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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS
Appeal from Spartanburg
The Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 5372 (S.C. Ct. App. filed December 30, 2015)

Appellate Case No. 2016-000610

FARID A. MANGAL, #320609 .... RESPONDENT

v.

STATE OF SOUTH CAROLINA, ... PETITIONER

BRIEF OF RESPONDENT

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Statement of the Case

The Respondent agrees with the Statement of the Case as set forth in the Brief of the Petitioner.

Statement of the Facts

The Respondent also agrees that the Statement of the Facts state the relevant facts for this appeal. By agreeing to the facts, the Respondent does not agree that the minor child should be referred to as "victim."

Argument

The Court of Appeals did not err in reversing the Post Conviction Relief judge's finding that trial counsel was not ineffective for failing to object or move for a mistrial in response to the testimony of Dr. Nancy Henderson that she based her opinion of child sex abuse upon the history told to her by the minor child.

A. *The issue of the vouching testimony of Dr. Nancy Henderson was properly preserved for review by this Court when the direct testimony of the trial counsel at the Post Conviction Relief hearing raised the issue and the issue was again raised in the Post Conviction relief Counsel's Rule 59e motion.*

The question of the vouching by Dr. Nancy Henderson was first raised during the Post Conviction Relief testimony of trial counsel. Post Conviction Relief Counsel asked the trial counsel about the testimony of Dr. Henderson. App. at 584, ll 2-24. PCR Counsel specifically asked:

> Q. Having - - was there any reason not - - or assuming for a moment that that might be outside the scope of what she would be able to testify to or improper bolstering, would there have been any reason not to raise an objection to that testimony?
> A. No, there would not.
> App. at 584, ll 14-19.

Trial counsel further opined that his failure to object may have had an impact upon the jury. App. at 584, ll 22-24. The issue was again raised on re-direct examination. PCR counsel asked trial counsel the following questions:

> Q. If it does not fall under that evidentiary rule, if it in fact - - it did not strike a cord as improper bolstering to you at the time of trial.
> A. It did not.
> App. At 596, ll 17-20.

On cross examination trial counsel testified that he expected Dr. Henderson to testify as she did. Thus, trial counsel should have been prepared to object to her

bolstering or vouching testimony.[1]

At the close of the testimony trial counsel again raised the issue of improper vouching. In referring to the testimony of Dr. Henderson he again said "It was improper vouching." App. at 613, l 9. He cited cases from the memo he had provided to the PCR judge. In his Rule 59e Motion he again made reference to the vouching of Dr. Henderson. App. at 630 to 633. In the Return to the Rule 59e Motion the State simply took the position that PCR counsel only argued that trial counsel should have obtained another expert. App. at 637. As noted earlier, the record reflects that PCR counsel raised the issue of the failure of trial counsel to object to the bolstering or vouching testimony of Dr. Henderson. PCR counsel preserved this issue. The PCR judge erred in not ruling on this issue.

B. *The South Carolina Court of Appeals properly considered all the testimony in the record in making a ruling in this matter.*

The PCR judge had before him the entire transcript of the trial testimony. In fact his order specifically says he "has had the opportunity to review the record in its entirety . . . ." App. at 618. The record in its entirety included the cross examination of Dr. Henderson as well as the closing argument of counsel. This Court has the right to assume the PCR judge read and considered all the evidence because that is what the order says. As the cross examination of Dr. Henderson was in the record before the PCR judge, the

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Trial counsel discussed at the PCR hearing the problem that arises with medical testimony when a doctor states something is "consistent with." Thomas D. Lyon & Jonathan J. Koehler, *The Relevance Ratio: Evaluating the Probative Value of Expert Testimony in Child Sexual Abuse Cases*, 82 CORNELL L. REV. 43 (1996) proposes a solution to the problem.

Court of Appeals had the right to consider the same evidence that the PCR judge considered in its entirety. Had trial counsel understood he needed to make a timely objection to the vouching testimony of Dr. Henderson, then he probably would not have cross examined her and brought out more vouching testimony. The fact that trial counsel did not object to the vouching testimony and then increased the vouching prejudice by cross examining Dr. Henderson, simply demonstrates that trial counsel was ineffective. He simply did not understand the law prohibiting the vouching by medical experts which had been the law since at least 1989. *See, State v. Dawkins,* 297 S.C. 386, 377 S.E.298 (1989).

The State argues that because the testimony cited by the Court of Appeals was elicited by counsel, it somehow lessens the validity of the opinion finding trial counsel ineffective. To the contrary, as noted above, as the rule prohibiting such testimony had been the law of our State since at least 1989, trial counsel's eliciting inadmissible testimony simply makes the case of ineffective assistance of counsel stronger. Trial counsel simply did not know the law.

The PCR judge did not rule on an issue that was presented before him. When a judge refuses to rule on an issue, an analysis by an appellate court becomes increasingly difficult. First, what is the standard of review? The PCR judge made no factual findings on this issue other than it was not presented to the PCR judge. If he refused to rule on the issue, the State then can hardly be critical of the PCR judge's failure to make reference to the cross examination as he did not even consider the direct examination. All the Court of Appeals did was to point out, as they should, that the record as a whole

contains ample evidence that trial counsel was ineffective in his failing to object to the improper vouching.

C. The Court of Appeals did not err in finding trial counsel was ineffective for not objecting to the vouching testimony of Dr. Nancy Henderson when she stated that her diagnosis was based upon the history as related by the minor child and trial counsel had no valid trial strategy to permit such testimony.

This case is based upon one simple question: "Was trial counsel ineffective for not objecting to conclusion of Dr. Nancy Henderson that the minor child had been sexually abused when her opinion was based upon the history as related by the minor child and not her physical findings?" The answer to the question is that trial counsel was ineffective as such testimony has not been permitted in South Carolina since at least 1989. *State v. Dawkins,* 297 S.C. 386, 377 S.E.298 (1989). More recently this Court re-affirmed that expert opinion testimony as to the believability of a minor child in a child abuse case is not admissible. As this Court said "[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). The principles established in these two cases are followed by numerous courts in our country. *See Hamilton v. State,* 49 N.E.3rd 554 (Ct. App. Ind. 2015); *State v. Dudley*, 856 N.W.2d 668 (Iowa 2014); *Commonwealth v. Quinn*, 469 Mass. 641, 15 N.E.3rd 726 (2014); *State v. Lupoli*, 348 Or. 346, 234 P.3d 117 (2010); *State v. Churchill,* 98 S.W.3d 536 (Mo. 2003); *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986).

In this case the opinion of Dr. Henderson was she found the minor child had been sexually abused. Her finding was based upon the history as related by the minor child.

The physical examination in this case was not sufficient for Dr. Henderson to conclude the minor child was sexually abused. She stated "Well the actual abnormality on her hymenal tissue I cannot say for certain that it was caused by the incident." App. at 162, ll 14-15. She further said "I can't say that the actual result that I saw was caused by the penis, but based on the history that she shared, and she denies any other kind of trauma to that area, that my conclusion is . . . is as I stated." App. at163, ll 19-24. Thus, she told the jury in making her diagnosis, she believed what the minor child told her.

In *Kromah* this Court held inadmissible "any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter . . . ."*Id.* at 360, 737 S.E.2d at 500. App. at 159, ll 16-18. Dr. Henderson could not have made her diagnosis without believing what the minor child told her. The statement from Dr. Henderson did more than indicate she believed the minor child. She stated that her diagnosis was based upon her believing the history given by the minor child. App. at 163, ll 14-24.

The State had no need to ask Dr. Henderson her opinion of whether the minor child had been sexually abused. The minor child testified. As Dr. Henderson's opinion was based upon what the child told her, a diagnosis of child sex abuse by Dr. Henderson was a comment on the child's credibility. The jury is to determine whether the child is credible. They are in an equal position as Dr. Henderson to make that determination. Dr. Henderson, as an expert, could testify as to the physical findings of her examination. This Court would not permit the examining physician of an adult rape victim to testify that the patient, based upon the history given, was diagnosed as having been raped.

The State argues that because Dr. Henderson is a medical doctor her opinion as to

the credibility of the minor child is admissible. Such reliance is simply incorrect. A medical doctor is no more allowed to give an opinion about the credibility of a witness than is a forensic interviewer or a psychologist who claims training in detecting lies in people. The credibility of the witness is a determination to be made by the jury.

This case is very similar to *State v. Southard*, 347 Or. 127, 218 P.3d 104(2009). In *Southard*, the Court first stated "The question in this case is whether a medical diagnosis of child sexual abuse is admissible scientific evidence." *Id.* at 129, 218 P.3d at 105. In *Southard*, as in this case, there was no physical evidence to support the diagnosis. The Court then conducted an analysis as to whether the diagnosis of child sex abuse was scientifically reliable. The Court concluded that based upon the testimony at the trial, the diagnosis was reliable. The Court then turned to the issue of whether the prejudice from the evidence substantially outweighed its probative value. In holding the diagnosis was not admissible, the Court said:

> [W]e note that her diagnosis did not tell the jury anything that it was not equally capable of determining on its own. As noted above, whether defendant caused the boy to engage in oral sex (and thus sexually abused him) does not present the sort of complex factual determination that a lay person cannot make as well as an expert. If the jury credited the boy's reports of oral sex (which he recounted to his grandmother, the staff at the KIDS Center, and the jury at trial), then it necessarily follows that he was sexually abused.
> *Id.* at127, 140, 218 P.3d at 111–112

The conclusion by the Oregon court is in keeping with the precedent in our state. As noted earlier, this Court has held since 1989 that an expert may not give an opinion that indicates a belief in the truthfulness or believability of a child witness.

The Court of Appeals of Oregon in *Berg v. Nooth,* 258 Or. App. 286, 309 P.2d 164 (2013) addressed the vouching issue in a post conviction relief case. In *Berg* trial counsel failed to object to the vouching testimony of two expert witnesses and the vouching statement in the closing argument of the prosecutor. In reversing the conviction, the Court of Appeals said "We have little difficulty concluding that trial counsel failed to exercise reasonable professional skill and judgment, given the Supreme Court's emphatic condemnation of allowing one witness to vouch for another." *Id.* at 295, 309 P.3d at 170. The reason the Oregon Court of Appeals had "little difficulty" is that they knew "the concern with vouching testimony—particularly testimony from experts—is that jurors will defer to the vouching witness's credibility determinations instead of making those determinations themselves." *Id.* at 299, 309 P.3d at 172.

In *Tappeiner v. State*, 416 S.C. 239, 785 S.E.2d 471 (2016) this Court reversed the denial of a post conviction relief petition when trial counsel failed to object to the vouching in the closing argument by the solicitor as well as other improper arguments. In finding the failure to object was prejudicial to the applicant, this Court said:

> Here, as the parties freely admitted during trial, the case was entirely dependent on a credibility determination between the prosecution's witnesses and the defense's witness. Given the dearth of evidence beyond Victim's assertions, we cannot say evidence of Tappeiner's guilt was overwhelming. Therefore, we find that but-for the improper vouching for Victim's credibility, there is a reasonable likelihood the outcome of the trial would have been different, and Tappeiner was thus prejudiced by trial counsel's failure to object.
> *Id.* at 253, 785 S.E.2d at 479

The same principles should apply in this case. No DNA or other physical

evidence connected Mr. Mangal to the alleged crime. The trial was a credibility issue involving a minor child that the testimony shows was or became rebellious. App. at 140, l 6 to 17 141, l 24; 284, l 20 to 286, l 7. In addition to the vouching testimony of Dr. Henderson, Wiley Garrett, a forensic interviewer and therapist, testified that the minor child's disclosure was "clear, consistent, and compelling of sexual abuse." App. at 130, ll 20-21. The prejudice of Dr. Henderson's testimony is increased because as a medical professional she lent support and gave credence to the improper vouching of Mr. Garrett. In closing, the solicitor placed emphasis on the vouching testimony of the two experts. He said when discussing the abuse "We corroborated it with Wiley Garrett. And we corroborated it with Doctor Nancy Henderson." App. at 514, ll 3-5. He further argued "And their impression, the physician's impression, and presumptive diagnosis was panic disorder and posttraumatic stress disorder secondary to sexual abuse from her father." App. at 515, ll 4-6.[2]

The solicitor was able to capitalize on the improper testimony to the prejudice of Mr. Mangal. As in *Tappeiner*, the applicant was prejudiced by the improper bolstering which the solicitor used in his closing argument.

No doubt can exist that if a physician is able to give their opinion as to the honesty of a minor child that they examine, then the prosecution of a guilty defendant will become much easier and much more certain. But such evidence would also be admissible against an innocent defendant and the conviction of an innocent person will likewise be much

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Dr. Henderson did not testify to such a diagnosis. This is an apparent reference to Wiley Garrett, not a physician, when he testified as to his opinion. Supp. App. at 2, ll 2-4.

easier and much more certain. As was said by the Pennsylvania Supreme Court:

> It is true, of course, that permitting the Commonwealth to introduce the out-of-court assertions ... against the defendant ... would make it easier to convict the guilty. Unfortunately, it would also make it easier to convict the innocent. If such a trade-off is acceptable, why not suspend the hearsay rule entirely when the Commonwealth introduces evidence in a criminal case? More defendants, guilty and innocent alike, would undoubtedly be convicted. The same result would obtain if we allowed the Commonwealth to introduce coerced confessions.
>
> However, such a trade-off is not acceptable. It is a fundamental precept of law in Pennsylvania that one charged with crime, be it murder, child abuse, or keeping a public nuisance, comes to trial clothed in the presumption of innocence. If we bear this in mind, we will be less tempted to distort the law of evidence in favor of the Commonwealth in order to increase the conviction rate. The Commonwealth should be bound by the same rules of evidence, including the hearsay rule, as other litigants.
> *Commonwealth v. Bujanowski,* 418 Pa. Super. 163, 172, 613 A.2d 1227, 1232 (1992).

Response to Amicus Curaie Brief

Amicus Curaie's brief also raises the preservation issue discussed in Petitioner's brief. The *Amicus* brief argues that Farid Mangal did not list in his Post Conviction Relief petition the specific issue of the failure to object to the vouching testimony of Dr. Nancy Henderson. Mr. Mangal raised the issue of "ineffective assistance of trial counsel" (App. at 558) and that trial counsel was ineffective because he "failed to preserve direct appeal issues." (App. at 559). In the Return, the State repeated the allegations (App. 564) and concluded "However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue." App. at 565-566.

From the date of the filing of the Return on May 13, 2010 until the date of the Post Conviction Relief hearing on April 4, 2011 the State never filed a Motion to make the Application more definite and certain. Therefore, anything that trial counsel did that failed to preserve an issue for appellate review was admissible without having to amend the application. Obviously when trial counsel failed to object to vouching testimony that violated *Dawkins*, then the vouching testimony issue is not preserved for review.

The *Amicus* notes in footnote 4 of its brief that the administration of justice is hampered when an applicant makes a vague claim for relief. The *Amicus*, however, places no blame on the State for its failure to request that the application be amended to be more definite and certain. *State v. Gentry,* 363 S.C. 93, 610 S.E.2d 494 (2005) requires a defendant to file a motion to quash or the defendant waives defects, including vagueness, in an indictment. In a civil case, a defendant can not be heard to complain after the trial that the complaint was vague. S.C. R. Civ. P. 12(e). The same general principle should apply in this case. If the State did not request that the applicant be made more definite and certain, they cannot complain on appeal the application was vague. The Court of Appeals did not err in ruling on the issues before them.

The *Amicus* further argues the issue of vouching is not preserved because the PCR judge did not rule on the motion. *Amicus* is correct the PCR judge did not rule on the motion. But the failure to rule was not because the issue was not before him. As noted above, PCR counsel made several references to "bolstering" and "vouching." He made reference to the cases in his Memorandum raising those issues. The PCR judge simply did not rule on the issue. The PCR judge said "this Court finds the issues were not presented

to the Court in the application or in an amendment and no testimonial evidence from the Applicant was presented in support of these allegations." App. at 639. The PCR judge does not explain how the references to improper "vouching" and "bolstering" during the testimony did not present the issue to him and is not testimonial evidence. He failed to recognize that a general allegation of ineffective assistance of counsel, with no motion by the state to make the allegation more definite and certain, raises any issue of ineffective assistance of counsel. If the position of the *Amicus* is correct, then a losing party could never successfully appeal if a lower court simply issues an order and does not rule on the key issue in the case. This is not the law in our State. As this Court has said "We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner." *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011).

The *Amicus* brief attempts to distinguish this case from other cases that prohibit expert testimony from attesting to the credibility of a minor child by saying Dr. Nancy Henderson is a medical doctor. This is a distinction without a difference. The important distinction to make in this case is that the opinion of Dr. Henderson was not based upon her physical findings. If she had seen clear evidence of penetration, she could have testified that based upon her physical finding there was evidence of sexual abuse. When a doctor so testifies the impact of their testimony may be to increase the credibility of the minor child, but they are not saying to the jury, "I believe the minor child." The *Amicus* brief correctly cites the cases in South Carolina and other states where this type of vouching testimony is not permitted.

The *Amicus* brief is simply not correct when it states "Dr. Henderson did no more than testify as to her examination of the victim, the physical findings from the examination and her medical opinion - based upon her education, experience, examination of the victim, and the history provided by the victim . . . .that the physical finding was consistent with penetration and abuse." Brief of *Amicus Curaie* at 25. The problem with the statement just quoted is that the physical findings do not support such a conclusion. In fact, Dr. Henderson testified that her physical findings alone were not sufficient to conclude the minor child was sexually abused. The findings became "consistent with" abuse only when the history given by the minor child is considered. She testified:

> Q. And you've got down five choices, normal exam, non-specific, suspicious, consistent, and diagnostic, and you have checked suspicious?
> A. Right
> Q. But not consistent.
> A. Right
> App. at 162, ll 2-7.
>
> * * *
>
> A. Well, the actual abnormality on her hymenal tissue I can not say for certain that it was caused by the incident. But the overall history, and what I am seeing, that's the, when you - - that check box that you're looking at is just related to the actual finding on the exam, and that's why it's suspicious because there could be other things that cause it. And, based on just the narrowing of the hymen, hymen I can't say that absolutely it was caused by the incident that occurred.
> App. at 162, ll 14-22.

From her testimony the physical finding alone was only determined to be suspicious and not consistent with. And if her testimony had been limited to her physical

findings, then there would be no error in this case. The error occurred when the State elected to have her testify to more than her physical findings and say the history from the minor child convinced her the minor child had been sexually abused. That was the testimony that was improper. She testified that the "narrowing" was consistent with penetration without describing the type of penetration as there could be causes other than sexual abuse.

But even this "consistent with" analysis is confusing. As stated by one writer "However, when a doctor states that the physical findings are 'consistent with' abuse and then concludes that the child was abused, a finder of fact may erroneously conclude that the physical findings constitute independent evidence of abuse." Lyon & Koehler, *supra*, at 53. In the present case, this is exactly what occurred. App. at 159, ll 11-21. Contrary to the position of the *Amicus* brief, as noted above, the ambiguous phrase "consistent with" could easily mislead the jury.[3] In addition, it was a comment upon the credibility of the minor child.

The *Amicus* brief argues that the history of alleged abuse "*was not conducted to support the credibility of any witnesses, much less the victim.*" *Amicus Curaie* Brief at 28 (emphasis in the original). First, there is nothing in the record in this case to establish the validity of the statement. Only the prosecuting attorney who asked the question can state the reason behind the question. The prosecutor did not testify at the PCR hearing. The

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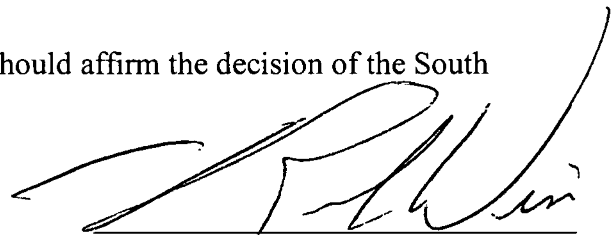
Dr. Henderson did not provide the trial court with any statistical study to support her conclusion that her analysis was consistent with abuse. If her observations occurred in one out of 50 cases of abused children, would that be "consistent with"? What if the condition also occurred in non-abused children, would it still be "consistent with"?

point the *Amicus* misses is that the reason for the questioning is not relevant. An improper question asked with the best of intentions, is still an improper question. The question before this Court is could a reasonable juror have interpreted the questions and answers as Dr. Henderson believing what she was told. This Court has previously said the answer to that question is "yes" and this Court should answer the question "yes" in this case also. Inadmissible testimony is not made admissible simply because of the intent of the questioner.

CONCLUSION

For the foregoing reasons this Court should affirm the decision of the South Carolina Court of Appeals.

September 28, 2016



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