

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County

Honorable William H. Seals, Circuit Court Judge

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S.C. SUPREME COURT

THE STATE,

PETITIONER,

V.

JIMMY TURNER,

RESPONDENT

APPELLATE CASE NO. 2016-002204

BRIEF OF RESPONDENT

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STATE'S QUESTION PRESENTED

Did the Court of Appeals err in reversing Respondent's conviction where it: (1) improperly equated the circumstances of Respondent's case with the circumstances present in Chavis and (2) failed to conduct a proper harmless error analysis because the alleged error could not reasonably have affected the outcome of the trial?

RESPONDENT'S COUNTER QUESTION PRESENTED

In a case with no physical evidence of abuse where the child complainant initially identified someone other than respondent as her abuser, did the Court of Appeals properly apply this Court's decision in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) where, just like in Chavis, the State's expert was the forensic interviewer who conducted the interview of the child, was qualified as an expert in "child abuse assessment," and told the jury that she recommended therapy, no contact with respondent, and that her opinions were "evidence based?"

STATEMENT

On May 10, 2012, a Marion County grand jury indicted respondent Jimmy Turner (“Turner”) for first degree criminal sexual conduct with a minor under eleven years of age and lewd act. R. 272. On August 7, 2012, Turner was tried before the Honorable Thomas A. Russo, and a jury. R. 1. Fitzlee H. McEachin represented the State. R. 1. Marcus Woodson represented Turner. R. 1. **The result was a hung jury.** R. 2, l. 6 – 7, l. 17.

On February 5, 2013, Turner was again tried, this time before the Honorable William H. Seals and a jury. R. 8. The same attorneys represented the State and Turner. R. 8. The jury convicted Turner. R. 263, l. 14 – 264, l. 17. Judge Seals sentenced Turner to concurrent terms of life imprisonment on the CSC conviction and fifteen years’ imprisonment for lewd act. R. 270, ll. 14 – 21. Turner appealed.

On September 7, 2016, a panel of the Court of Appeals consisting of Judges Williams, Thomas, and Geathers heard oral argument. App. 323. On September 21, 2016, the Court of Appeals unanimously reversed Turner’s convictions in an unpublished, per curiam opinion. App. 323-24. On October 21, 2016, the Court of Appeals unanimously denied the State’s petition for rehearing. App. 344. On September 8, 2017, this Court granted the State’s petition for certiorari and this brief of respondent now follows.

ARGUMENT

In this case with no physical evidence of abuse where the child complainant initially identified someone other than respondent as her abuser, the Court of Appeals properly applied this Court's decision in *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015) where, just like in *Chavis*, the State's expert was the forensic interviewer who conducted the interview of the child, was qualified as an expert in "child abuse assessment," and told the jury that she recommended therapy, no contact with respondent, and that her opinions were "evidence based."

Introduction

The State desperately begs this Court to elevate semantics over substance. The State's entire argument on certiorari and in its brief depends on the words "always" and "alleged." State's Pet. Cert. at 12. Brief of Pet. at 13. The State claims that the forensic interviewer's use of the word "always" distinguishes respondent's case from *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015). According to the State, *Chavis* forbids a forensic interviewer from telling the jury that she recommended therapy for a child, but if the forensic interviewer instead tells the jury she "always" recommends therapy for a child, *Chavis* somehow approves. Similarly, while *Chavis* forbids a forensic interviewer from telling a jury that she recommended no contact with the defendant, the State claims if the forensic interviewer instead uses the phrase "alleged perpetrator," *Chavis* approves.

Relevant Facts

The child complainant in this case changed her story overnight. The complainant first reported the alleged sexual abuse to her teachers. R. 33, ll. 14 – 17. She told them her mother’s boyfriend had sexually abused her. R. 55, l. 25 – 56, l. 10. She was released into her mother’s custody and spent the night with her mother. R. 51, ll. 14 – 18. The next day, at her forensic interview, the complainant changed her story and identified Turner as her abuser. (State’s Exhibit 12). There was no physical evidence of abuse.

The Allegations at School

Annette Wardy (“Wardy”) worked as a behavioral specialist in classrooms with children who had emotional disturbances. R. 26, l. 19 – 27, l. 17. She worked alongside the classroom teacher. R. 27, ll. 15 – 24. Complainant (“Minor”) was a student in her class. R. 28, l. 22 – 29, l. 6. In December 2011, Minor had “a meltdown” in class. R. 31, l. 19 – 32, l. 13. Minor told Wardy that her mother’s boyfriend (“Vincent”) was “bothering her sexually.” R. 33, ll. 14 – 17. Wardy reported what Minor told her and the school reported the allegations to social services and law enforcement. R. 33, l. 18 – 34, l. 7.

Minor did not mention Turner at the school. R. 36, ll. 14 – 17. Minor told Wardy the abuse happened at her house, in her bed, while she was sleeping. R. 184, l. 18 – 185, l. 1. R. 186, ll. 12 – 16. Minor’s mother was home. R. 185, ll. 12 – 16. Minor repeated her story to Wardy, the teacher, and the school nurse and again did not mention Turner. R. 36, l. 22 – 37, l. 12.

Florence County Sheriff’s Deputy Vincent Hanna (“Hanna”) arrived at the school to investigate. R. 187, l. 19 – 188, l. 5. He spoke with Minor. R. 188, ll. 6 – 7. Minor told Deputy Hanna that the abuse happened at her mother’s house in Florence. R. 188, ll. 21 – 25.

Minor's Mother Arrives at the School

After Minor reported her allegations against Vincent to her teachers, the school called Minor's mother, Pearlene Commissiong ("Mother"), and she went to the school. R. 48, l. 15 – 50, l. 3. Mother first spoke with a uniformed law enforcement officer. R. 50, ll. 1 – 9. Mother was then taken into an office where she met with a teacher, a worker from DSS, and Minor. R. 50, ll. 10 – 18. The meeting lasted an hour and a half. R. 51, ll. 1 – 13. An appointment was set up for a forensic interview the next day at the Care House. R. 51, l. 17 – 25. Mother was allowed to take Minor home with her. R. 51, ll. 14 – 18.

Mother testified that she and Minor lived in Florence in the fall of 2011. R. 43, ll. 1 – 3. No one else lived with them. R. 44, ll. 3 – 6. Mother's aunt was named Janie Mae Thompson ("Thompson") and lived in Marion. R. 42, ll. 5 – 19. Mother worked the night shift at the hospital. R. 44, ll. 9 – 20. On the weekends, Mother worked 12 hour shifts from 7:00 AM to 7:00 PM. R. 44, ll. 16 – 25. When Mother worked, Minor stayed with Thompson in Marion. R. 45, ll. 1 – 15. Mother's uncle JW, her cousin Faye Thompson ("Faye"), and Faye's boyfriend, Turner, lived in Thompson's house in Marion. R. 46, l. 19 – 47, l. 4. Mother had dated Vincent for approximately five years. R. 52, ll. 1 – 5. Vincent would stay nights with Mother and Minor. R. 52, ll. 8 – 18.

Minor Changes Her Story

The solicitor concluded his direct examination of Mother with the following:

Q. All right. At any point in time, Pearlene, from when you got the phone call from the school up until today's date, have you ever told [Minor] to tell anybody anything?

A. No, sir.

Q. With regard to this case?

A. No, sir.

Q. Have you ever told her to change any story?

A. No, sir.

Q. Nothing along those lines?

A. No, sir.

R. 54, ll. 2 – 11.

The reason for the solicitor's odd questioning quickly became apparent on cross-examination. R. 55, l. 25 – 56, l. 10. Minor's initial allegation at the school was against Vincent, not Turner. R. 55, l. 25 – 56, l. 10. The following occurred on cross-examination:

Q. Okay. And did you have any discussion with [the school resource officer] about it? And don't say what he said, but did you all have a conversation or did he just tell you and you kept going?

A. No, I mean, we talked about it.

Q. All right. And the allegation was not against Jimmy Turner; is that correct?

A. That's correct.

Q. Okay. And the allegation was against Vincent, I think, you said Brunson; is that correct?

A. That's correct.

Q. Okay. And you didn't believe your daughter; is that correct?

A. I was very upset at the time with everything that was going on. I mean, kind of hit me all of a sudden, so I was very upset.

Q. Right. And so you said it couldn't have happened. He couldn't have done it; is that correct?

A. I said that to – I'm not understanding your question.

Q. You said at the school that Vincent couldn't have done it?

A. I said I was upset at the school. I'm not understanding what your – I'm not understanding your question.

Q. When you were told that your daughter was accusing your boyfriend of abuse, you said that could not have happened?

A. When I found out that [Minor] was touched, I was very upset. I said how – I was in disbelief that it happened period, that's what I was upset about.

...

Q. Okay. So is it your testimony today that when she made an allegation against Vincent that you believed her. I'm not sure if you answered my previous question. So did you believe –

A. I was upset about everything that was going on. I believe she was touched, yes. No child would come up and make that up, yes, I believe she was touched.

Q. But you don't believe it was by Vincent?

A. When the allegations came out, no I didn't believe it was Vincent. I was very upset though.

Q. Okay. And your daughter knew you were upset?

A. Yes, she was upset also, sir, at the time when I saw her.

R. 55, l. 21 – 57, l. 17 (emphasis added).

Mother admitted that when they left the school Mother was crying and emotional in the car. R. 58, ll. 12 – 15. **Mother denied that she discussed the situation with Minor in the car.**

R. 59, ll. 7 – 10. Mother claimed she had been directed by the social worker not to question Minor and that she did not talk to Minor about her allegations at all. R. 59, ll. 11 – 21.

However, on redirect, Mother contradicted herself and claimed that Minor told her in the car outside of the school that the alleged abuse occurred in Marion, not their home in Florence as she told the school officials. R. 62, l. 19 – 63, l. 20. She told the solicitor that Minor did not indicate in the car ride home that Vincent had abused her. R. 66, ll. 9 – 12.

Mother denied calling Vincent that night and telling him about the accusations. R. 59, ll. 22 – 25. Mother also categorically denied that Vincent had ever been alone with Minor, even though Mother often spent the night at Vincent’s house and Minor often played with Vincent’s daughter. R. 60, l. 14 – 61, l. 9.

Mother took Minor to the Care House for a forensic interview the next day. R. 53, ll. 2 – 10. Mother met with the forensic interviewer, Sally Williamson (“Williamson”) at the Care House. R. 53, ll. 2 – 16. During the forensic interview, Minor claimed Turner abused her and denied Vincent abused her. (State’s Ex. 12)

Minor’s Trial Testimony

Minor was eight years old at the time of trial. R. 92, ll. 17 – 18. Minor claimed that Turner performed vaginal and anal sex on her and forced her to perform oral sex on him. R. 98, l. 5 – 100, l. 17. Minor admitted telling Wardy that Vincent did it and that the abuse happened at her house in Florence when she had a sleepover with some of her friends. R. 100, ll. 5 – 17. R. 103, ll. 13 – 23. Minor claimed that Turner threatened to kill her if she “didn’t say it was Vincent.” R. 100, l. 24 – 101, l. 9.

Minor and Mother’s testimony were contradictory on several points. Minor claimed she told Mother on the car ride home from the school that it was not Vincent. R. 101, ll. 12 – 19. Minor admitted that her mother was crying in the car and they talked about the allegations both in the car, and later about it that evening. R. 104, ll. 8 – 22. She claimed not to remember what her mother told her that evening. R. 104, ll. 23 – 24. Also contradicting her mother’s testimony, Minor denied that Vincent ever slept over at her house. R. 103, l. 24 – 104, l. 1.

At trial, Minor claimed the abuse happened at Thompson’s house when both Thompson and Faye were at home. R. 106, ll. 17 – 21. Minor claimed she would loudly ask for help, but

nobody would come. R. 107, ll. 6 – 13. Minor did not ask Thompson or Faye for any help or tell them about the abuse after it happened. R. 107, ll. 14 – 24.

Minor's Forensic Interview

During the forensic interview, when discussing Turner and the alleged abuse, Minor is almost playful and frequently changes positions in her chair. (State's Exhibit 12). She is rarely serious, somber, or emotional when she describes oral, anal, and vaginal sex. (State's Exhibit 12). When Williamson asked Minor if anything ever came out of Turner's penis, Minor told her "green stuff." (State's Exhibit 12). Near the end of the forensic interview, Williamson asked Minor whether she had ever told anyone that someone else abused her. (State's Exhibit 12). Minor hesitated. (State's Exhibit 12). Williamson told Minor that it was okay if she had said that someone else did it because sometimes kids get confused. (State's Exhibit 12). Minor then denied ever saying anyone else ever touched her private parts. (State's Exhibit 12).

At this point, Minor's demeanor changed from being playful to sitting up straight in her chair with her head looking at her feet. (State's Exhibit 12). Williamson asked Minor if she was telling the truth. (State's Exhibit 12). Williamson then told Minor that she had spoken with Minor's mother who had said something about Vincent. (State's Exhibit 12). Williamson then asked if Minor had ever told anyone that Vincent had touched her private parts. (State's Exhibit 12). Minor replied that she was nervous and that was why she said that. (State's Exhibit 12). Williamson asked if Vincent had ever touched her private parts. (State's Exhibit 12). Minor said only if she hugged him. (State's Exhibit 12). Minor sat very still and replied "no" to questions about touching or being touched by Vincent. (State's Exhibit 12). Williamson then said she wanted to make sure that she understood—that Minor had first said Vincent, but was really nervous when she first accused Vincent. (State's Exhibit 12). Williamson then asked who she

really meant when she accused Vincent and Minor named Turner. (State's Exhibit 12). Williamson then exited the room. (State's Exhibit 12).

The Defense Case – Faye and Thompson

Faye testified that Thompson's house was "fairly small." R. 197, ll. 16 – 17. The house had three bedrooms and a dining area. R. 195, ll. 4 – 5. Faye testified that she could not recall any time when Turner looked after Minor by himself. R. 195, ll. 18 – 20. Turner worked at McCall Farms and also had a paper route. R. 195, l. 21 – 196, l. 10. Thompson took care of Minor during the day. R. 196, ll. 18 – 19. Faye testified she never sent Minor into her room to get anything for her. R. 197, ll. 1 – 3. Faye never recalled Minor being in a closed room with Turner. R. 198, ll. 17 – 19. She never heard Minor scream for help. R. 197, ll. 4 – 6. Minor never acted fearful around Turner. R. 197, ll. 7 – 8. She never told Faye that anything was wrong. R. 197, ll. 9 – 11.

Thompson testified that Mother and Minor lived with her in Marion when they first moved to South Carolina from New York. R. 210, ll. 17 – 19. When Mother got a job in Florence, she would leave Minor with Thompson for "weeks after weeks." R. 210, l. 20 – 211, l. 1. Minor stayed with Thompson "so much until I would beg her mother to come get her and she wouldn't." R. 211, ll. 9 – 15. Thompson testified that "welfare had to get into it and make her come get her and take her home," but the solicitor's objection to this statement was sustained and it was stricken.¹ R. 211, ll. 9 – 20.

Thompson testified that Minor was never alone with Turner. R. 212, ll. 5 – 7. Thompson contradicted Mother's testimony about Vincent. R. 216, ll. 16 – 217, l. 14. She testified that

¹ The trial judge did not have the benefit of argument that this testimony would be relevant to show bias of Mother pursuant to Rule 608(c), SCRE.

there were times that Minor was alone with Vincent. R. 216, l. 16 – 217, l. 14. Thompson never noticed Minor behave unusually towards Turner. R. 217, ll. 15 – 17. She never heard Minor scream for help. R. 217, ll. 18 – 20. She testified that because her house was so small, if Minor had screamed she would have heard it and gone running to see about it. R. 217, l. 21 – 218, l. 4.

The Forensic Interviewer's Testimony

Before the forensic interviewer, Williamson, took the stand, the court heard lengthy argument on the boundaries of her testimony. R. 111, l. 4 – 122, l. 12. Turner argued Williamson should not be allowed to vouch for Minor's credibility or discuss whether the child had been coached. R. 111, ll. 6 – 112, l. 21. Turner cited State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (2011); State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012); and State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). R. 111, l. 6 – 112, l. 17. He noted to the trial judge that in the previous trial, the forensic interviewer gave an opinion that Minor's behavior indicated she was telling the truth. R. 113, ll. 8 – 14. Kromah was decided between the first trial **that resulted in a hung jury** and the instant trial.

The State replied that Kromah did not bar Williamson's testimony because it did not plan on admitting Williamson as an expert in forensic interviewing, but instead in "the field of child sexual abuse assessment and treatment." R. 114, l. 4 – 115, l. 24. The solicitor admitted he could not ask Williamson whether the child was telling the truth, but told the court there were "other things" that were "certainly within the purview of her expertise" and that her testimony should be allowed. R. 116, ll. 2 – 18.

The solicitor said that he did plan to ask Williamson about coaching and Turner objected. R. 117, ll. 12 – 16. The solicitor argued it was not improper under Kromah because the case

only dealt with forensic interviewers and “not somebody who was qualified as an expert in child sexual abuse assessment and treatment.”

R. 117, ll. 18 – 23. Defense counsel told the trial judge that Williamson “holds herself out as a forensic interviewer” and that the State’s strategy was, after Kromah, to have her say, “I’m really not a forensic interviewer, I’m a child sexual expert.” R. 117, l. 24 – 118, l. 4. The solicitor replied that forensic interviewing was “only a small portion” of what Williamson does. R. 118, ll. 5 – 15. Trial counsel argued that Williamson should not be allowed to testify regarding coaching and that her purpose should only be to admit the tape of the forensic interview. R. 120, l. 14 – 121, l. 2. The trial judge overruled Turner’s objections. R. 121, ll. 7 – 11.

After asking Williamson her name, solicitor’s next question asked her current occupation. R. 123, ll. 15 – 18. Williamson replied, “I’m a forensic interviewer.” R. 123, l. 19. After prompting from the solicitor, she said she was “also a therapist as well.” R. 123, ll. 23 – 25. The solicitor offered Williamson “as an expert in child sexual abuse assessment and treatment.” R. 127, ll. 10 – 12. During voir dire, Turner asked Williamson whether the work she did in this case was as a forensic interviewer or as a counselor. R. 128, ll. 7 – 9. Williamson said, “I conducted a forensic interview with this child.” R. 128, l. 10. Defense counsel then objected to having her qualified as an expert in child abuse assessment, but the trial judge overruled the objection and qualified the expert. R. 130, ll. 14 – 23.

Williamson then testified about the concept of delayed disclosure and stated that, “most sexual abuse is not disclosed at all.” R. 131, ll. 2 – 22. Williamson was asked about the concept of “partial disclosure,” which she explained as when a child discloses abuse “but says it happened to a friend.” R. 132, ll. 20 – 25. She described “partial disclosure” as the child trying

to say something happened either in a dream or that a person tried to do something to them but did not succeed, or might say something happened one time that actually happened ten times. R. 132, l. 20 – 133, l. 12.

The solicitor then asked Williamson to define “active disclosure.” R. 133, ll. 13 – 20. Williamson defined an “active disclosure” as one in which “there has been no part of inconsistency or no inconsistent piece in the disclosure. The child has been clear and concise in their disclosure and has not strayed from the original disclosure in any way.” R. 133, ll. 13 – 20. The solicitor asked if partial disclosures and active disclosures were common and Williamson said they were. R. 133, ll. 21 – 23. Turner objected to this question and his objection was overruled. R. 133, l. 24 – 134, l. 5.

The tape of the forensic interview was played during Williamson’s testimony. R. 142, ll. 13 – 16. The following questioning took place soon after the jury watched the video:

Q. Okay. Now, Sally, as an expert in the field of child abuse assessment and treatment, **do you look to see if a victim has been coached or influenced by any sort of third-party?**

MR. WOODSON: And, Your Honor, I renew my objection at this time.

THE COURT: I’m going to overrule those objections.

BY MR. MCEACHIN:

Q. Do you look to see if a victim has been coached or has some sort of influence by a third party before speaking to you?

A. We do throughout interview.

Q. What do you look for?

A. We look for a few different pieces. We look for what we call congruents in child’s behavior, which is basically does their behavior in some way go along with pieces of information that [they’re] disclosing through the interview. And we also look for any inconsistencies that might arise through the interview in the victim’s disclosure of what happened.

Q. And when you say any inconsistencies we saw the video is that why you'll sometimes revert back and ask a same question again a little bit further in interview to see if you get a consistent answer?

A. Yes, that's correct and sometimes why I rephrase the question as well.

Q. All right. If you could explain to the jury about the concept of peripheral facts. I think you talked about congruency but could you go a step further there?

A. Peripheral facts are other pieces of information that we look to obtain during a victim's statement such as do you remember where you were, do you remember what the room look like, what you were wearing, what did – were there descriptors like the bed spread for example, what did the bed spread look like, what time of day was it. So basically helps us to build a picture of what occurred and when where it occurred.

Q. Okay. After that interview, you had with [Minor] on December 2nd did, you have any other contact with her after that time period?

A. No, I did not.

Q. And as a result of [Minor]'s disclosure that she had been assaulted, what if any recommendations, did you make?

A. I made a recommendation of therapy as I always do when a child discloses any form of abuse and typically that's trauma focused therapy of some sort, it's evidence based and also no contact with the alleged perpetrator.

MR. WOODSON: Your Honor, I would object to that last question same grounds.

THE COURT: Overruled.

BY MR. MCEACHIN:

Q. So in essence you recommended therapy for her?

A. I did, yes.

R. 144, l. 4 – 146, l. 7 (emphasis added).

The jury was excused and Turner argued “that last question about a recommendation, I think bolsters the child's credibility because if she's testifying that there need to be a

recommendation, she's basically telling the jury I found something, then this child's credible. Therefore, this child needs some counseling and I think that bolsters the child's credibility and I would ask for a mistrial." R. 146, l. 20 – 147, l. 2. Defense counsel further argued that Williamson had implied that she had "made some sort of finding and this child needs counseling. There's no way you can say a child needs counseling unless you believe the allegations are true." R. 147, ll. 21 – 25. The trial judge overruled the objection, stating that Williamson did not "state any opinions at all. She just said I recommend counseling." R. 148, ll. 21 – 23.

Discussion

The Court of Appeals properly applied this Court's decision in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015). As the Court of Appeals undoubtedly recognized by issuing a short, unpublished, per curiam decision, the application of Chavis to Turner's case involved no great or novel leaps of legal reasoning. Respondent also submits, to counter the State's criticism that the Court of Appeals erred in not "conducting a proper harmless error analysis," that because of the inherent contradictions in Minor's allegations and the contradictions in the mother's testimony, the notion that this error could not be harmless beyond a reasonable doubt was obvious. Brief of Pet. at 19. State v. Stukes, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016) (using only five sentences to conclude the error in a sex abuse case could not be harmless because the case "hinged on credibility). Far from reducing this Court's holdings to "a bright-line rule" on harmless error, the Court of Appeals assessed this case according to its own merits: a child complainant who frequently contradicted herself, even with regard to the identity of the perpetrator; a mother who contradicted herself during her own testimony; and the lack of physical evidence.

The Error at the Trial Court

In Chavis, the Court held it was error to allow an expert in child abuse assessment to testify regarding her recommendation that the victim “not be around [the defendant] for any reason.” Chavis at 108, 771 S.E.2d at 340. The Court held that the expert’s “recommendation that [the defendant] not be around Victim for any reason, can only be interpreted as [the expert] believing Victim’s claim that [the defendant] sexually abused her. This type of testimony is improper.” Id. at 109, 771 S.E.2d at 340. The Court further held that even if the qualification of the expert was not error, allowing her to testify about her recommendation was erroneous. Id. The reason for the error was that it improperly bolstered the complainant’s credibility. Id.

In this case, the same error—and a more egregious one—are present. Just as in Chavis, Williamson testified that she recommended no contact with Turner. Even worse than Chavis is her recommendation for counseling. Williamson also said this was “evidence based.” These recommendations cannot be interpreted in any other way than that Williamson believed Minor’s allegations. Under Chavis, these statements by Williamson are error. See also State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011); State v. Dawkins, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989). “This type of bolstering, especially when made by a witness imbued with imprimatur of an expert witness, improperly invades the province of the jury.” Chavis at 109, 771 S.E.2d at 340.

The State contends that because Williamson testified that she “always” recommends counseling, Chavis does not control. The State’s contention ignores the solicitor’s questions and the reasoning of Chavis. The central command of Chavis and this Court’s forensic interviewing jurisprudence is that the expert—no matter what new name is given them by the State—may not comment directly or indirectly on the credibility of the complainant.

To expose the fallacy of the State's reasoning, the Court need only ask the purpose of the solicitor's question, "And as a result of [Minor]'s disclosure that she had been assaulted, what if any recommendations, did you make?" The only purpose of this question was to imply to the jury that Williamson believed Minor because she recommended therapy. After Turner's objection was overruled, the solicitor asked the question again, "So in essence you recommended therapy for her?" R. 147, ll. 2 – 7. This question was the **last** question on direct-examination of the State's **last** witness. R. 146, ll. 8 – 9. The final word the State wanted the jury to hear from its final witness was that the expert recommended therapy. In other words, the final inference the State wanted the jury to make was that Williamson believed Minor. Similarly, "alleged perpetrator" is no different than naming the defendant. By this point, the jury had heard all the State's testimony and viewed the forensic interview where Williamson directed the child away from naming Vincent and toward Turner. The State cannot seriously contend the jury did not know who the "alleged perpetrator" was. See also State v. Haslam, 663 A.2d 902, 904-05 (R.I. 1995) ("Even when a witness does not literally state an opinion concerning the credibility of another witness but his or her testimony would have the same substantive import, such testimony is inadmissible.").

The Error in this Case Cannot be Harmless

The error in this case cannot be harmless beyond a reasonable doubt because the entire case rested on Minor's credibility, which was very much in question. Kromah at 360-61, 737 S.E.2d at 501 (applying beyond a reasonable doubt standard of harmless error in sexual abuse case). When the outcome of a sexual abuse case turns on the credibility of the complainant, a bolstering error is not harmless. See State v. Anderson, 413 S.C. 212, 219, 776 S.E.2d 76, 79-80 (2015). Just like in Anderson, no physical evidence of abuse existed. Id. The State contends

that the Court of Appeals interpreted Chavis as imposing a bright line rule that when there is no physical evidence, reversal is automatic. Much to the contrary, the Court of Appeals easily recognized the substantial credibility problems with Minor's claims.

First and foremost among the problems with Minor's allegations is that she initially claimed her mother's boyfriend, Vincent—**not respondent**—sexually abused her. R. 55, l. 25 – 56, l. 10. She was released from school to her mother and Minor's story literally **changed overnight**. R. 51, ll. 14 – 18. (State's Ex. 12). It cannot be seriously contended that when a complainant first names someone other than the defendant as her abuser—someone who had access to the child—and then changes her story in a fashion that suits her mother, that an error bolstering the complainant's shaky credibility is harmless.

The videotape of the forensic interview shows a dramatic change in Minor's demeanor when she was asked about Vincent. Mother's testimony was inconsistent with Minor's testimony concerning Vincent and their discussions in the car immediately after leaving the school and that evening. Faye and Thompson's testimony concerning the size of the house made Minor's claims seem improbable. The first jury that heard this case could not reach a unanimous verdict. No error in this case could be harmless.

The similarity of the facts here to this Court's decision in Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016) further demonstrate the error below cannot be harmless. Just like in Turner's case, in Tappeiner, the house where the alleged abuse occurred was small and the complainant would have been heard had he called for help as he claimed. Tappeiner at 244-45, 785 S.E.2d at 473-74. No physical evidence existed in Tappeiner. Id.

Tappeiner was a PCR case in which the PCR court denied relief. Even under the rigorous standard of review in PCR cases, this Court held that trial counsel's failure to object to the


solicitor's comments in his closing argument implying the forensic interviewer believed the victim required a new trial for the defendant. Id. at 251-54, 785 S.E.2d at 477-79. Turner's case is legally indistinguishable from Tappiener except that Turner's procedural hurdle is flipped: the State must show that the error was harmless beyond a reasonable doubt. See also Briggs v. State, ___ S.C. ___, ___ S.E.2d ___, Op. No. 27745 (Oct. 25, 2017) (holding that standard of review controlled in sexual abuse case with no physical evidence where "the victim's credibility was very important.").

"The determination whether a bolstering error is harmless depends on whether the case turns on the credibility of the victim." Chavis at 110, 771 S.E.2d at 341. Minor and her mother's shaky credibility were in desperate need of bolstering by an expert witness. This Court should affirm the Court of Appeals.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed, Turner's convictions should be reversed, and this case should be remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of October, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Marion County

Honorable William H. Seals, Circuit Court Judge

THE STATE,

PETITIONER,

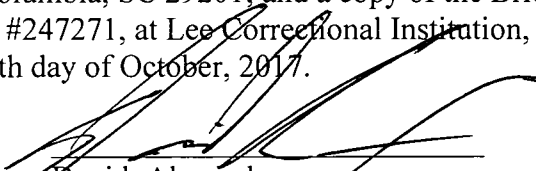
V.

JIMMY TURNER,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Respondent has been served on Jimmy Turner, #247271, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 30th day of October, 2017.


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 30th day of October, 2017.

Marie Hendel (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023