

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

 ORIGINAL

Appeal from Lexington County

Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMIE L. STROMAN,

APPELLANT

APPELLATE CASE NO 2017-000823

INITIAL BRIEF OF APPELLANT

RECEIVED

NOV 29 2017

SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in qualifying a counselor and forensic interviewer as an expert in child abuse dynamics and disclosure without making preliminary findings as to the admission of expert testimony pursuant to Rule 702, SCRE?

STATEMENT OF THE CASE

In 2014, the Lexington County Grand jury indicted Appellant Stroman for criminal sexual conduct with a minor first degree, indictment #2014-GS-32-2501. In October of 2016, the earlier indictment was re-presented to the Lexington County Grand Jury with a narrowed time frame. Also in October of 2016, the Lexington County Grand Jury indicted Appellant for an additional count of criminal sexual conduct with a minor first degree, indictment #2016-GS-32-2423. On March 27, 2017, Appellant proceeded to jury trial before the Honorable Robert E. Hood. Aimee Zmroczek represented Appellant at trial. Rhonda W. Patterson and Bradley Pogue prosecuted the case. The jury returned verdicts of guilty. Judge Hood sentenced Appellant to thirty-five (35) years concurrent on each charge. A timely notice of intent to appeal was served on April 5, 2017. This appeal follows.

ARGUMENT

The trial court erred in qualifying a counselor and forensic interviewer as an expert in child abuse dynamics and disclosure without making preliminary findings as to the admission of expert testimony pursuant to Rule 702, SCRE.

Prior to trial Appellant objected to the State calling Heather Smith as an expert witness in child abuse dynamics and disclosure. (Tr. pp. 207 – 213). The State argued that the testimony was admissible because the witness was being called as a “blind expert witness” and pursuant to State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015). (Tr. p. 207, lines 10-13). The judge overruled the objection but limited Ms. Smith’s testimony to delayed disclosure. (Tr. p. 211, lines 16-24). Ms. Smith did not testify pre-trial and the judge made no specific findings in regard to her expert testimony.

At trial the State moved to qualify Ms. Smith as an expert witness in child abuse dynamics and disclosure. (Tr. p. 434, lines 2-4). Ms. Smith testified that she worked at a children’s advocacy center named the Assessment and Resource Center [ARC] where she conducted forensic interviews. (Tr. p. 431, line 18 – p. 432, lines 1-10). She testified that she has a master’s degree in counseling and is a licensed professional counselor. (Tr. p. 434, lines 13-18). She admitted that she has not written any peer reviewed articles on the subject and has not participated in any scientific testing on the subject. (Tr. p. 435, lines 8-17). She admitted that the only research she had done in the area was a study through the ARC “where they looked at truth, lie in children.” (Tr. p. 434, line 23 – p. 435, line 1). She admitted that she was not involved in any national research studies. (Tr. p. 435, lines 2-7).

Appellant renewed the pre-trial objection to Ms. Smith’s qualification as an expert. (Tr. p. 435, lines 18-19). The judge overruled the objection stating:

All right. Overruled. Ms. Smith will be an expert in the area of child abuse dynamics and disclosure. She will be allowed to give opinion testimony in that area. That does not mean you have to accept her opinion, but it is evidence for you the use in any way you see fit and give it the weight and credibility that you believe is appropriate as you are required to do with each and every witness that appears before you.

(Tr. p. 435, lines 20 – p. 436, lines 1-3). Ms. Smith then testified about delayed disclosure. (Tr. pp. 436-452). The trial court failed to make the requisite findings for the admission of expert testimony pursuant to Rule 702, SCRE.

The admission of expert testimony is governed by Rule 702, SCRE, which 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, 445-447, 699 S.E.2d 169, 175 (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).

The trial court in the present case failed to make specific findings that delayed disclosure was beyond the ordinary knowledge of the jury and required an expert to explain. The trial court failed to make specific findings that the proffered expert had indeed required the requisite knowledge and skill to qualify as an expert. Finally, the trial court failed to make specific findings as to the reliability of the testimony.

In Brown, the case relied upon by the State, the Court addressed whether the expert testimony was beyond the ordinary knowledge of the jury and required an expert to explain, the first finding required by Rule 702, SCRE. The present case is distinguished from Brown because in Brown the trial court made a specific finding that the proffered expert's testimony would assist the jury because the jury "would not have any prior knowledge from family members or otherwise as to sex abuse directly." In State v. Brown, 411 S.C. 332, 341–42, 768 S.E.2d 246, 251 (Ct. App. 2015), this Court wrote:

Accordingly, we find Galloway–Williams' specialized knowledge of the behavioral characteristics of child sex abuse victims was relevant and crucial in assisting the jury's understanding of why children might delay disclosing sexual abuse, as well as why their recollections may become clearer each time they discuss the instances of abuse. See White, 361 S.C. at 414–15, 605 S.E.2d at 544; Weaverling, 337 S.C. at 474–75, 523 S.E.2d at 794.

In contrast, in the present case the trial court made no such specific findings in regard to whether Ms. Smith's testimony was beyond the ordinary knowledge of the jury and required an expert to explain.

As to the second finding required by Rule 702, SCRE, the trial court failed to make specific findings that Ms. Smith had indeed required the requisite knowledge and skill to qualify as an expert. While Ms. Smith testified that she was a forensic interviewer and counselor with a

master's degree and experience in counseling and forensic interviewing, it is unclear how this experience qualified her to testify as an expert in delayed disclosure.

As to the third finding required by Rule 702, SCRE, the trial court failed to make specific findings that the testimony was reliable. Pursuant to Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), prior to admitting expert testimony the judge must determine that the testimony is reliable. "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. 389 S.C. at 445-447, 699 S.E.2d at 175. In State v. Chavis, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015) the South Carolina Supreme Court wrote, "Both parties argue, and we agree, that State v. White should apply in qualifying child abuse assessment experts because their testimony is non-scientific." In the present case the judge allowed the witness to testify as an expert in child abuse dynamics and disclosure. Pursuant to Chavis, the witness testimony in the present case is non-scientific expert testimony. Non-scientific expert testimony must still satisfy the reliability requirement of Rule 702, SCRE, and Watson. State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). In White the South Carolina Supreme Court set forth foundational requirements for the admission of non-scientific expert testimony in regard to dog tracking, recognizing that the standard reliability factors set forth for scientific expert testimony in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) may not be useful when evaluating non-scientific expert testimony. In a footnote in White the Court wrote:

The State v. Council factors for scientific expert testimony are: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.

382 S.C. 265, 274, 676 S.E.2d 684, 688 fn# 7.

The factors for expert dog tracking testimony set forth in White are:

(1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) by experience the dog is found to be reliable; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated.

In White, the South Carolina Supreme Court wrote:

We hold that the trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to “weight, not admissibility” may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.

382 S.C. at 274, 676 S.E.2d at 689. The trial court, with a gatekeeping role, must make a determination on the reliability of the non-scientific expert testimony. No such finding was made in this case.

In State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) the South Carolina Supreme Court found that the trial judge erred in admitting expert testimony before vetting it for reliability but found the error harmless. In the present case the trial judge erred in admitting expert testimony before vetting it for reliability. The error, however, was not harmless.

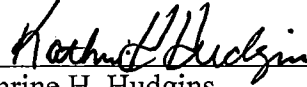
“To deem an error harmless, this court must determine ‘beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.’ ” State v. Fonseca, 383 S.C. 640, 650, 681 S.E.2d 1, 6 (Ct.App.2009) (quoting Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993)), *aff’d*, 393 S.C. 229, 711 S.E.2d 906 (2011); see also State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006) (“When guilt is conclusively proven by competent evidence,

such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result.”); State v. Mizzell, 349 S.C. 326, 333–34, 563 S.E.2d 315, 319 (2002) (finding error is harmless beyond a reasonable doubt if the “reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt”); State v. Pradubsri, 403 S.C. 270, 281, 743 S.E.2d 98, 104 (Ct.App. 2013) (explaining the requirement that a reviewing court must review the entire record to determine the effect of an error on the verdict in determining whether an error is harmless).

Reviewing the entire record in the present case, guilt was not conclusively proven such that no other rational conclusion could be reached. The State’s case was based on the testimony of the minor and a statement by the Appellant. A defense witness testified in regard to false confessions. (Tr. pp. 320-354). In March of 2014, after the minor experienced vaginal discomfort at school, she disclosed that her biological father, not Appellant, sexually abused her. (Tr. p. 308, lines 1-18). The minor tested positive for gonorrhea. (Tr. p. 308, lines 2-4). Her father was arrested and charged with criminal sexual conduct with a minor and at the time of Appellant’s trial was awaiting trial. (Tr. p. 308, lines 5-16). The minor initially told an interviewer that her father and no one else sexually assaulted her. (Tr. p. 308, lines 9-13). It was not until later in June of 2014, during a counseling session that the minor made allegations against Appellant. The minor admitted that her biological grandmother said to just say that the Appellant did it. (Tr. p. 406, lines 19-22). The minor’s mother admitted having to obtain a restraining order against the paternal grandmother. (Tr. p. 570, lines 3-7; p. 566, lines 2-14). The error in admitting Ms. Smith’s testimony was not harmless.

CONCLUSION

Based on the above argument this Court should reverse Appellant's sentence and conviction and remand for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of November, 2017.

STATE OF SOUTH CAROLINA
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Honorable Robert E. Hood, Circuit Court Judge

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THE STATE,

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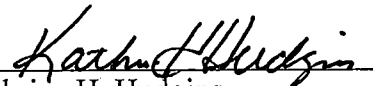
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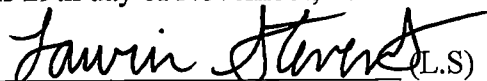
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Ben Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Jamie L. Stroman, #262517, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 29th day of November, 2017.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of November, 2017.


Notary Public for South Carolina
My Commission Expires: July 5, 2027.