STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JOHN HENRY LOWERY II,

APPELLANT

APPELLATE CASE NO 2014-002653

Appeal from Chester County

Honorable R. Knox McMahon, Circuit Court Judge

Opinion No. 2017-UP-023

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant John Henry Lowery, II, respectfully petitions the Court for a rehearing of its Opinion No. 2017-UP-023 issued on January 11, 2017 based upon the following points overlooked or misapprehended by the Court:

I.

In affirming Appellant's conviction, this Court held that the trial court erred in permitting Margo Dixon to testify as an expert in forensic interviewing. Nevertheless, this Court ruled that the error did not impact the verdict, "considering the entire record in this case, including both testimony and physical evidence, the error was harmless."

Respectfully, this Court may have overlooked the importance and scope of Margo Dixon's testimony regarding her forensic interviews of both Minor 1 and Minor 2 to the State's case.

Dixon testified at length about the forensic interviewing process; going well beyond laying the foundation necessary to admit the video of the interview. *State v. Anderson*, 413 S.C. 212, 220, 776 S.E.2d 76, 80 (2015) (holding that the sole purpose of forensic interviewer testimony is to lay the foundation for the introduction of the forensic interview video). She stressed to the jury that forensic interviewing is designed to determine whether or not the minor child is telling the truth regarding the alleged abuse:

> The forensic interview process is a child friendly interview that is solicited from a child who may have made allegations of some type of abuse or have knowledge of some type of abuse that may have happened to them or someone that they know or may have witnessed a violent act.
>
> Within that interview setting we structure it to put it in a non-leading manner. Basically we're asking that child what took place as far as what happened, where did it happen, who did it happen to and any other knowledge that they may have concerning that particular incident. It can't be a leading situation where I suggest things to them, but rather they tell me what they have of their own knowledge, in their own terms and their own language.

R. 186, l. 15 - 187, l. 4; *See Anderson*, 413 S.C. at 221, 776 S.E.2d at 80 ("There is to be no testimony to such things as techniques, of the instruction to the interview subject of the importance of telling the truth, or that the purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted. This type of testimony, which establishes the " particularized guarantees of trustworthiness," necessarily conveys to the jury that the interviewer and law enforcement believe the victim and that their beliefs led to the

defendant's arrest, these charges, and this trial, thus impermissibly bolstering the minor's credibility.").

Dixon also described in detail how she used the forensic interviewing protocol to determine whether or not Minor and Minor 2 were being truthful:

> In this interview we -- at that time we are using the RATAC protocol and in the RACTAC protocol basically we develop a rapport with the child. ***We also get an understanding of what the child recognizes between the truth and a lie, as well as their ability to tell an event and then an anatomy recognition to understand what they call their body parts.*** At that point the child educates me, so if the child is referring to their vagina, for instance, and they call it the pocketbook. I know they are referring to their vagina and not the purse or pocketbook that I or yourself may carry. ***Once we develop the understanding of the anatomy and they are educating me then we go forth and begin to talk about different things in their life as far as the events that they are there to see me in reference to.*** At that time we notify that as the disclose act. Within that disclosure things are taking place and at that time we talk about what happened and then we have a closure setting.

R. 187, l. 16 - 188, l. 9 (*emphasis added*). The State then asked Dixon, "[a]nd after your interview with Minor and Minor 2 did you make any recommendations for them, for any people to see or anything for them to do?" R. 189, l. 24 - 190, l. 3. Dixon replied that she recommended that Minor schedule an appointment to meet with Dr. Singletary. *Id.* Dr. Singletary was the State's next witness and was qualified as an "expert in sexual assault." R. 198, ll. 20-22.

Qualifying Dixon as an expert was improper. Forensic interviewing is not a recognized field of expertise. *See Anderson*, 413 S.C. 212, 776 S.E.2d 76; *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009); *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) fn. 5; *see also State v. Baker*, 411 S.C. 583, 769 S.E.2d 860 (2015). Dixon's testimony should have been limited to laying the foundation necessary to admit the video of her forensic interview.

Dixon impermissibly vouched for the credibility of Minor 1 and Minor 2, the State's only witnesses to the alleged abuse. *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (2012); *see also 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"). 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 also 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).

It is obvious from the record that the prosecution attempted to circumvent South Carolina case law and provide more weight to validate the Minor 1 and Minor 2's testimony. Dixon portrayed the forensic interview process as a kind of lie detector test. By telling jurors that she referred Minor 1 to Dr. Singletary, the sexual assault expert, Dixon was impermissibly vouching for the credibility of both Minor 1 and Minor 2.

The evidence against Appellant was not overwhelming. Minor 1 claimed that she woke up in the middle of the night to Appellant attempting digitally penetrate her. R. 69 - 71. She further alleged that Appellant attempted to have sex with her, "[h]e was trying to get his private part to go inside mine, but he couldn't get it all the way in. So he did it as far as he could." R. 70, ll. 1-3.

The sole corroborative witness for Minor 1's allegations was Minor 2, making Dixon's bolstering of the minors' testimony all the more prejudicial. Physical evidence of the alleged

assault was minimal. Despite Minor 1 claiming that Appellant attempted to have sex with her, of the eight items from the rape kit that were tested, only a cutting from the back of Minor 1's underwear returned with Appellant's sperm on it. Results from vaginal swabs, oral swabs, and a swab of suspected bodily fluid were all either inconclusive or tested negative for the presence of Appellant's DNA. R. 249 - 252.

SANE nurse trainee Jennifer Propst examined Minor 1 only hours after the alleged sexual assault occurred. Her examination revealed only slight redness and a possible "mircotear" in Minor 1's vaginal canal. R. 146, ll. 20 - 147, ll. 3. Similarly, Dr. Singletary's examination several days later also found no evidence of any physical injuries. R. 203.

Moreover, Appellant testified as to his version of events, rendering the trial a credibility battle. Not only was Dixon's testimony used to bolster the complainants' testimony, it was also highly prejudicial to Appellant and cumulative. Minor 1 and Minor 2 had already testified as to their versions of events and as to why they came forward with the allegations. Dixon was used solely to reinforce the minors' credibility.

Dixon's testimony and improper expert witness qualification could not have been harmless because of the minimal amount of physical evidence and the centrality of the minors' credibility to the State's case. "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." *Jolly v. State,* 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) (*emphasis in original*); *see also Smith,* 386 S.C. 562, 689 S.E.2d 629 (forensic interviewer's hearsay testimony impermissibly corroborated the victim's testimony because the outcome of the case hinged on the victim's credibility regarding the identification of the perpetrator); *Dawkins*, 346 S.C. at 154, 551 S.E.2d at 261(defendant was entitled to post-

conviction relief where four witnesses testified without objection regarding the victim's out-of-court conversations with them concerning the alleged abuse).

Because minors' credibility was the most critical determination of this case, Appellant was clearly prejudiced and should be granted a new trial.

II.

In affirming Appellant's conviction, this Court held that Appellant had "waived any argument he previously raised regarding the admission of the doctor's report because, at trial, he consented to the admission of the redacted report and agreed the report was subject to the Rule 803(4), SCRE, hearsay exception."

Respectfully, this Court's decision misapprehended the nature of Appellant's objection. This issue is preserved for appellate review. Appellant lodged an objection on the record prior to the report being published to the jury:

> I understand you are letting them in under that hearsay exception, Your Honor. I am just saying that I think that they still should be kept out [as hearsay]. I just want that objection on the record, Your Honor. . . . ***I am not saying that I agree that these should come in. These are coming in over my objection due to your ruling on the 803 hearsay exception.***

R. 218, ll. 14-24 (*emphasis added*).

Defense counsel objected to the admission of the report on the grounds that it constituted inadmissible hearsay that was improperly corroborative of the victim's testimony. R. 216, l. 25 - 217, l. 10; *see* Rule 17, SCRCrimP. Counsel noted that the report exceeded the time and place corroboration exemption provided by Rule 801(D)(1)(D). In support, Appellant cited to *Smith v. State*, 386 S.C. 562, 689 S.E.2d 562 (2010). *Id.*

In *Smith*, the Supreme Court held that trial counsel was ineffective for failing to object to the testimony of a forensic interviewer who "interjected, impermissible hearsay into the trial, which

impermissibly bolstered the victim's testimony." 386 S.C., 689 at 564-565, S.E.2d at 630-631. *Smith* is factually very similar to the present case. Smith was convicted of criminal sexual conduct with a minor and the State was heavily reliant on the testimony of the twelve year old complainant. *Id.*

The State bolstered her testimony by calling a forensic interviewer who testified, without objection, that she found the victim to be believable and that the victim had "no reason 'not to be truthful.'" *Id.* Counsel's failure to object to this testimony constituted ineffective assistance of counsel. Citing to Rule 801(D)(1)(D), SCRE, the Court held that "the forensic interviewer's testimony substantially exceeded the limitations of time and place." *Id.* at 566-567, 689 S.E.2d at 632.

In Appellant's case, the trial court agreed that the report was hearsay, but ruled that the statements made for the purpose of medical treatment exception to the hearsay rule made the report admissible. R. 217, l. 14 - 218, l. 13. Defense counsel then reiterated her hearsay objection and again stated that the report exceeded the limited, non-hearsay corroborative testimony exemption allowed in criminal sexual conduct cases. *Id.* Only after the court ruled that the hearsay contained in Dr. Singletary's report was admissible, did defense counsel then address redactions. *Id.*

In sum, Appellant objected to the entire report on the grounds that it, like the forensic interviewer's testimony in *Smith*, was inadmissible hearsay not fitting within any exception or non-hearsay exemption. *State v. Byers,* 392 S.C. 438, 710 S.E.2d 55 (2011) (defense counsel's challenge to the evidence was presented with sufficient specificity to inform the court of "the point being urged as objectionable").

The court agreed that the report was hearsay, but ruled that portions of the report were admissible under the medical records exception to the hearsay rule. Therefore, the issue of whether or not the report constituted impermissible hearsay evidence is preserved for review.

That defense counsel may have failed to redact every possible statement that exceeded the narrow Rule 803(4), SCRE, exception does not mean that Appellant waived his hearsay objection to the report being admitted. The trial court's error was in admitting the report into evidence at all. The vast majority of the report consisted of statements not made by Minor 1, but rather conclusions reached by Dr. Singletary or the forensic interviewer calculated to bolster Minor 1's credibility.

Appellant's requested relief was that the report be ruled inadmissible. Appellant did not receive that relief. The rules of error preservation do not require Appellant to enter into a Faustian bargain whereby to preserve his hearsay objection, Appellant had to allow the report into evidence un-redacted. To the contrary, any argument that Appellant waived his hearsay objection by imperfectly redacting the report is without merit.

Appellant did not induce or contribute to the trial court's error and did not waive his hearsay objection by participating in the redacting of the report. Defense counsel's duty was to preserve her hearsay objection to the entire report - which she did - and, then to mitigate the damage. Accordingly, Appellant did not waive his objections to the report.

III.

In affirming Appellant's conviction, this Court found that the trial court acted within its discretion in qualifying Jennifer Propst as an sexual assault nurse examiner despite Propst having not completed her training at the time that she conducted her examination of Minor 1. In so ruling, the Court failed to address whether Propst could apply her incomplete training as so to reliably assess Minor 1.

Trial courts have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, SCRE, whether the evidence is scientific or nonscientific. *State v. White*, 382, S.C. 265, 274, 676 S.E.2d 684, 688 (2009). In the discharge of its gatekeeping role, a trial court must assess an expert's qualifications before determining if the expert's proposed testimony is sufficiently reliable. *State v.Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (reversible error to allow expert testimony without first assessing expert's qualifications).

Rule 702, SCRE, imposes on the trial courts an affirmative and meaningful gatekeeping duty. *White*, 382 S.C. at 270, 676 S.E.2d at 686. An expert's testimony may not exceed the scope of her expertise. *State v. Ellis,* 345 S.C. 175, 547 S.E.2d 490 (2001) (police officer, qualified as an expert in crime scene processing and fingerprint identification, exceeded the scope of his expertise when he testified to conclusions drawn from the location and position of the victim's body at the time of the shooting).

While an expert witness is not necessary to testify to the existence of prior injuries; only a properly qualified expert may offer a conclusion that a child has been a victim of abuse. *State v. Lopez*, 306 S.C. 362, 366, 412 S.E.2d 390, 393 (1991) (diagnosis of victim's injuries and determination of the cause based on the symptoms is beyond the ability of the average trier of fact and a qualified expert opinion is essential to connect those injuries to a physical cause).

Nothing in Propst limited experience, training, and education suggested that she had the necessary, specialized medical background or professional qualifications to ***reliably*** determine that Minor 1 had sustained injuries consistent with digital penetration. R. 147. Accordingly, the trial court abused its discretion in ruling that Propst qualified as a "sexual assault nurse examiner". *Price,* 368 S.C. at 498, 629 S.E.2d at 365.

As an initial matter, Propst was merely a trainee SANE nurse when she examined Minor 1. R. 130 - 134. She had only begun the SANE certification process in September, two months before she examined Minor 1. *Id.* Propst did not complete her SANE certification until January, 2014. R. 133.

The only portion of the SANE certification that Propst had completed was the forty-hours of classroom instruction. *Id.* Prior to Minor 1, she had only conducted four supervised sexual assault examinations. R. 134. Moreover, from her testimony it is unclear to what extent she was actually supervised during the examination. *Id.*; *Cf. Gooding*, 326 S.C. at 253, 487 S.E.2d at 598 (paramedic who had intubated over one thousand patients and been an instructor in the method was properly qualified.) Propst simply stated that she had conferred with an unnamed colleague at the hospital of the course of her examination. R. 134.

Crucially, Propst had no specialized training whatsoever in pediatrics, let alone any training in juvenile sexual assault cases. R. 131; (*emphasis added*); *see Lopez*, 306 S.C. at 366, 412 S.E.2d at 393. Nevertheless, Propst testified that Minor 1's injuries were consistent with a sexual assault and even went as far as to claim that she observed - with her unaided eye - that Minor 1 had sustained a microtear. R. 146 - 147. Probst did not have the professional background or the opportunity to acquire the necessary skills and experience to support a finding that she was an expert sexual assault nurse examiner. She was not properly qualified to opine that Minor 1 had been sexually abused.

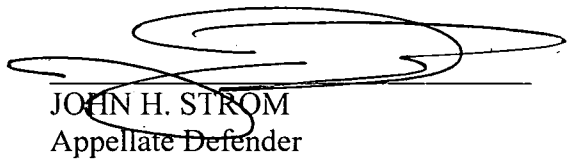
Appellant was prejudiced by the court's erroneous ruling on Propst expertise because she was the only witness that claimed to have observed Minor 1's alleged physical injuries. Her lack of training and experience coupled with the minor nature of the supposed physical injuries heightened the risk of misdiagnosis and made the gatekeeping role of the court all the more important.

Therefore, the trial court committed reversible error by qualifying trainee SANE nurse Jennifer Propst as an expert "sexual assault nurse examiner" when she had not completed her SANE certification and where, regardless of her lack of formal qualifications, she also lacked the necessary skill or practical experience required to give reliable expert opinion testimony

CONCLUSION

Based on the following arguments and the arguments raised in the Final Brief of Appellant and Final Reply Brief of Appellant, Appellant John Henry Lowery, II, respectfully requests that this Court grant his petition for rehearing.

Respectfully Submitted,



JOHN H. STROM
Appellate Defender

This 26th day of January, 2017.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and John Henry Lowery, #210338, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 26th day of January, 2017.

John H. Strom
Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 26th day of January, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025