (finding the case distinguishable from other cases involving forensic interviewers because the expert never commented about the credibility of the victims' allegations or testimony, nor did she make any of the statements prohibited in *Kromah*); *cf. State v. McKerley*, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (Ct. App. 2012) (holding the forensic interviewer's general testimony indicated belief in the victim's truthfulness and was thus inadmissible); *Smith*, 386 S.C. at 564, 569, 689 S.E.2d at 631, 633 (finding the forensic interviewer's opinion testimony that she believed the victim improperly bolstered the victim's credibility).

361 S.C. 407, 414–15, 605 S.E.2d 540, 544 (2004) ("Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior.").[3]

Accordingly, although the more prudent practice would have been to call an independent mental health professional in lieu of the forensic interviewer to discuss general behavioral characteristics, the trial court did not err in qualifying Twitty and admitting her testimony.

II. Motion for Continuance

Barrett argues the trial court erred in failing to grant a continuance to allow him to obtain an expert witness to counter Twitty's testimony. We disagree.

"The denial of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion resulting in prejudice." *State v. Meggett*, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *Id.*

> When a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case[,] its denial by the trial court has rarely been disturbed on appeal. It is axiomatic that determination of such motions must depend upon the particular facts and circumstances of each case.

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[3] *See also Weaverling*, 337 S.C. at 474–75, 523 S.E.2d at 794 ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible. Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor." (citations omitted)); *Brown*, 411 S.C. at 341–42, 768 S.E.2d at 251 (finding the expert's "specialized knowledge of the behavioral characteristics of child sex abuse victims was relevant and crucial in assisting the jury's understanding of why children might delay disclosing sexual abuse, as well as why their recollections may become clearer each time they discuss the instances of abuse").

Id. (quoting *State v. Babb*, 299 S.C. 451, 454–55, 385 S.E.2d 827, 829 (1989)).

In *State v. Nicholson*, 366 S.C. 568, 579, 623 S.E.2d 100, 105 (Ct. App. 2005), Nicholson argued the trial court erred in refusing to grant his motion to suppress the testimony of an expert witness offered by the State or, in the alternative, to grant a continuance so he could obtain his own expert on the subject. The witness was called to testify about the general characteristics of a sexually abused victim, and Nicholson argued the notice he received was too close in time to the trial for him to prepare an adequate defense. *Id.* This court held:

> The State, however, is not required to provide its witness list to a criminal defendant, and the disclosure in the present case of this witness to the defense before trial was nothing more than a professional courtesy. We therefore hold that the trial [court] properly declined to suppress the expert testimony and acted within [its] discretion in refusing to continue the case.

Id. at 579, 623 S.E.2d at 105–06 (footnotes omitted).

Here, Barrett argues he needed additional time to secure an expert to combat Twitty's testimony regarding Child Sexual Assault Accommodation Syndrome. However, Twitty stated she was not an expert on that topic and preferred not to testify on the subject. The *only* time in which the theory was discussed in front of the jury was when Barrett initiated the topic during recross-examination. Although Twitty discussed delayed disclosure and recantation, those are only two factors in the stages of behavior associated with the syndrome. Prior case law is clear that the topic of general behavioral characteristics of sexually abused children could arise in a CSC case with a minor. *See Weaverling*, 337 S.C. at 474, 523 S.E.2d at 794 (discussing the appellant's argument regarding similar expert testimony and stating "[e]xpert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible"). Therefore, Barrett was on notice that the trial might include testimony regarding general behavioral characteristics of sexually abused minors. Accordingly, the trial court did not abuse its discretion in declining to grant a continuance. *See Nicholson*, 366 S.C. at 579, 623 S.E.2d at 105–06 (holding the trial court acted within its discretion in declining to grant a continuance).

CONCLUSION

Based on the foregoing, we affirm.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

GERALD BARRETT,

APPELLANT

APPELLATE CASE NO. 2013-002158

Appeal from Beaufort County

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5395

PETITION FOR REHEARING

Appellant asks this Court to re-examine its opinion in this case and grant rehearing on both issues. Respectfully, the Court's opinion overlooks key points that necessitate reversal of appellant's conviction. As to Issue 1, the Court errs in distinguishing State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015). As to Issue 2, the Court, should correct the portion of its opinion that would allow solicitors to argue that appellate decisions—and not discovery—provide criminal defendants with notice of the State's expert witnesses. This portion of the opinion has the potential to allow rampant discovery abuse by solicitors.

Issue 1

Anderson controls the result in this case. A comparison of this case to Anderson shows no significant difference and, respectfully, this Court erred in distinguishing Anderson. In both Anderson and this case, the expert conducted a forensic interview of the complainant. In both Anderson and this case, the former forensic interviewer was given a different name by the solicitor to avoid the Supreme Court's decision in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). In Anderson, the new name for the forensic interviewer was an expert in "child abuse assessment." Here, the forensic interviewer was renamed an expert in "child sexual abuse characteristics and behavior." In both Anderson and this case, the renamed forensic interviewers bolstered the complainant's testimony by mirroring the allegations of abuse.

This Court acknowledges the Supreme Court's statement in Anderson that a forensic interviewer who met with the child should not be qualified as an expert, but interprets this language as merely advisory. The Anderson Court stated that to "allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will couch for the alleged victim's credibility." Id. at 218-19, 776 S.E.2d at 79. The Court stated that the forensic interviewer in Anderson "vouched for the minor when she testified only to those characteristics which she observed in the minor." Id.

The risk of improper vouching recognized in Anderson was also fully realized in appellant's case. The forensic interviewer tailored her testimony regarding delayed disclosure to fit the facts of this case. She testified that children usually "never tell" and an adult usually finds out by accident, which matched Minor's claims that she had to tell her step-grandmother because her sister told. R. 144, ll. 8 – 9. R. 145, ll. 2 – 19. R. 111, ll. 22 – 25. Twitty's testimony was tailored to match Minor's testimony that children usually tell peers, as Minor testified she told her friends and

boyfriend before her step-grandmother discovered the allegations from the sister. R. 110, l. 24 – 111, l. 21. R. 145, ll. 2 – 19. The fact that Twitty testified about characteristics that matched Minor's allegations—especially after the jury learned that she had conducted a forensic interview of Minor—could only be offered to show that Twitty believed Minor's allegations. One of Twitty's first statements to the jury was that she worked with children who "**have been** sexually abused." R. 134, l. 20 – 135, l. 4 (emphasis added). The clear inference was that Twitty believed Minor had been abused.

Furthermore, Twitty's testimony was unreliable. State v. White, 382 S.C. 265, 272-273, 676 S.E.2d 684, 687-688 (2009). Twitty's list of abuse characteristics is vague and unscientific. No research or tests were cited for these characteristics and the forensic interviewer admitted that "some" children might exhibit a combination of the characteristics. R. 40, l. 21 – 41, l. 4. Further compounding the unscientific and illogical aspect of this purported syndrome, Twitty opined that children who were abused would either behave poorly or "over excel." R. 41, ll. 5 – 14. It seems that a "syndrome" that can be diagnosed by a sufferer having completely opposite symptoms is of little probative or descriptive value. If a medical doctor gives a test to a patient for tuberculosis, one result reveals that the patient has it and the other result reveals the patient does not. But in the case of Twitty's syndrome, no matter the result of the test, the victim could have been abused. This "syndrome" is not science, it was not relevant, it was not the proper subject for expert testimony, and it was not admissible.

Issue 2

If the Court is correct in its holding in Issue 1, then it cannot be correct in holding that appellant was not prejudiced by the failure to grant a continuance. If Twitty's testimony is somehow different than the inadmissible testimony barred by Kromah and is the subject of reliable expert testimony that passes the White gatekeeping test, then it follows that the defense also needs an expert to rebut such testimony. Appellant relied on Kromah to **bar** Twitty's testimony and filed a motion to exclude her testimony the Wednesday before trial. R. 327. The next day, the State "dropped off" a "packet of information" at defense counsel's office renaming the forensic interviewer as an expert in "Child Sexual Assault Accommodation Syndrome." R. 6, l. 3 – 7, l. 2.

Failing to present expert testimony in response to the State's case prejudices a criminal defendant and the court should have granted a continuance in this matter. In McKnight v. State, 378 S.C. 33, 43-44, 661 S.E.2d 354, 359 (2008), the defendant received a new trial in part because he was prejudiced by counsel's failure to seek a continuance to secure a favorable expert's testimony. If this Court's decision stands, then defense counsel was ineffective for not anticipating that an expert witness would offer testimony on child abuse characteristics even though she filed a motion to have such testimony excluded under Kromah.

Even if the Court does not grant rehearing and reverse on this issue, it should delete from its opinion the portions indicating that a criminal defendant may be on notice of the State's expert witnesses merely through appellate decisions. These portions of the opinion have the potential to allow rampant discovery abuse by solicitors. This Court should not allow its decisions to be used by the State to promote trial by ambush. Our state's discovery rules and the requirements of Brady v. Maryland, 373 U.S. 83 (1963) "each has the same goal of ensuring the criminal defendant's right to a fair trial." State v. Kennerly, 331 S.C. 442, 454, 503 S.E.2d 214, 220 (Ct. App. 1998). Rule 5

requires disclosure, upon request by the defense, expert reports which are material to the preparation of the defense or intended to be used by the State at trial. S.C. R. Crim. P. 5(a)(1)(D).

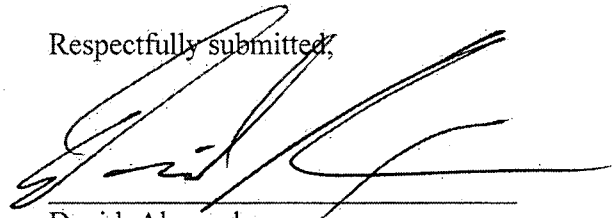
Discovery protections for criminal defendants in this State remain at the barest minimum. Civil defendants can use interrogatories, requests for production, requests for admissions, and depositions to ensure a fair trial. S.C. R. Civ. P. 26, 30, 33, 34, 36. Civil lawyers may also issue their own subpoenas. S.C.R. Civ. P. 45(a)(3). Criminal defense attorneys lack access to any of these tools. In federal prosecutions, the government has a duty to disclose expert witnesses. Fed. R. Crim. P. 16(a)(1)(G). Upon a defendant's request, the government must "give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial." Fed. R. Crim. P. 16(a)(1)(G). In Brady, the Court stated that the aim of due process is "avoidance of an unfair trial to the accused." Brady, 373 U.S. at 87. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Id. See also S.C. Const Art. I, § 3 (South Carolina due process clause). Refusing to grant a continuance in this case deprived appellant of due process and was an abuse of discretion.

Allowing these portions of the opinion to remain will only embolden prosecutors to ambush the defense with late disclosures of experts. As a practical matter, solicitors still retain control of when cases are called for trial. See State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012). Combined with this power, this language in the Court's opinion will promote the denial of notice and time to prepare for defendants. The Court should, at a minimum, modify its opinion to prevent sanctioning future discovery abuse.

Conclusion

For the foregoing reasons, the Court should grant rehearing on both issues with the ultimate relief of reversing appellant's conviction and granting him a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

This 5th day of April, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GERALD BARRETT,

APPELLANT

APPELLATE CASE NO. 2013-002158

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Gerald Barrett, #334201, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 5th day of April, 2016.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 5th day
of April, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.

STATE OF SOUTH CAROLINA

IN THE 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

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

April 20, 2016

STATE OF SOUTH CAROLINA

IN THE 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.

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.

SALLY ELLISON
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

The South Carolina Court of Appeals

The State, Respondent,

v.

Gerald Barrett, Jr., Appellant.

Appellate Case No. 2013-002158

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul G. Short, Jr. J.

John D. Geathers J.

James E. Lockemy J.

Columbia, South Carolina

cc: Alan McCrory Wilson, Esquire
David Alexander, Esquire
William M. Blitch, Jr., Esquire
Isaac McDuffie Stone, III, Esquire

FILED
May 20, 2016