STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Greenville County

Perry H. Gravely, Circuit Court Judge

FREDERICK R. CHAPPELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000283

SUPPLEMENTAL APPENDIX

WANDA H. CARTER
Deputy Chief 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

KAREN RATIGAN
Senior Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

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STATE'S EXHIBIT # 1 (CD OF FORENSIC INTERVIEW)

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FREDERICK R. CHAPPELL,

APPELLANT

APPELLATE CASE NO. 2012-212745

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in allowing an expert in child sexual abuse and treatment to testify generally about "child abuse dynamics" when the witness had no knowledge of the child in question and the expert testimony was irrelevant?

STATEMENT OF THE CASE

In December of 2010, the Greenville County Grand Jury indicted Chappell for criminal sexual conduct with a minor first degree and lewd act up on a child, indictments #2010-GS-23-7901, 7902. On August 6, 2012, Chappell proceeded to jury trial before the Honorable D. Garrison Hill. Attorney Susannah C. Ross represented Chappell at trial. Attorney L. Mark Moyer prosecuted the case on behalf of the State. The jury returned verdicts of guilty and Judge Hill sentenced Chappell to a sentence of life without parole pursuant to S.C. Code §17-25-45. A timely notice of intent to appeal was filed on August 15, 2012. This appeal follows.

ARGUMENT

> The trial judge erred in allowing an expert in child sexual abuse and treatment to testify generally about "child abuse dynamics" when the witness had no knowledge of the specific child in question and the expert testimony was irrelevant.

At trial the prosecution called Shauna Galloway-Williams as a witness. Ms. Galloway-Williams is the executive director for the Julie Valentine Center, a child abuse and sexual assault recovery center. While Ms. Galloway-Williams conducts forensic interviews as part of her job at the Center, she did not conduct the forensic interview of the minor in this case. R. p. 153, line 17 – p. 154, lines 1-24. Another forensic interviewer at the Julie Valentine Center, Christine Carlberg, interviewed the minor in this case. Ms. Carlberg testified at trial and a tape of the interview was played for the jury. R. pp. 136-153, p. 143, line 15 – p. 144, lines 1-7.

Ms. Galloway-Williams testified, "My purpose in testifying today is to share information related to child abuse dynamics – or dynamics related to child sexual abuse." R. p. 157, lines 23-25. The prosecution moved to qualify Ms. Galloway-Williams as an expert in child sexual abuse and treatment. R. p. 159, lines 1-5. Appellant objected to the testimony on the ground of relevancy. R. p. 159, lines 13-15. The trial judge found that Ms. Galloway-Williams was qualified and allowed her to testify as an expert. R. p. 159, line 17 – p. 160, lines 1-3. The trial judge erred in allowing the irrelevant testimony.

In her testimony in front of the jury Ms. Galloway-Williams generally discussed delayed disclosure and accidental disclosure. R. pp. 160 – 171. She testified that a disclosure that comes as a result of an adult catching a child acting out in a sexually inappropriate manner would be considered an accidental disclosure. R. p. 167, lines 1-8. She also testified that children who have been sexually abused act out in sexually

inappropriate ways. R. p. 167, lines 9-16. In the present case the minor was questioned about possible sexual abuse after her mother found her and her sister in a possible inappropriate sexual act. R. p. 121, line 2 – p. 122, lines 1-5.

Ms. Galloway-Williams testified that while both children and adults lie:

> Children don't often lie about sexual abuse incidents. They don't often lie about things that are beyond their real scope of knowledge. And children often are unable to anticipate what the next question is that someone is going to ask them. So if a child is – you know, has been interviewed by law enforcement, and they've been – talked to DSS, and they've talked to a forensic interviewer, you know, generally, if the child is lying, there are going to be some – someone is going to – at some point, the child is going to – it's going to become apparent among those interviewers. They're just not sophisticated enough to carry a story out over multiple interviews like that.

R. p. 164, lines 22 – p. 165, lines 1-9. Additionally Ms. Galloway-Williams testified, "When a child is believed and supported and, you know, the person that they've disclosed to seeks help and does something about the disclosure, that tends to have a much more positive effect than if a child is not believed." R. p. 168, lines 13-16.

The testimony from Ms. Galloway-Williams was not only irrelevant but also improperly vouched for the credibility of the minor's testimony by indicating that the minor must be telling the truth. The irrelevant and improper testimony was particularly prejudicial in this case where the sole evidence against appellant was the testimony of the minor. The error in admitting the irrelevant testimony requires reversal.

In State v. Sobers, 404 S.C. 263, 267-268, 744 S.E.2d 588, 590 (Ct.App. 2013) the Court wrote, " 'The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.' State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of

discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (citation omitted)."

Rule 401, SCRE provides, " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence which is not relevant is not admissible. Rule 402, SCRE.

Ms. Galloway-Williams' testimony does not make any fact of consequence more or less probable. The testimony is irrelevant and the trial judge abused his discretion in admitting the testimony. Her purported purpose of sharing information on child abuse dynamics was merely a thinly veiled disguise to improperly vouch for the credibility of the minor witness. The testimony was not needed to lay the proper foundation for introduction of the videotape of the forensic interview as that was done by the forensic interviewer who actually interviewed the child.

In State v. Whitner, 399 S.C. 547, 559-560, 732 S.E.2d 861, 867 (2012) the South Carolina Supreme Court wrote:

> Admittedly, we have confronted instances where the State has abused the statute and sought to have the forensic interviewer, improperly imbued with the imprimatur of an expert witness, invade the province of the jury by vouching for the credibility of the alleged victim. However, this is not such a case. In fact, the forensic interview of the child and mere foundational trial testimony of the interviewer serve as a model of how the statute is designed to work. Specifically, the forensic interviewer did not improperly lead or influence the victim in any way, and the victim answered the questions on her own accord. Moreover, the forensic interviewer's testimony was for the limited purpose of laying the proper foundation for the admission of the videotape. It offered no improper testimony, and included no bolstering testimony that would invade the province of the jury. Compare State v. Jennings,

394 S.C. 473, 716 S.E.2d 91 (2011) (finding the trial court erred in admitting portions of forensic interviewer's written reports that went to the victims' veracity for truth regarding the allegations of abuse) with State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that trial court's admission of testimony from a forensic interviewer did not prejudice defendant as interviewer testified as to her personal observations and did not vouch for the victim's veracity).

In contrast to Whitner, in the present case the State called Ms. Galloway-Williams, imbued with the imprimatur of an expert witness, to vouch for the credibility of the minor witness. In State v. Kromah, 401 S.C. 340, 358-359, 737 S.E.2d 490, 499-500 (2013) the South Carolina Supreme Court wrote:

> Further, even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others. It is undeniable that the primary for calling a "forensic interviewer" as a witness is to lend credibility to the victim's allegations. When this witness is qualified as an expert the impermissible harm is compounded. Our courts have previously held that "[t]he assessment of witness credibility is within the exclusive province of the jury," and that witnesses generally are "not allowed to testify whether another witness is telling the truth." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App.2012); see also L.A. Bradshaw, Annotation, Necessity and Admissibility of Expert Testimony as to Credibility of Witness, 20 A.L.R.3d 684 (1968 & Supp.2012) (stating an expert witness should not vouch for the truthfulness of a witness). Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter. State v. Hill, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct.App.2011); cf Smith v. State, 386 S.C. 562, 564–65, 689 S.E.2d 629, 631 (2010) (observing the forensic interviewer interjected impermissible hearsay into the trial, which improperly bolstered the victim's testimony; the forensic interviewer testified that the victim told her that the defendant had sexually assaulted her and that she found the victim's statement "believable").

Although the trial judge in the present case did not have the benefit of the Kromah case as the trial took place in August of 2012, and Kromah was decided in January of 2013, the Kromah decision provides specific guidance as to what type of testimony is

inadmissible and admissible in regard to forensic interviews and child sexual abuse. "Because the admissibility of forensic interviews and the testimony based thereon at trial has been the subject of several recent appeals, we believe it would be helpful to set forth, by way of example, the kinds of statements that a forensic interviewer should avoid at trial:

> • that the child was told to be truthful;
>
> • a direct opinion as to a child's veracity or tendency to tell the truth;
>
> • any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a "compelling finding" of abuse;
>
> • any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or
>
> • an opinion that the child's behavior indicated the child was telling the truth.
>
> A forensic interviewer, however, may properly testify regarding the following:
>
> • the time, date, and circumstances of the interview;
>
> • any personal observations regarding the child's behavior or demeanor; or
>
> • a statement as to events that occurred within the personal knowledge of the interviewer.

These lists are not intended to be exclusive, since the testimony will of necessity vary in each trial, but this may serve as a general guideline for the use of this and other similar testimony by forensic interviewers." State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 500-501 (2013).

Ms. Galloway-Williams' expert testimony that children don't often lie about sexual abuse incidents and if they did lie the forensic interviewer would know they were lying is

analogous the type of vouching the Court found improper in Kromah and in State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), decided before trial in the present case. In Jennings, 394 S.C. at 480, 716 S.E.2d at 94 (2011), this Court wrote:

> For an expert to comment on the veracity of a child's accusations of sexual abuse is improper. See State v. Dawkins, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (finding 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) (finding therapist's testimony children were being truthful in ninety-five percent of instances in which sexual abuse was alleged was improper vouching for child); but see State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (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).

The testimony in the present case goes to an ultimate issue for the jury, the credibility of the minor witness. As noted by the dissent in Douglas, "Juries do not require the assistance of human "truth detectors" in assessing the credibility of testimony." 380 S.C. at 505, 671 S.E.2d at 610. Ms. Galloway-Williams' testimony does not make any other fact of consequence more or less probable. The testimony is irrelevant and improper. The trial judge abused his discretion in admitting the irrelevant testimony.

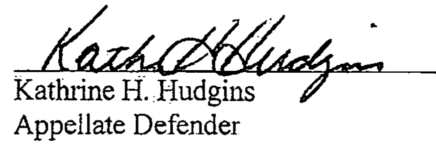
The error in allowing the expert to improperly vouch for the minor's veracity is not harmless. The State referenced Ms. Galloway-Williams' testimony in closing argument arguing that the minor could not make "this stuff up." R. p. 215, line 11 – p. 216, lines 1-18. In Jennings this Court wrote, "Because the children's credibility was the most critical determination of this case, we find the admission of the written reports was not harmless." (citing State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 492 (2001) ("An officer's improper opinion which goes to the heart of the case is not harmless."). 394 S.C. at 480, 716 S.E.2d at 95. In the present case as in Jennings, there was no physical

evidence presented and the State's evidence was based solely on the testimony of the minor witness, rendering her credibility the critical factor to be determined by the jury.

CONCLUSION

Based on the above argument, the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

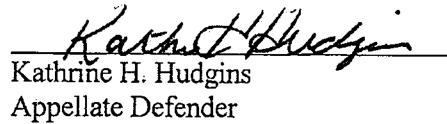
ATTORNEY FOR APPELLANT

This 18th day of February, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

February 18th, 2014



Kathrine H. Hudgins
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

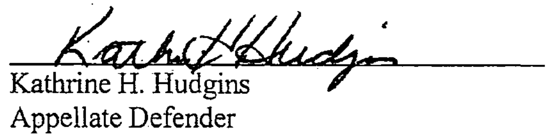
FREDERICK R. CHAPPELL,

APPELLANT

APPELLATE CASE NO. 2012-212745

CERTIFICATE OF SERVICE

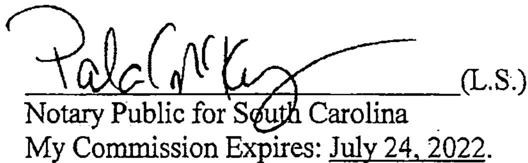
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 18th day of February , 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of February , 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Frederick R. Chappell, Appellant.

Appellate Case No. 2012-212745

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Unpublished Opinion No. 2014-UP-272
Submitted May 1, 2014 – Filed June 30, 2014

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Christina J. Catoe, both of Columbia; and Solicitor William W. Wilkins, III, of Greenville, for Respondent.

PER CURIAM: Affirmed[1] pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."); *State v. Weaverling*, 337 S.C. 460, 474-75, 523 S.E.2d 787, 794 (Ct. App. 1999) ("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."); *id.* at 475, 523 S.E.2d at 794 ("There is no requirement the sexual assault victim be personally interviewed or examined by the expert before the expert can give behavior evidence testimony.").[2]

AFFIRMED.

FEW, C.J., and SHORT and GEATHERS, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] Chappell's contention that the expert's testimony was improper because it constituted improper vouching for the victim is not preserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (noting "[i]ssues not raised and ruled upon in the trial court will not be considered on appeal" and "[a] party may not argue one ground and trial and an alternate ground on appeal").