STATE OF SOUTH CAROLINA

ORIGINAL

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

WAYLAND PURNELL,

APPELLANT

APPELLATE CASE NO. 2014-001501

Appeal from Richland County

Honorable Clifton Newman, Circuit Court Judge

Opinion No. 2017-UP-272

PETITION FOR REHEARING

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SC Court of Appeals

On July 5, 2017, this Court affirmed Appellant's convictions for lewd act upon a child and first degree criminal sexual conduct with a minor in The State v. Wayland Purnell, 2017-UP-272 (S.C. Ct. App. Filed July 5, 2017). 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 in rendering its opinion as detailed below.

The trial judge abused his discretion by qualifying Allison Foster as an expert in child sexual abuse dynamics because her testimony did not assist the trier of fact in understanding the evidence as required by Rule 702, SCRE, improperly bolstered the minor complainants' credibility in

violation of State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), and where there was insufficient evidence of the reliability of the subject matter of her testimony as required by State v. White, 382 S.C. 265, 676 S.E.2d 684, 686 (2009).

Rule 702, SCRE provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), the South Carolina Supreme Court wrote:

> Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider 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.** See State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim). **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.** See Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). **Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.** See State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements).

Id. at 445-447, 699 S.E.2d at 175 (emphasis added).

In State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009), our Supreme Court held all expert testimony, not just scientific expert testimony, must be vetted for reliability prior

to its admission at trial. The Court removed any confusion that the reliability determination required by Rule 702 only applied to scientific expert testimony. State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012). In State v. Chavis, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015), the Court wrote, "Both parties argue, and we agree, that State v. White should apply in qualifying child abuse assessment experts because their testimony is nonscientific." Here, the judge allowed Foster to testify as an expert in child sexual abuse dynamics. Pursuant to Chavis, Foster's testimony constituted nonscientific expert testimony and, under White, must have met a reliability threshold prior to its admission at trial.

In Chavis, the Court held the state failed to show the individual reliability of one of its witnesses sufficient to allow her to testify as a child abuse assessment expert. The Court asserted:

> There is no formulaic approach for determining the foundational requirements of qualifications and reliability in non-scientific evidence. However, 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. We find no evidence in this record as to Mrs. Elliott's ability to draw reliable results from the RATAC procedures she consistently follows, and thus find that the threshold reliability requirement of Rule 702 is not met. Accordingly, we hold that the circuit court abused its discretion in allowing Mrs. Elliot to testify as an expert regarding the report by Mrs. Gist.

412 S.C. at 108, 771 S.E.2d at 339.

As in Chavis, the state failed to establish that Foster's testimony was reliable. The subject matter of her testimony, particularly her testimony related to the child sexual abuse accommodation syndrome, is not supported by the research community. Some researchers in the field have gone so far as to call it "junk science." See R. 235, ll. 4-12. While Foster claimed her statements and conclusions were supported by research that was peer reviewed, she failed to cite to any specific studies or explain the methods of peer review that were used. In essence, Foster did not provide any

testimony from which the trial judge could have concluded that the subject of her testimony was reliable. One the other hand, she admitted the "dynamics of chronic child sexual abuse are complex," that some of the conclusions in the field are based on "an imperfect analysis," and that the field is "certainly not settled science." See R. 209, ll. 9-20 and R. 220, ll. 11-13. Because the state failed to demonstrate the subject matter of Foster's testimony was reliable, the judge abused his discretion by qualifying her as an expert and permitting her to testify before the jury.

Additionally, the trial judge abused his discretion by qualifying Allison Foster as an expert in child sexual abuse dynamics because the subject matter of her testimony did not assist the trier of fact in understanding the evidence or determining a fact in issue as required by Rule 702, SCRE. Instead, Foster's testimony merely improperly bolstered the credibility of the minor complainants. The critical determination in this case was the credibility of Minor 1 and Minor 2 since no physical evidence was presented. Foster's generalized statements and conclusions on the memory and behavior of child sexual abuse victims could not properly assist the jury in determining whether Minor 1 and Minor 2 were telling the truth about being sexually abused and, instead, more likely confused the jury. Further, the jury did not need expert knowledge to explain this subject matter as it did not involve scientific, technical, or other specialized knowledge. See Rule 702, SCRE.

The only purpose of Foster's "expert" testimony was to improperly bolster Minor 1 and Minor 2's credibility. 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 knew about the case. Id. at 466, 725 S.E.2d at 142. This Court determined that 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. The Court 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, 393–94, 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).

In Jennings, the "expert" forensic interviewer 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 had 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 an "expert" witness who had not met with the complainants, but who was familiar with the case as a result of discussions with the solicitor's office. While Foster did not meet with Minor 1 or Minor 2, the state still used her to indirectly comment on their credibility and provide greater weight to their testimony.

Foster's testimony was very likely interpreted by the jury to express that they should believe Minor 1 and Minor 2 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 complainants acted in a similar manner as other victims of sexual abuse they must be telling the truth. Her testimony also improperly made an excuse for Minor 1 and Minor 2's lack of memory regarding specific incidents of the alleged abuse and the lack of detail in their accounts. 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)).

Foster's testimony was also prejudicial to Appellant because there was no physical evidence presented in the case and the sole issue was the credibility of Minor 1 and Minor 2. Because the complainants' credibility was the "most critical determination of this case" and Foster's testimony improperly bolstered 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.").

In rendering its opinion, this Court relied in part on State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) and State v. Jones, 417 S.C. 319, 790 S.E.2d 17 (Ct. App. 2016). This Court's opinions in Brown and Jones in turn are based largely in part on our Supreme Court's outdated opinions in State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) and State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (1999), which predate State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) and Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), 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.

Weaverling and Schumpert were also decided before State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) 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). Schumpert and Weaverling are no longer good law in light of our Supreme Court's holdings in White and Kromah. Consequently, Jones and Brown, along with this case, were wrongly decided.

In light of the significant points overlooked and misapprehended by this Court in reaching its opinion, Appellant respectfully requests this Court grant rehearing and reverse his convictions and sentence.

Respectfully Submitted,

LARA M. CAUDY
Appellate Defender

This 20th day of July, 2017.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above referenced case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Wayland Purnell, #360617, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 20th day of July, 2017.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 20th day of July, 2017.

Mary M (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.