ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

AUG 04 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ROY L. JONES,

APPELLANT.

APPELLATE CASE NO. 2014-001639

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

Opinion No. 5428

PETITION FOR REHEARING

On July 20, 2016, this Court affirmed Appellant's convictions for one count of first degree criminal sexual conduct (CSC) with a minor, one count second degree CSC with a minor, and two counts of lewd act upon a child. State v. Jones, Op. No. 5428 (S.C. Ct. App. Filed July 20, 2016). Pursuant to Rule 221(a), SCACR, Appellant respectfully petitions this Court for rehearing in light of the significant points overlooked and misapprehended by this Court.

Although Galloway-Williams was qualified as an expert in "child sex abuse dynamics," the law governing forensic interviewing is applicable here. There is simply no field of study regarding "child sex abuse dynamics" and the *real job* of Galloway-Williams is to conduct

forensic interviews. Although the solicitor tried to take her testimony outside the ambit of forensic interviewing by creating a fictitious area of expertise, Galloway-Williams is simply a forensic interviewer as revealed through her testimony and our state's case law.

In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the South Carolina Supreme Court proclaimed: "[W]e state today that we can envision no circumstance where [a forensic interviewer's] qualification as an expert at trial would be appropriate." Id. at 357, n.5, 737 S.E.2d at 499 n.5. Moreover, in State v. Douglas, 380 S.C. 499, 502-503, 671 S.E.2d 606, 608 (2009), our Supreme Court held the trial court erred in qualifying a forensic interviewer as an expert because the testimony simply did not require expert qualification.

In Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), the Supreme Court specified the following three-prong test that must be considered by the trial judge before allowing the jury to hear expert testimony:

> First, **the trial court must find that the subject matter is beyond the ordinary knowledge of the jury**, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, **the trial court must evaluate the substance of the testimony and determine whether it is reliable.**

Id. at 446, 699 S.E.2d at 175 (emphasis added).

Galloway-Williams's testimony, which focused on delayed disclosure and the response of a non-offending caregiver, was not beyond the ordinary knowledge of the jury. The reason that it is unnecessary to qualify a forensic interviewer as an expert or to qualify someone as an expert in the fictitious field of "child sex abuse dynamics" is because the information imparted by such a witness is within the jury's knowledge. Even without having any direct or indirect experience with the circumstances surrounding sexual abuse, a juror can understand that a victim

of sexual abuse may not disclose immediately for a variety of reasons. Likewise, a juror can understand why a non-offending caregiver may not act immediately to protect a child from sexual abuse. The jury did not need expert testimony to explain this subject matter as it did not involve scientific, technical, or other specialized knowledge. See Rule 702, SCRE.

This Court must have overlooked Older Sister and Younger Sister's testimony which provided an explanation as to why the now adult women delayed in disclosing and what eventually led each to disclose. For example, Older Sister and Younger Sister both claimed Appellant made repeated threats and told them no one would believe them if they told. Younger Sister also said she was afraid she would be taken away from her mother if she disclosed.

Furthermore, Mother explained why she reacted the way she did when her daughters disclosed to her. Specifically, Mother stressed her disbelief in the truth of the allegations, her love for Appellant, and her fear of losing custody of her children to the Department of Social Services if the allegations surfaced.

Older Sister, Younger Sister, and Mother had explained their thoughts and actions to the jury. Expert testimony was not required for the jury to understand why the women delayed in disclosing and why Mother responded the way she did. Again these subjects did not involve scientific, technical, or other specialized knowledge, and the jury was capable of deciding whether it believed the women's explanations for why they delayed in reporting their allegations and Mother's reasons for failing to immediately act. Galloway-Williams' testimony as an "expert" was simply not needed, and it was improper bolstering.

Turning to the third prong of the Watson test, the state failed to show Galloway-Williams' testimony was reliable. Recently, in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), our Supreme Court held that State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) should apply in

qualifying child abuse assessment experts because their testimony is non-scientific. "Under White, two threshold determinations must be made. First, the qualifications of the expert must be sufficient, and second, there must be a determination that the expert's testimony will be reliable." Chavis, 412 S.C. at 106-107, 771 S.E.2d at 339 (citing White, 382 S.C. at 273, 676 S.E.2d at 688). The Supreme Court held the trial court improperly qualified the child abuse assessment "expert" in Chavis because there was no evidence that her conclusions or impressions taken from the forensic interviews she conducted were accurate and her only peer review was another interviewer reviewing her work to ensure she was using the RATAC protocol. Id. at 108, 771 S.E.2d at 339. The Court further noted that although there is "no formulaic approach for determining the foundational requirements of qualification and reliability in non-scientific evidence," "*evidence of mere procedural consistency does not ensure reliability* without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies." Id. (emphasis added).

Like the "expert" in Chavis, there was no evidence that Galloway-Williams' conclusions and claims were accurate or reliable. She testified about her experience and research, but provided no specific information about what the research consisted of, whether it involved peer-reviewed studies, or whether the underlying research had been found to be reliable.

As defense counsel pointed out, Galloway-Williams could not identify or name a single study that supported her conclusions or opinions nor did she state whether any of the articles, publications, or studies she relied on had been peer reviewed. This Court apparently found the fact that Galloway-Williams named a publication, Child Maltreatment, which she explained is a textbook that discusses delayed disclosure and the response of non-offending caregivers, as evidence of her *individual* reliability. Appellant fails to see how her ability to name a textbook is

evidence that her opinions and conclusions are reliable. Galloway-Williams maintained that this textbook references articles about delayed disclosure and non-offending caregivers, but she never named these articles, stated whether they had been found to be reliable, nor indicted whether the articles had been peer reviewed.

Because there was no evidence of the reliability of Galloway-Williams' conclusions and opinions, this Court should have held the trial court failed to properly execute its gatekeeping function by qualifying her as an expert in "child sex abuse dynamics."

The **only** purpose of Galloway-Williams' testimony was to improperly bolster Older Sister and Younger Sister's testimony. See Kromah, 401 S.C. at 358, 737 S.E.2d at 499 ("It is undeniable that the primary purpose for calling a 'forensic interviewer' as a witness is to lend credibility to the victim's allegations."). This Court held in State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012), that it is improper for a witness to bolster the testimony of other witnesses. See Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (finding a "forensic interviewer's . . . opinion testimony improperly bolstered the Victim's credibility").

In McKerley, the trial court allowed a witness to testify as an expert in "forensic interviewing and child abuse assessment." 397 S.C at 463, 725 S.E.2d at 141. The "expert" had interviewed the alleged victim twice and concluded that both interviews were compelling for sexual abuse. She also determined that the victim's statements were consistent with other information she had received about the case. Id. at 466, 725 S.E.2d at 142. This Court determined there was no other way to interpret the language used in the expert's testimony other than to mean she believed the victim was being truthful. It further held, "In light of [the expert's] extensive inadmissible testimony bolstering the credibility of the victim . . . we cannot

say the erroneous admission of [the expert's] testimony did not contribute to the jury's decision," therefore finding harmful error. Id. at 467, 725 S.E.2d at 143.

Our Supreme Court has also held that it is improper "for an expert to comment on the veracity of a child's accusations of sexual abuse." State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); see State v. Dawkins, 297 S.C. 386, 393-394, 377 S.E.2d 298, 302 (1989) (holding therapist indicating he believed victim's allegations were genuine was improper); see also State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000) (holding therapist's testimony children were being truthful in ninety-five percent of instances in which sexual abuse was alleged was improper vouching for child); see also Kromah, 401 S.C. 340, 737 S.E.2d 490 (holding testimony by forensic interviewer of victim that victim had given a "compelling finding" of child abuse was inadmissible).

In Jennings, Shauna Galloway-Williams, the same witness at issue in this case, interviewed the three alleged victims of sexual abuse and issued a separate report for each child that was admitted into evidence. She concluded in her reports that each child provided a compelling disclosure of abuse by the defendant and that the children provided details that were consistent with the background information received from their mother, the police report, and the other children. 394 S.C. at 476-481, 716 S.E.2d at 92-95. Our Supreme Court held that the conclusions in the reports improperly vouched for the children's veracity and, thus, the trial court abused its discretion by admitting the reports into evidence. It further held the error was not harmless because there was no physical evidence presented at trial and, therefore, the children's credibility was the sole issue in the case. Id. at 94-95, 716 S.E.2d at 480.

It is clear from the record that the state in this case attempted to circumvent recent case law by presenting a witness who had not met with Older Sister and Younger Sister, but who was

familiar with the case, and presumably the women's testimony and specific allegations, as a result of discussions with the solicitor's office. While Galloway-Williams did not meet with the Older Sister and Younger Sister, the state still used her to **indirectly comment on their credibility** and provide greater weight to their testimony.

Galloway-Williams' testimony was very likely interpreted by the jury to express that they should believe Older Sister and Younger Sister because their behavior is typical, expected, and complies with the behavior of the majority of other victims of sexual abuse. Her testimony strongly implied that because the women acted in the same manner as other victims of sexual abuse they must be telling the truth. Therefore, qualifying her as an expert and allowing her to testify was error for "[t]he assessment of witness credibility is within the exclusive province of the jury." McKerley, 397 S.C. at 464, 725 S.E.2d at 141 (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)).

Not only was Galloway-Williams' testimony used to bolster the complainants' testimony, it was also highly prejudicial to Appellant and cumulative. Under Rule 403, SCRE, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." Because Older Sister and Younger Sister had already testified as to why they disclosed when they did and what caused them to disclose, among other details, Galloway-Williams' testimony was merely cumulative. It was used solely by the state to reinforce and reiterate the reasoning for the women's actions and behavior. See Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) ("Improper 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.") (emphasis in original).

Galloway-Williams' testimony was also prejudicial to Appellant because there was no physical evidence presented in the case and the sole issue was the credibility of Older Sister, Younger Sister, and their mother. Because the witnesses' credibility was the most critical determination of this case and Galloway-Williams' testimony was used solely to bolster their credibility, Appellant was clearly prejudiced and should be granted a new trial. See Jennings, 394 S.C. at 480, 716 S.E.2d at 94-95 ("Because the children's credibility was the most critical determination of this case, we find the admissibility of the [forensic interviewer's] written reports was not harmless.").

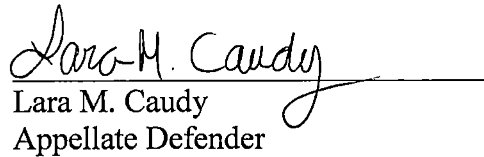
Respectfully, Appellant also urges this Court to reconsider its decision in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), as it applies to this case. Brown, which this Court relied on heavily when rendering its opinion in this case, reads Kromah too narrowly. The intent of Kromah and the line of cases that preceded it was to limit opinions vouching for the credibility of witnesses. The state has simply renamed forensic interviewers as experts in spurious fields like "dynamics of child sexual abuse." This testimony does not aid the trier of fact, but instead it invades the province of the jury.

Further, this Court erred by relying on the now outdated cases of State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999) and State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Both Weaverling and Schumpert were decided long before our Supreme Court's opinions in Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010) and State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), both of which emphasized the important gatekeeping role of trial courts in determining the admissibility of expert testimony under Rule 702, SCRE. Significantly, Schumpert was decided before the Rules of Evidence were even adopted in South Carolina. Moreover, Weaverling and Schumpert were also decided before Kromah and the line of cases that

preceded it, including State v. McKerley, 397 S.C. 461, 725 S.E.2d 139, (Ct. App. 2012), State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), and Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), were published.

In light of the factors listed above that were overlooked and misapprehended by this Court in reaching its opinion, Appellant respectfully requests this Court grant rehearing, hold the trial court abused its discretion by qualifying Galloway-Williams as an expert, and reverse his convictions and sentence.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of August, 2016.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

RECEIVED
AUG 04 2016
SC Court of Appeals

THE STATE,

RESPONDENT,

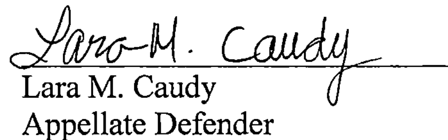
V.

ROY L. JONES,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above captioned case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Roy L. Jones, #129886, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 4th day of August, 2016.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this
4th day of August, 2016.

(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.