STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARY GLENN RYALS,

APPELLANT

APPELLATE CASE NO. 2017-001090

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial court erred by allowing the state's "intimate partner violence dynamic" expert to give testimony that was irrelevant to the crime charged against Appellant?

2.

Whether the trial court erred by allowing the state's expert to give testimony regarding a subject matter that was not outside the ordinary knowledge of the jury?

3.

Whether the trial court erred by allowing the state's expert to give testimony that improperly vouched for and bolstered the complaining witness's own testimony?

STATEMENT OF THE CASE

Appellant was indicted for first and second degree harassment by the Berkeley County Grand Jury. R. *. On April 17 – 20, 2017, Appellant was tried in Berkeley County in front of the Honorable Kristi Harrington and a jury. Tr. 1. Kamila Szymczynska-Sas and Price S. Sigal represented the state, and Veronica Small and Myesha Brown represented Appellant. Id.

Appellant was found guilty of second degree harassment. Tr. 725, ll. 2 – 13. Judge Harrington sentenced him to one year in prison, and issued a permanent restraining order from contacting the complaining witness. Tr. 740, ll. 4 – 5. This appeal follows.

ARGUMENT

1.

The trial court erred by allowing the state's "intimate partner violence dynamic" expert to give testimony that was irrelevant to the crime charged against Appellant.

Relevant Facts

Between May 13, 2014 and September 13, 2014, Appellant allegedly maintained contact with Julie Welch after Appellant had been provided a notice of trespass and a restraining order. Tr. 172, ll. 19 – 23; 199, l. 25 – 200, l. 8. Allegedly on June 29, 2014, Appellant threatened Julie Welch not to testify at an upcoming court proceeding in regards to his violation of the trespass notice. Tr. 150, ll. 3 – 8.

Appellant and Welch were involved in a romantic relationship for some time. Tr. 158, ll. 10 – 12. He lived at her home with her and her daughter. Tr. 157, l. 16 – 158, l. 25. Appellant had clothes and other items at the house. Tr. 160, ll. 10 – 20.

After an ostensible falling out, Welch had Appellant evicted from the home; however, the two still maintained a romantic relationship. Tr. 161, ll. 15 – 162, l. 9. After breaking off the romantic relationship with Appellant in March of 2014, Welch maintained contact with Appellant afterwards. Tr. 163, ll. 8 – 10. After the relationship ended, Appellant returned to the house on multiple occasions to do landscaping, get his belongings, and converse with Welch. Tr. 164, l. 1 – 10. Welch apparently told him to stop coming to the house, but Appellant returned on occasion unannounced, and Welch told him he needed to let her know he was coming over, allowing Appellant over the house with her consent. Tr. 166, ll. 16 – 19.

On May 13, 2014, Welch found Appellant in the driveway of her home sleeping in his truck. Tr. 167, ll. 5 – 11. Welch called the police and they removed Appellant from the property.

Tr. 167, l. 21 – 168, l. 2. On May 27, 2014, Appellant allegedly contacted Welch at work. Tr. 171, ll. 13 – 15. Welch went to the police where she was given a trespass notice against Appellant. Tr. 172, ll. 11 – 20. "In the first part of June," 2014, Appellant and Welch were at the same restaurant and Appellant approached her to talk. Welch allowed Appellant a short period of time to talk to her. Tr. 186, l. 14 – 187, l. 11. On or around June 17, 2014, Welch believed that Appellant was trying to take her boat so she called him to see what he was doing, but hung up soon after calling. Tr. 194, ll. 1 – 6. Welch met with Appellant at the boat shop, Appellant was ultimately allowed to leave with the boat, and Welch followed him in her car and videotaped Appellant as he drove away. Tr. 195, ll. 1 – 16.

After a phone call from Appellant to Welch on June 29, 2014, Welch filed for a restraining order that was granted on July 15, 2014. Tr. 199, l. 17 – 200, l. 5. Appellant allegedly contacted Welch multiple times after the restraining order was granted, one instance was while Appellant was admitted to a hospital. Tr. 200, ll. 6 – 7; Tr. 201, l. 22 – 202, l. 7. Welch called Appellant three times while he was in the hospital. Tr. 203, ll. 22 – 25.

Welch then testified that all the contact from Appellant was unwanted, even though she initiated some contact herself. Tr. 206, l. 5 – 207, l. 3. She also testified why she maintained contact with Appellant even though she is saying now that she did not want contact with him. Tr. 207, ll. 8 – 16.

The state called Dr. Alyssa Ann Rheingold as an educational expert in the field of, "intimate partner violence dynamic." Tr. 453, l. 25 – 454, l. 3. In a pretrial motion, defense counsel objected extensively to the admittance of the alleged expert. She objected to the "expert" testimony's relevance. Tr. 86, ll. 10 – 12; 86, l. 21 – 88, l. 22. She objected that the testimony was outside the ordinary experience of the jury because, "[i]f they [the jury] find that

she was harassed they're perfectly capable ... of making that determination." Tr. 91, l. 11 – 92, l. 6. Defense counsel also objected because the testimony amounted to improper bolstering of the complaining witness' testimony, "the only thing the expert can do in this case... is say... you have to believe what she said." Tr. 91, ll. 21 – 25; 91, l. 25 – 92, l. 2.

Defense counsel explained her objections again after Rheingold gave proffered testimony. Tr. 439, ll. 3 – 25. Defense counsel highlighted the difference between the alleged expertise of the witness in domestic violence and stalking, both of which are not relevant to Appellant's case. Id. Defense counsel also reiterated the fact that the expert's testimony provided improper bolstering of the complaining witness, Julie Welch's, testimony. Id.

Rheingold testified her role was to, "just educate the court." Tr. 474, l. 20 – 21. However, her testimony improperly vouched for and bolstered Welch's testimony about maintaining and initiating contact with Appellant after Welch claimed she cut off contact. An excerpt from the expert testimony reads as follows:

Q: Is it normal for victims to take calls from the perpetrator?

A: It is normal for victims to take calls initially.

Q: Is it normal to slowly cut off communication?

A: It is normal to slowly cut off communication with the individual.

Tr. 460, ll. 4 – 11.

The expert's testimony served to reinforce the reasonableness of Welch's testimony regarding her continued communication with Appellant after allegedly not wanting contact. The expert testimony was mean to absolve the victim of any fault in the fact that she and Appellant maintained contact after May 14, 2014. Defense counsel properly objected to the expert

testimony when it was proffered outside the presence of the jury as improper bolstering. Tr. 435, l. 23 – 436, l. 21.

However, the court overruled all of defense counsel's objections, that was an error and that error prejudiced Appellant. Tr. 442, l. 6 – 443, l. 22.

Discussion

In order for a witness to be qualified as an expert they must provide, "scientific, technical, or other specialized knowledge [that] **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. See Rule 702, SCRE. (emphasis added) Moreover, "relevant evidence" means evidence that has a tendency to make the existence of a fact that is of consequence more or less probable than it would be without the evidence. See Rule 401, SCRE.

Alyssa Rheingold was admitted as an expert in the field of "intimate partner violence dynamic." Tr. 457, ll. 5 – 24. Defense counsel objected on the grounds that the "expert" would testify to domestic violence issues and stalking issues, both of which were not present in this case and would not be relevant to assisting the trier of fact to understand the evidence or a fact in issue. Tr. 439, ll. 3 – 25.

In State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (2002), Jarrell was on trial for accessary before the fact of murder by child abuse. Id. On appeal, Jarrell argued that the trial court erred for not admitting the testimony of two of his expert witnesses because their testimonies were not relevant. Id. at 101, 564 S.E.2d at 368. This Court affirmed the trial court's decision because the first expert testified as to the father's mental state at the time of the murder, which had no relevance as to whether the appellant was an accessory before the fact. Id. at 102, 564 S.E.2d at 369. "The important inquiry is whether Jarrell helped to plan, counsel, aid, or procure the crime.

Jarrell's argument that because the murder was an impulsive act it is unlikely the parties planned the murder is without merit because the two are not mutually exclusive." Id. at 103, 564 S.E.2d at 369. Therefore because the father's mental state had no bearing on the elements of accessory before the fact, the expert testimony on the father's mental state was irrelevant.

The second expert testified that the Jarrell did not fit the profile of a pedophile. Id. at 103, 564 S.E.2d at 370. Jarrell argued that this testimony should have been admitted because it would be relevant to show that the appellant would be unlikely to engage in sexual abuse and therefore unlikely to plan the murder of the child to cover up the sexual abuse. Id. However, there is a difference between incest abusers and pedophiles as recognized by the fourth circuit in U.S. v. Powers, 59 F.3d 1460 (1995). Jarrell, at 104, 564 S.E.2d at 370. This Court found that due to the difference between the incest abuser and pedophile classifications, the expert's testimony that the appellant did not fit the profile of a pedophile was not relevant under Rule 401, SCRE. Jarrell, at 105, 564 S.E.2d at 371.

In this case, the court qualified an expert in, "intimate partner violence dynamic," when no violence was alleged nor was violence an element of the crimes charged. More telling was that initially, the state tried to admit Rheingold as an expert in domestic violence, but since there was no domestic violence at issue in this case the "expert's" field was revised to, "intimate partner violence dynamic," as a thin veil to cover the irrelevance of her testimony. The solicitor said in the state's initial motion to allow testimony of an expert witness, "I believe the Court is familiar with Dr. Rheingold...She has previously been qualified as an expert in the area of domestic violence." Tr. 83, ll. 21 – 25. After defense counsel objected to the relevance of a domestic violence expert testifying in a case with not domestic violence in it, the expert's title

began to change, and eventually became on "intimate partner violence dynamic." Tr. 86, ll. 21 – 24; 454, ll. 2 – 3.

The holding in State v. Jarrell is illustrative to this case. As in Jarrell, one party seeks to admit an expert to give testimony regarding subject matter that is outside the scope of the statute. In Jarrell, it mattered not that the father's mental state may have been impulsive because the statute for accessory before the fact of murder by child abuse does not mention the principle's mind state as an element of the crime. Jarrell at 102-103, 564 S.E.2d at 369.

In this case, the harassment statute does have violence as being an element of the crime. See S.C. Code Ann. § 16-3-1700 (A) and (B). Therefore, admitting an expert in the field of domestic violence or of "intimate partner violence dynamic" is improper in this case because it is not relevant to proving any element of the crimes charged against Appellant under both Rule 401, SCRE and Rule 702, SCRE.

2.

The trial court erred by allowing the state's expert to give testimony regarding a subject matter that was not outside the ordinary knowledge of the jury.

Discussion

Although Alyssa Rheingold was qualified as an expert in "intimate partner violence dynamic" the law governing forensic interviewing is applicable here. The expertise of "intimate partner violence dynamic" does not have any foundation in South Carolina precedent. Tr. 441, ll. 16 – 25. The real aim of Rheingold's testimony is to explain personal relationships, something which every juror has in their own common knowledge. Although the solicitor attempted to couch Rheingold's testimony as complex and scientific in nature, Rheingold simply explained the aspects of a close relationship. In other words, Rheingold explained that relationships can become strained and that people in the relationship may act seemingly unreasonably to people outside the relationship. These are all things that are within the natural purview of the average juror and do not need to be explained by an, "expert."

In Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), the South Carolina Supreme Court put forth a test that a trial just must use before admitting expert testimony to the jury:

> 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 testimony 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 if it is reliable.

Id. at 446, 699 S.E.2d at 175 (emphasis added)

Moreover, in negligence tort claims, the Court has held that, "A plaintiff in ordinary negligence cases does not need to produce expert testimony to establish his claim because the jurors can easily understand and evaluate the relevant facts and law merely by exercising their common knowledge." Dawkins v. Union Hosp. Dist., 408 S.C. 171, 177, 758 S.E.2d 501, 504 (2014).

Rheingold's testimony focused on the maintained contact between complaining witness and Appellant. Qualifying her as an expert in "intimate partner violence dynamic" was unnecessary because such information was within the jury's knowledge. Even without being in an "intimate partner violence" relationship, a juror can understand that relationships can become strained and understand when the conduct of the participants of the relationship rises to the level of illegality.

The type of expert testimony introduced here is arguably even more improper than with forensic interviewers in child sex abuse cases because having an intimate relationship is something that all jurors either directly or indirectly experience, which put the subject matter firmly within a juror's common knowledge. The jury did not need expert testimony to explain this subject matter as it did not involve scientific, technical, or other specialized knowledge. See Rule 702, SCRE.

Welch described her thoughts and actions in regards to her relationship and communication with Appellant. Expert testimony was not required for the jury to understand why she maintained contact with Appellant or why she did not cut off communication immediately, she explained her reasons in her own testimony. These subjects did not involve, scientific, technical, or other specialized knowledge, and the jury was capable of deciding on its own whether it believed the complaining witness' explanations of her own conduct. See Rule

702, SCRE. Rheingold's "expert" testimony was unnecessary and should not have been admitted because the jurors had the requisite knowledge to decide for themselves. Rheingold's testimony did not aid the trier of fact, but rather invaded the province of the jury.

3.

The trial court erred by allowing the state's expert to give irrelevant testimony that improperly vouched for and bolstered the victim's own testimony.

Discussion

The assessment of a witness's credibility is, "within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977). Therefore, a witness, "may not offer an opinion regarding the credibility," of other witnesses. State v. Perry, 410 S.C. 191, 208, 763 S.E.2d 603, 611 (2014). Similarly, a witness, "may not improperly bolster the testimony," of another witness. Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010). Improper bolstering occurs when a, "witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth." State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (2013).

As our Supreme Court noted in State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013), "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." This likely occurred in this case because there is a reasonable probability that the jury treated Rheingold's testimony with more significance because the court qualified her as an expert in, "intimate partner violence dynamic." While Rheingold did not meet with the complainant, the state still used her to ***indirectly comment on the complainants' credibility*** and provide greater weight to her testimony. See Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) ("Improper corroboration testimony that is ***merely cumulative to the victim's testimony***, however, cannot be harmless, because it is precisely this

cumulative effect which enhances the devastating impact of improper corroboration.") (emphasis in original).

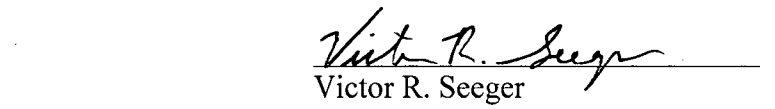
In this case, the expert witness was allowed to give her opinion as to whether the actions of Welch were reasonable or normal under the circumstances. Tr. 432, ll. 6 – 19; 460, ll. 4 – 11. The state used Rheingold's testimony served that to improperly bolster the complaining witness' testimony. The state said that the expert would answer the jury's questions about the complaining witness' actions, "Why would you stay with someone? Why would you not leave? Why would you continue being in a friendship? Why would you answer any calls?" Tr. 90, ll. 13 – 15. This was designed to validate the testimony from the complaining witness' actions in this case.

Rheingold's testimony was very likely interpreted by the jury to believe Welch's testimony because according to the expert Welch's behavior is typical victims of abuse. Therefore, the state's expert's testimony that the types of actions taken by Welch and the voluntary contact between Welch and Appellant were normal of harassment victims improperly bolstered Welch's allegations that she was harassed by Appellant. Appellant was prejudiced by the admittance of the expert testimony because the improper bolstering of the complaining witness' testimony precluded Appellant from effectively attacking the complaining witness' credibility. This case boiled down to a credibility battle and the improper bolstering by the state's expert witness was improper, and prejudicial.

CONCLUSION

By reason of the foregoing arguments Appellant's conviction should be reversed, and this case remanded to the Berkeley County Court of General Sessions for a new trial.

Respectfully Submitted,



Victor R. Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of March, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARY GLENN RYALS,

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 have 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 Initial Brief of Appellant and Designation of Matter have been served upon Cary Ryals, #364293, at Wateree River Correctional Institution, P.O. Box 189, Rembert, SC 29128-0189, this 26th day of March, 2018.

Victor R. Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of March, 2018.

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