STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Clifton Newman, Circuit Court Judge

Opinion No. 2017-UP-272 (S.C. Ct. App. Filed July 5, 2017)

2012-GS-40-05044; 2014-GS-40-01247

THE STATE,

RESPONDENT,

V.

WAYLAND PURNELL,

PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 18, 2017.

QUESTIONS PRESENTED

1.

Did the Court of Appeals err by holding the trial court did not abuse its discretion when it qualified Allison Foster as an expert in the dynamics of child sexual abuse where there was insufficient evidence of the reliability of the subject matter of her testimony or whether those matters had ever been subjected to peer review?

2.

Did the Court of Appeals err by holding the trial court did not abuse its discretion when it qualified Allison Foster as an expert in the dynamics of child sexual abuse where the subject matter of her testimony would not assist the trier of fact as required by Rule 702, SCRE and improperly bolstered the minor complainants' credibility?

STATEMENT OF THE CASE

Procedural History

A Richland County Grand Jury indicted Petitioner at the October 11, 2012 term of General Sessions for two counts of first degree criminal sexual conduct (CSC) with a minor, and at the February 20, 2014 term for lewd act upon a child. R. 345-347. His case was called to trial on July 7, 2014 before the Honorable Clifton Newman, and a jury. R. 1. Assistant Solicitors Margaret Bodman and John Steadman represented the state, and J. Taylor Bell and Jessamine Grice represented Petitioner. R. 1.

On July 10, 2014, the jury acquitted Petitioner of one count of first degree CSC with a minor, but found him guilty of the second count as well as lewd act upon a child. R. 329, l. 21 – 330, l. 18. Judge Newman sentenced him to twenty five years imprisonment for first degree CSC with a minor and fifteen years concurrent for lewd act. R. 331, ll. 4-17.

The Court of Appeals affirmed Petitioner convictions and sentence. State v. Purnell, Op. No. 2017-UP-272 (S.C. Ct. App. filed July 5, 2017). App. 1-2. Petitioner filed a petition for rehearing on July 20, 2017. On August 18, 2017, the Court of Appeals denied the petition for rehearing. App. 3-11. Petitioner now files this petition for writ of certiorari to the Court of Appeals requesting this Court review the Court of Appeals' decision. App. 12.

Evidence at Trial

Petitioner and Kia Muse began dating sometime during the year 2010. Their relationship consisted mostly of talking on Facebook and exchanging text messages. They also spent a few weekends together in Atlantic City. At some point during January 2011, Petitioner came to live with Muse and her four children, B.M., Minor 1, Minor 2, and B.S, in New Jersey. He left to visit

his family for several weeks shortly after he moved in with Muse, but returned to live with the family permanently after the couple married on March 18, 2011. R. 60, l. 24 – 61, l. 23.

The family eventually moved to Columbia, South Carolina on September 2, 2011. R. 63, l. 17-19. They moved into a four bedroom home. B.M., who was the oldest child, and B.S., the youngest child and only boy, both had their own bedrooms and Minor 1 and Minor 2 shared a bedroom. R. 65, l. 16 – 66, l. 7. Shortly after they moved, Petitioner became employed as a barber and worked long hours seven days a week. R. 67, ll. 9-23. Muse also worked, but only part-time. The children were all enrolled in school and engaged in after school activities such as Girl Scouts and Boy Scouts. Minor 1 also attended a community reading literacy program three days a week after school because she was "having problems with reading." R. 67, l. 24 – 68, l. 11.

On April 30, 2012, Minor 1 attended the reading literacy program with her friend, D.H. R. 40, ll. 3-24. D.H.'s mother drove the children to and from the program that evening. Sometime after the program ended, Minor 1 allegedly told D.H. that she "knew what a male's private was." D.H. asked Minor 1 how she knew about a "male's private" and Minor 1 allegedly "told [D.H.] what happened." R. 40, l. 21 – 42, l. 20. D.H. shared this information with her mother, Danielle Jackson, when they arrived home, and Jackson immediately called Muse and relayed the allegations to her. R. 43, ll. 8-15; R. 47, l. 4 – 49, l. 3. Later that evening, after Muse picked Minor 1 up from Jackson's home, she questioned B.M., Minor 1, and Minor 2. Minor 1 and Minor 2 both claimed Petitioner had sexually abused them and Muse immediately reported the allegations to law enforcement. R. 69, l. 11-21.

Petitioner was interviewed that evening by an investigator and was given permission to travel to Delaware to care for his father who had been diagnosed with stage four cancer. R. 162, l. 2 – 164, l. 14. He was instructed to stay in touch with the investigator and did so regularly. R. 173, ll.

4-24. On June 21, 2012, Petitioner was asked to return to South Carolina to further discuss the case with law enforcement. When he arrived in Columbia, an investigator picked him up, interviewed him, and eventually served him with arrest warrants. R. 164, l. 15 – 165, l. 9.

On May 22, 2012, Minor 1 and Minor 2 went to the Assessment Resource Center (ARC) to attend a forensic interview. R. 179, l. 23 – 180, l. 5; R. 230, ll. 12-18. Recordings of their forensic interviews were played for the jury over Petitioner's objection. See R. 186, ll. 3-30 and R. 231, ll. 4-15. The girls were also physically examined by a licensed pediatrician for signs of sexual abuse on that same day. Dr. Susan Luberoff testified that neither child had any signs of trauma, injury, or scarring in their vaginal or anal region that would suggest they had been sexually abused. R. 142, l. 13 – 143, l. 8; R. 145, l. 4 – 146, l. 13.

Minor 1, who was eleven years old at the time of trial, testified that when she was between eight and nine years old Petitioner had anal sex with her once at their home in New Jersey and multiple times at their house in South Carolina. R. 106, l. 13 – 109, l. 20. Minor 2, who was ten years old at the time of trial, likewise testified that when she was between seven and eight years old Petitioner had anal sex with her once at their home in New Jersey and multiple times at their house in South Carolina. R. 126, l. 25 – 127, l. 25. Surprisingly, both Minor 1 and Minor 2 indicated that the alleged abuse did not hurt. R. 108, ll. 7-8; R. 119, l. 23 – 120, l. 3; R. 51, l. 25 – 130, l. 1.

Kia Muse admitted during her testimony that she discovered Petitioner was having an affair with a woman in Chicago over the Internet and telephone. However, she claimed she did not find out about this affair until the day of Petitioner's arrest on June 21, 2012 while she was looking through Petitioner's cell phone. R. 73, l. 15 – 74, l. 24. Defense counsel suggested through his questioning that Muse discovered the affair before Petitioner's arrest after Petitioner sought to send Girl Scout cookies to an address in Chicago earlier in the year. However, Muse denied this. Muse

also denied searching through Petitioner's cell phone and discovering the affair before the allegations surfaced despite having access to his passcode. R. 86, l. 13 – 89, l. 6. Petitioner's defense was that Muse knew about the affair and sought revenge by fabricating the allegations against Petitioner. R. 311, l. 4 – 312, l. 10. Muse did admit to calling the woman in Chicago the day after Petitioner was arrested and informing her of the allegations. R. 87, l. 19 – 88, l. 13.

As stated above, there was absolutely no physical evidence of sexual abuse. The jury ultimately acquitted Petitioner of the first degree CSC with a minor charge related to Minor 2, but found him guilty of the first degree CSC with a minor charge related to Minor 1 and the lewd act charge related to Minor 2. R. 329, l. 21 – 330, l. 18.

In Camera Testimony of Allison Foster

Petitioner sought pretrial to exclude the qualification of Allison Foster as an expert in child sexual abuse assessment or the dynamics of child sexual abuse. R. 332. The nature of Petitioner's specific objections is discussed *infra*. However, Petitioner's main objections were that (1) Foster's testimony would not assist the trier of fact as required by Rule 702, SCRE; (2) her testimony would improperly bolster the complainants' testimony which is prohibited by State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2009); and (3) the subject matter of her testimony is unreliable. Judge Newman qualified Foster as an expert in "the dynamics of child sexual abuse" over defense counsel's objection and found her testimony admissible. R. 260, ll. 5-15.

Foster testified in camera before the court made its ruling. Petitioner also proffered the testimony of Julie Buck to challenge Foster's testimony and discuss the unreliability of the subject matter.

Foster testified in camera that she is the "chief psychologist" at the Assessment Resource Center (ARC) in Columbia, South Carolina and also has her own private practice. R. 193, ll. 3-7.

She discussed her educational background, which included an undergraduate degree from Emory University and a Ph.D. in clinical psychology from the University of South Carolina. R. 195, ll. 1-7. The vast majority of her practice and experience has been working with children who are the alleged victims of physical or sexual abuse. R. 195, ll. 12-18. Foster was also the director of the ARC for seventeen years and was responsible for conducting forensic interviews and providing therapy and counseling for physically and sexually abused children. R. 193, ll. 8-11; R. 194, ll. 9-25.

When prompted by the solicitor, Foster gave a generalized opinion that it is important to understand the dynamics of child sexual abuse and that such testimony would assist the trier of fact. She maintained that it was "a specialized area of knowledge and not something that a typical person understands." R. 196, l. 5 – 197, l. 15.

Foster testified about the "process of disclosure," including delayed disclosure and piecemeal disclosure. She maintained that "this phenomenon is robustly identified in our field." R. 197, l. 16 – 198, l. 9. However, she admitted the "process of disclosure" is a "very active area of research" and is certainly not "settled science." R. 199, ll. 6-15. She also discussed how chronic abuse can affect a child's memory. Specifically, she explained that chronic abuse may cause a child to only remember certain incidents, but not others. Foster likewise maintained, without citing any specifics, that her testimony on memory is supported by research that is peer reviewed. R. 196, l. 18 – 197, l. 8; R. 198, l. 10 – 199, l. 5.

Additionally, Foster testified about the "child sexual abuse accommodation syndrome," which has five components: secrecy, helplessness, "entrapment in accommodation," "delayed tentative unconvincing disclosure," and recantation. She maintained that these five characteristics are not seen in every child of chronic sexual abuse, but they are characteristics that are commonly

seen in "different combinations." R. 201, l. 22 – 202, l. 2. Foster admitted this was a "descriptive" syndrome as opposed to a "diagnostic" syndrome. However, according to Foster, the "phenomenon" is currently taught in "forensic interview academies" as "part of what investigative teams ought to understand about the dynamics of child sexual abuse." R. 200, ll. 9-25; R. 201, ll. 5-9.

On cross-examination, Foster admitted child abuse assessment is a hard topic to research because the population studied consists only of individuals who have previously made an allegation or disclosed sexual abuse and cannot account for individuals who have been abused but never disclosed. R. 204, l. 19 – 205, l. 5.

When questioned further about "child sexual abuse accommodation syndrome," Foster testified that not all children go through all five stages outlined in the syndrome. For example, she maintained that not all children go through a stage of recantation, but almost all go through a stage of secrecy and delay in disclosing alleged abuse. R. 207, ll. 8-17. Foster admitted there was no way to provide a percentage of the number of individuals or children who delay in disclosing alleged abuse because it is impossible to know the number of individuals who never disclose at all. R. 207, l. 18 – 208, l. 15. She conceded it "is an imperfect analysis." R. 209, ll. 9-20.

Foster also described some of the five stages further. "Secrecy" is essentially delayed disclosure. "Helplessness" is when the child feels unable to change or stop the abuse. "Entrapment and accommodation" is "the state that the child finds him or herself in when they feel helpless to change the bargain. The child molestation has begun, it is ongoing and essentially the child still had to get along with the business of life . . . [I]t's accepting and living with something you cannot change." R. 212, ll. 8-24. She explained that some children accommodate by being "on their best behavior" or being very obedient while others act out or show signs of violence. R. 212, l. 25 – 213,

l. 11. Other forms of accommodation are behaviors that are "inappropriate for [the child's] age" such as bed wetting or biting. R. 213, ll. 15-21. Foster admitted that it is difficult to know whether a child's behavior is actually "symptomatic of abuse" since "healthy children who have never experienced any kind of abuse" also exhibit such behaviors. R. 213, l. 22 – 214, l. 22.

Lastly, Foster conceded that the "dynamics of chronic child sexual abuse are complex" and that the field still has "a substantial amount of mystery and error." R. 220, ll. 11-19.

In response to Foster's testimony, defense counsel called Julie Buck to testify in camera. Buck has a master's degree in research psychology from the University of Tennessee-Chattanooga and a Ph.D. in psychology from Florida State University. She is currently a full time consultant in the field of eyewitness memory, which is her specialty. Her focus is on research and teaching and thus she has not done any clinical work with children. However, Buck testified that she is familiar with the research on the "child sexual abuse accommodation syndrome" and has conducted her own research in the field. R. 225, ll. 2-18.

Buck explained that the "child sexual abuse accommodation syndrome" is not supported by research and that "[s]ome researchers have gone so far as to call it junk science." She testified that there are a lot of "limitations" on the studies and research on the subject and that "the research community as a whole is not likely to support it because the research isn't there." R. 234, l. 23 – 235, l. 12.

Foster's Testimony Before the Jury

Foster's testimony before the jury was similar to her testimony in camera, but more detailed. She discussed a child's memory and how it relates to chronic abuse. She explained that "memory is often talked about in terms of three stages." One must code it, meaning "be alert to take it in at some level through your five senses," retain it, and then be able to retrieve it. She maintained

that children who suffer chronic sexual abuse suppress memories of the abuse and have difficulty with retrieving them, especially given their undeveloped brains. She also said that some children will only be able to recall certain instances of abuse, ones that "stick out" for whatever reason, and not recall others. Further, she claimed that it is very difficult for children to remember specific dates and times of the alleged abuse. R. 261, l. 11 – 267, l. 15. Foster also discussed the "child sexual abuse accommodation syndrome" and the five factors discussed during her in camera testimony. She explained delayed disclosures, purposeful and accidental disclosures, accommodation, and helplessness in detail. R. 267, l. 16 – 271, l. 23.

Defense counsel renewed her objection to Foster's qualification as an expert before the jury. R. 260, ll. 5-9.

Opinion of the Court of Appeals and Petition for Hearing

The Court of Appeals affirmed Petitioner's convictions and sentence in a very brief unpublished opinion. App. 1-2. In holding that the trial court committed no abuse of discretion in qualifying Allison Foster as an expert in the field of child sexual abuse dynamics, the Court of Appeals relied heavily on State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), State v. Jones, 417 S.C. 319, 790 S.E.2d 17 (Ct. App. 2016), and State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (1999). App. 2.

In his petition for rehearing, Petitioner argued 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) are no longer good law because they 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. App. 9. Significantly, Schumpert was also decided before the Rules of Evidence were even adopted in South Carolina.

Weaverling and Schumpert also predate 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). Petitioner strongly asserted in his petition for rehearing that Schumpert and Weaverling are no longer good law in light of this Court's holdings in White and Kromah. App. 9.

Because 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), which the Court of Appeals relied on in affirming Petitioner's convictions and sentence, are based in large part on Schumpert and Weaverling, Petitioner concluded both cases were wrongly decided by the Court of Appeals in addition to Petitioner's case. App. 9.

ARGUMENT

1.

The Court of Appeals erred by holding the trial court did not abuse its discretion when it qualified Allison Foster as an expert in the dynamics of child sexual abuse where there was insufficient evidence of the reliability of the subject matter of her testimony or whether those matters had ever been subjected to peer review.

Relevant Facts

Defense counsel objected to the qualification of Allison Foster as an expert in the field of child sexual abuse dynamics arguing the state failed to provide sufficient evidence of the reliability of the subject matter of her testimony under State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). Counsel argued that the field is based on "junk science" and is not widely recognized. R. 245, l. 16 – 246, l. 1.

Additionally, counsel argued that the studies and research in the field are unreliable because it is impossible to control the population studied due to the nature of the subject. For example, counsel asserted that there was no way to study the subject in a laboratory setting or to compare the differences in a control group versus a study group. Defense counsel also argued that the population studied in the field is always skewed because it consists of individuals who have already disclosed alleged sexual abuse. Moreover, Foster's personal experience is working with individuals or children who are referred to the ARC by law enforcement or the Department of Social Services on suspicion of abuse. Therefore, the group of individuals she deals with on a regular basis is not an accurate representation of the population and leads to unreliable conclusions. R. 246, ll. 2-25.

In her response, the assistant solicitor did not specifically address defense counsel's arguments on the lack of reliability of Foster's testimony. Instead, the state focused on counsel's other objections to the admissibility of her testimony. See R. 250, l. 14 – 252, l. 23.

Judge Newman ultimately held: "Though the whole field of behavioral characteristics of children who may have been sexual assault victims, child sexual abuse victims, it's difficult to place a scientific knowledge test to evaluate the reliability of the testimony based on the fact that it involves a particularized area of expertise. But I believe that from what I've heard I believe the testimony to be offered is sufficiently reliable that it meets the test for the Court in its gatekeeper function." The court went on to recognize that the subject matter of Foster's testimony has been accepted in some states and rejected in others, but refused "to weigh in on" the matter in this case. R. 252, l. 24 – 254, l. 14.

Discussion

"All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009); See Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (holding "the trial court must evaluate the substance of the testimony and determine whether it is reliable."). 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 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, this 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 opinions 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 trial judge abused his discretion by qualifying her as an expert and permitting her to testify before the jury.

Respectfully, this Court should grant certiorari because the Court has yet to consider the reliability of the subject matter of this sort of "expert" testimony since State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (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, were decided. This Court should hold the trial judge abused his discretion by qualifying Foster as an expert because the state failed to prove the subject matter of her testimony was reliable, reverse Petitioner's convictions and sentence, and remand for a new trial.

2.

The Court of Appeals erred by holding the trial court did not abuse its discretion when it qualified Allison Foster as an expert in the dynamics of child sexual abuse where the subject matter of her testimony would not assist the trier of fact as required by Rule 702, SCRE and improperly bolstered the minor complainants' credibility.

Relevant Facts

Petitioner sought pretrial to exclude the qualification of Allison Foster as an expert in child sexual abuse assessment or the dynamics of child sexual abuse. Defense counsel argued that the state's use of such so called "experts" is a "backdoor attempt to go around State v. Kromah."[1] R. 189, ll. 16-20. She said, "[I]t's the State's intention that she [Foster] speak generally about research of what you might typically see in a child's behavior following allegations of abuse." Counsel argued that the only inference the jury could make from Foster's testimony was that she believed the children were telling the truth and that she found their allegations compelling. R. 190, l. 1 – 191, l. 2. She later clarified, "[U]nder Kromah we believe that this testimony about behavior that a child exhibits . . . is improperly being offered to bolster the credibility of the children." R. 240, ll. 15-22.

Defense counsel also argued that Foster should not be qualified as an expert under Rule 702, SCRE, because the subject matter of her testimony would not assist the trier of fact. R. 191, l. 2 – 192, l. 3; R. 240, l. 25 – 241, l. 8.

The assistant solicitor argued in response that under 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 (Ct. App. 1999), expert testimony "regarding behavioral characteristics of sexual assault victims and the range of responses

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[1] State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013).

encountered" is admissible. She also argued that such testimony "is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assaults." Moreover, she maintained that such testimony is helpful when the defendant has attacked the credibility of the complainants and claimed Petitioner had done so by arguing that the mother had fabricated the allegations. Lastly, the solicitor argued that under Rule 702, Foster was qualified because she has "specialized knowledge" and that the probative value of her testimony outweighs any prejudicial effect. R. 250, l. 15 – 252, l. 23.

The judge found Foster was "qualified in the field of evaluating child sexual abuse cases and the behavioral characteristics of abused children." Judge Newman also found the subject matter of Foster's testimony "involved matters that would be helpful to the jury in understanding issues in this case" and would not bolster the complainants' testimony. He specifically ruled that no testimony "would be allowed that would broach upon vouching for a witness." Therefore, the judge found the testimony admissible and that the qualification of Foster as an expert in the dynamics of child sexual abuse was proper. R. 252, l. 24 – 254, l. 14.

Discussion

"The label of expert should be jealously guarded by the court and never loosely bandied about." Kromah, 401 S.C. at 357, 737 S.E.2d at 499. As this Court recognized in Kromah, "although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." Id.

As noted above, 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), this Court specified the following three prong test for expert testimony:

> [E]xpert testimony receives additional scrutiny relative to other evidentiary decisions. 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. 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 169, 175 (internal citations omitted).

Here, 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 that the children had been sexually abused. Foster's generalized opinions and conclusions on the memory and behavior of child sexual abuse victims as well as the child sexual abuse accommodation syndrome 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. The Court of Appeals 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. The Court of Appeals 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 the error was not harmless. Id. at 467, 725 S.E.2d at 143.

This Court has also held that it is improper "for an expert to comment on the veracity of a child's accusations of sexual abuse." Jennings, 394 S.C. 473, 716 S.E.2d 91; 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); 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. Jennings, 394 S.C. at 476-481, 716 S.E.2d at 92-95. This Court held 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 Petitioner 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, Petitioner 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, the Court of Appeals 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).[2] The Court of Appeals' opinions in Brown and Jones in turn are based largely in part on this 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

[2] This Court granted certiorari in State v. Jones, 417 S.C. 319, 790 S.E.2d 17 (Ct. App. 2016) on August 22, 2017.

good law in light of this Court's holdings in Watson, White, and Kromah. Consequently, Jones and Brown, along with this case, were wrongly decided.

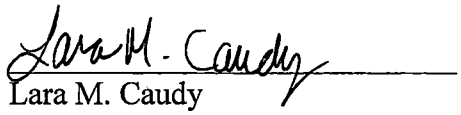
Both the state's and the Court of Appeals' reliance on outdated cases such as Weaverling and Schumpert highlight the confusion that has arisen since this Court's opinion in Kromah. The state incorrectly contends that as long as the "expert" has not met with the minor complainants, he or she is free to comment on their credibility and bolster their testimony. However, it is obvious that the assistant solicitors trying these cases, like Petitioner's case, provide these "experts" with all of the details of the complainants' allegations. Consequently, the expert's testimony substantially mirrors the allegations raised by the complainants in each case and improperly bolsters their credibility as occurred in Brown, Jones, and Petitioner's case. Respectfully, this Court should grant certiorari to provide guidance to both the bench and bar and announce that so called "experts" in spurious fields like "dynamics of child sexual abuse" are no longer proper under modern case law.

For these reasons, this Court should reverse the decision of the Court of Appeals, reverse Petitioner's convictions and sentence, and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the questions presented.

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of September, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 2017-UP-272 (S.C. Ct. App. Filed July 5, 2017)
2012-GS-40-05044; 2014-GS-40-01247

THE STATE,

RESPONDENT,

V.

WAYLAND PURNELL,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari to the Court of Appeals and a copy of the Appendix in this case have been served on 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 18th day of September, 2017.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 18th day of September, 2017.

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

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September 18, 2017

V. Henry Gunter, Jr., Esquire
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

Re: The State v. Wayland Purnell

Dear Mr. Gunter:

Enclosed are two copies of the Petition for Writ of Certiorari to the Court of Appeals and the Appendix in the above referenced case that I filed today with the South Carolina Supreme Court.

If you have any questions concerning this matter, please contact me.

Sincerely,

Lara M. Caudy
Appellate Defender

LMC/meb

Enclosures

cc: Court of Appeals