

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Beaufort County
Hon. Kristi Lea Harrington, Circuit Court Judge
Appellate Case Tracking No. 2016-001306

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SC SUPREME COURT

The State,

Respondent,

v.

Gerald Barrett,

Petitioner.

Opinion No. 5395 (S.C. Ct. App. filed March 23, 2016)

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals correctly affirmed the trial court's decision allowing the State's witness to testify as an expert and correctly found the testimony did not impermissibly bolster the child victim. Further, the issue as raised is not preserved for review.

II. The Court of Appeals correctly affirmed the trial court's decision to deny Petitioner's motion for a continuance.

STATEMENT OF THE CASE

The State agrees with Petitioner's procedural Statement of the Case.

ARGUMENT

- I. The Court of Appeals correctly affirmed the trial court's decision allowing the State's witness to testify as an expert and correctly found the testimony did not impermissibly bolster the child victim. Further, the issue as raised is not preserved for review.**

The Court of Appeals correctly found the State's witness was qualified as an expert in "child sexual abuse characteristics and behavior" and that the qualification was not in contravention of this Court's decision in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). Further, the testimony did not violate the holding of State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015). Finally, the Court of Appeals should have found the issue was not preserved for review on appeal and the issue raised in the Petition for Certiorari is different than the issue raised to the trial court.

Preservation

Any issue related to the substance of the expert's testimony is not preserved for review on appeal. Prior to trial, Petitioner objected to the State's witness being qualified as an expert. The expert proffered testimony during which many discussions were had between counsel and the court regarding her testimony and its validity. However, this was pre-trial and the trial court reserved any final ruling. (T.138; R. 50). The trial court specifically limited the expert's testimony based on the discussions with counsel and so any testimony which counsel believed went beyond that allowed required an objection. (R.131). Additionally, immediately before the expert's testimony, the trial court reminded counsel of the need to object to any testimony to protect the record. (T.233; R. 133). When the State's expert did testify, Petitioner never raised a single objection to her testimony. (T.244-248; R. 144-148). It was incumbent on Petitioner to raise an objection when the actual testimony was presented to the jury and to raise any specific

issues related to that testimony he wished to preserve for review on appeal. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (“In most cases, ‘[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.’”); State v. Kirton, 381 S.C. 7, 43, 671 S.E.2d 107, 125 (Ct. App. 2008) (same). As a result, no issue related to the expert’s actual testimony is preserved for review on appeal.

Further, in his brief to the Court of Appeals, Petitioner challenged the testimony and qualification on the basis that it was a means of getting around this Court’s decision in Kromah and was improper bolstering. Now he contends the testimony impermissibly violates the decision in Anderson by allowing one person to testify as both forensic interviewer and expert in child abuse characteristics. This argument was not raised until the oral argument and petition for rehearing and should not be a basis for review.

Merits

On the merits, the expert was properly qualified and properly allowed to testify regarding delayed disclosure. First, Petitioner contends the trial court improperly qualified the State’s expert because she served as forensic interviewer. Petitioner also 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 admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). A court’s ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal

error, which results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004).

Qualification of a witness as an expert and the subsequent admission of that witness's testimony are matters within the sound discretion of the trial court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

While Kromah specifically found a person cannot be qualified as an expert in forensic interviewing, the case did not preclude a person from being qualified in another area solely because that person also acted as a forensic interviewer. See Kromah, 401 S.C. at 357 n.5, 737 S.E.2d at 499 n.5. The case dealt solely with testimony regarding the interview of a child abuse victim by a forensic interviewer. It did not involve any testimony regarding behavioral characteristics of victims of trauma such as sexual abuse, nor did it relate to any other testimony an expert may give on a subject outside of forensic interviewing.

Following Kromah, this Court issued its opinion in Anderson, finding the "better practice" was for the State to use someone other than the forensic interviewer as their expert witness to discuss delayed disclosure and other characteristics of child sexual abuse. Again, this Court did not bar the use of the same individual, but reiterated the requirements that the testimony of the expert cannot be used to impermissibly bolster the victim by essentially testifying to the same thing as the minor victim.

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. It was the failure of the court to conduct a proper hearing to determine the witness's qualification and then the specific tailoring of the expert's testimony to match the victim's testimony, thereby impermissibly bolstering the victim's testimony in Anderson that were grounds for reversal. Neither is present in this case.¹

The Court of Appeals correctly found the trial court did not err in qualifying the State's witness as an expert, allowing her to testify pursuant to the requirements of Kromah as a forensic interviewer—not as an expert, and in allowing her to testify as an expert regarding characteristics and behaviors of a child sexual abuse victim. The Court of Appeals properly distinguished this Court's holding in Anderson from the facts of this case. This Court should deny the Petition for Writ of Certiorari as to Question I.

¹ The State believes it is telling that Petitioner complains for many more pages regarding testimony which was admitted only in a proffer of the expert's testimony and appears nowhere in the Record before the jury than he does the testimony that actually was admitted before the jury—testimony admitted entirely without objection by Petitioner at the time it was given.

II. The Court of Appeals correctly affirmed the trial court's decision to deny Petitioner's motion for a continuance.

The Court of Appeals correctly found no error in the trial court's decision to deny Petitioner's motion for a continuance. The Court of Appeals correctly found the State was not required to turn over the information prior to trial and that Petitioner's counsel should have been well aware of the possible expert testimony being presented at trial by the State.

First, there is no right to discovery in a criminal trial in South Carolina beyond what is provided by statute, case law, or court rule. See State v. Miller, 289 S.C. 316, 317, 345 S.E.2d 489, 490 (1986); State v. Flood, 257 S.C. 141, 184 S.E.2d 549 (1971) (holding there is no general discovery in criminal cases in South Carolina). Further, there is no requirement either side turn over a general witness to the other side prior to trial. See Miller, 289 S.C. at 317, S.E.2d at 490 (interpreting prior Circuit Court Rule 103, now Rule 5, SCRCrimP, and finding a defendant cannot be required to turn over a witness list prior to trial); State v. Nicholson, 366 S.C. 568, 579, 623 S.E.2d 100, 105 (Ct. App. 2005) (finding "The State, however, is not required to provide its witness list to a criminal defendant").

Additionally, "[i]n South Carolina '[t]he grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record.'" State v. Hill, 409 S.C. 50, 59, 760 S.E.2d 802, 807 (2014) (quoting Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007)). As this Court has stated: "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (citing State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)).

The Nicholson case is directly on point with the facts of this case and this Court should uphold both its reasoning and conclusion. In Nicholson, the State intended to call an expert to testify about the general characteristics of a sex abuse victim. Nicholson, 366 S.C. at 579, 623 S.E.2d at 105. The State provided notice of the expert to the defendant, but the defendant requested a continuance claiming the notice was too close in time to trial for him to fully prepare his defense. Id. The Court of Appeals found the trial court acted within its discretion in denying the motion for a continuance, finding the notice provided to the defendant was a “professional courtesy” because not witness list is required to be provided. Id. at 579, 623 S.E.2d at 105-106. The same holding should apply in this case in which a professional courtesy was extended but not required, and the trial court clearly did not abuse its discretion in denying Petitioner’s motion for a continuance when he failed to provide even the name of the person he sought to hire but was unable to in the time allowed.

Further, the two cases cited by Petitioner are clearly inapposite to the case at hand. In McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008), the case was heard as a post-conviction relief case and not on direct appeal. At trial, counsel for petitioner called an expert who had testified at the first trial of McKnight favorably for the State, instead of finding and calling an expert who would be more favorable to the petitioner. Id. at 43-44, 661 S.E.2d at 359. The Court found counsel should have requested a continuance to find a more suitable expert. Id. at 45, 661 S.E.2d at 360. The situation addressed in McKnight is completely different given the level of knowledge McKnight’s counsel had going into the second trial as well as the fact he called an expert who he already knew to be more favorable to the State. Here, counsel **speculated** as to the type of testimony he might could find from an expert, presented no names of persons he

could call as an expert, and merely complained about notice of which he was not entitled in the first place.

Petitioner's second case is McMillian in which the Supreme Court found the entire case hinged on the testimony of a single witness who testified previously in McMillian's first trial. McMillian, 349 S.C. at 21-22, 561 S.E.2d at 604. Counsel requested a continuance to obtain a transcript to impeach the sole neutral witness. Id. The continuance was denied and the Court found error because it found the ability to impeach the witness to be of the utmost importance in that case. Id. at 22-23, 561 S.E.2d at 605. Unlike this case, counsel knew going into the second trial the importance of the testimony and the need for the transcript. In the instant case, as discussed above, counsel merely **speculated** regarding the need for an expert and there is no showing a countering expert would have had a significant difference on the outcome of the trial even if Petitioner had located one to testify.

Petitioner, instead of trying to distinguish the one case directly on point in Nicholson, 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 the Court of Appeals' 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. Petitioner'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.

The Court of Appeals correctly found this case was not one of the proverbial hen's teeth requiring reversal for the failure to grant a continuance. Petitioner 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 Court of Appeals correctly affirmed the decision of the trial court denying Petitioner's motion for a continuance. This Court should deny the Petition for Writ of Certiorari as to Question II.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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August 8, 2016

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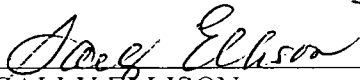
Petitioner.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the 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
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I further certify that all parties required by Rule to be served have been served.
This 8th day of August, 2016.


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