THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAR 29 2018
SC Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
Doyet A, Early, III, Circuit Court Judge

Court of Appeals Case No. 2015-001436

The State of South Carolina, ... Respondent,

v.

Nakia Karreim Johnson,.. Appellant.

Petition for Rehearing

Pursuant to Rule 221, SCACR, Nikia Johnson petitions this Court for rehearing because this Court overlooked or misapprehended the following points:

A. Expert Testimony.

This court's opinion states, "We hold the trial court did not err in denying Johnson's motion for a mistrial because Dr. Foster's testimony did not bolster Mother's testimony." Slip Opinion at 4. As set forth in Mr. Johnson's Final Brief of Appellant at 10-13, this testimony violates the procedure set forth in *State v. Anderson*, *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) and *State v. Brown,* 411 S.C. 332, 768 S.E.2d 246 (Ct.App.2015), which limited the testimony prosecution experts can provide regarding the general characteristic of victims of child abuse. Neither *Anderson* nor *Brown* nor any other appellate court precedent allows the State to introduce evidence explaining the characteristic or dynamics of caregivers of children that experience child

abuse. *See, e.g., State v. Schumpert,* 312 S.C. 502, 435 S.E.2d 859 (1993); *State v. Weaverling,* 337 S.C. 460, 523 S.E.2d 787 (Ct.App.1999); and *State v. White,* 361 S.C. 407, 605 S.E.2d 540 (2004).

The only conclusion the jurors could reach was that Dr. Foster's testimony meant the child's mother was telling the truth. *See State v. Kromah*, 401 S.C. 340, 360, 737 S.E.2d 490, 500-01 (2013); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011). This testimony, additionally is the very type of "absolute" opinion testimony previously held to be improper bolstering and vouching. *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989) (psychiatrist's testimony that alleged victim's "symptoms are genuine" improperly vouched for alleged victim's credibility."); *State v. Dempsey,* 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000) (testimony from a child abuse counselor that child tells the truth 95% to 99% percent of time abuse is alleged improperly vouches for child's credibility).

B. "Forensic" Interviewer's Testimony.

This Court correctly found that David Kellin's testimony improperly bolstered or vouched for the credibility of the child. This Court, however, erred by not reversing the conviction and ordering a new trial for Mr. Johnson's conviction for committing or attempting to commit a lewd act on a minor child. Specifically, this Court erred in concluding that the mother's testimony was sufficient to corroborate the child's testimony regarding the alleged assault at the graveyard. In reaching this conclusion, this Court overlooked Mr. Johnson presenting evidence of the mother's motive to pressure or coach the child to make false allegations. Following the Court's analysis to the logical conclusion, the appellate courts could never reverse a conviction of third-degree criminal

sexual conduct with a minor when the adult "coaching" the child provides testimony corroborating the child whose credibility is an issue in the case.

This Court must be able to conclude the error was "harmless beyond a reasonable doubt." *State v. Mouzon*, 326 S.C. 199, 205, 485 S.E.2d 918, 921 (1997). Although arising in the context of a post-conviction relief case, our Supreme Court's recent opinion in *Smalls v. State*, No. 2016-001079, 2018 WL 736339, at *8 (S.C. Feb. 7, 2018) is instructive for when the State's evidence is so strong that error does not result in prejudice. *Smalls* held, "[F]or the evidence to be overwhelming such that it categorically precludes a finding of prejudice..., the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland*[1] standard of a reasonable probability ... the factfinder would have had a reasonable doubt cannot possibly be met." *Id.* (internal quotations omitted). In this case, the State did not present any evidence so conclusive that excludes the possibility that the jurors could have a reasonable doubt if the error was removed from the case.

This Court correctly observed, "Mother's testimony, however, does not corroborate Victim's testimony about any other events" other than the graveyard allegations. Slip Opinion at 7. The lewd act indictment alleged the crime occurred "on or between January 1, 2007 and [redacted], 2011." Accordingly, there is no way to know whether the jurors convicted Mr. Johnson of lewd act based on the graveyard allegations. Indeed, the record contains evidence that Mr. Johnson and the child were at the store at the time of the phone call that supposedly occurred when they were at the graveyard.

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

Because credibility of the witnesses was the central issue for the jurors to determine, the error was not harmless. *Compare State v. Kromah*, 401 S.C. 340, 362, 737 S.E.2d 490, 501 (2013) ("Based on the entire record, including the physical evidence documented in this case, the challenged testimony could not reasonably have affected the result of the trial, so any error in its admission was harmless beyond a reasonable doubt.") *with Anderson*, 413 S.C. at 219, 776 S.E.2d at 79 (finding "overwhelming" prejudice when the "case turned solely on the credibility of the minor and of Appellant. The minor testified to abuse by Appellant over a course of three to four years, while Appellant denied any improper conduct. There was no physical evidence of sexual abuse.").

Alternatively, if this Court does not order a new trial on the lewd act charge, then this Court should vacate the sentence and remand for a new sentencing hearing. The lewd act sentence was subsumed by the concurrent second-degree criminal sexual conduct with a minor sentence. The sentence might have been different if the trial judge was sentencing Mr. Johnson only on the lewd act charge.

C. Cumulative Error.

This Court declined to apply the cumulative error doctrine because "the trial judge did not err in regard to Dr. Foster's testimony." Slip Opinion at 8. Once this Court finds error regarding Dr. Foster's testimony, *see* Section A, *supra,* the need to apply the cumulative error doctrine becomes apparent. See Final Brief of Appellant at 16.

D. Conclusion.

This Court should grant rehearing, reverse Mr. Johnson's conviction for committing or attempting a lewd act on a minor child, and remand this case to the Court

of General Sessions for Kershaw County for a new trail. Alternatevly, this Court should vacate the lewd act sentence and remand for a new sentencing hearing.

IT IS SO MOVED.

Respectfully Submitted,

By

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

Attorney for Appellant

March 28, 2018
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
Doyet A, Early, III, Circuit Court Judge

RECEIVED
MAR 29 2018
SC Court of Appeals

Court of Appeals Case No. 2015-001436

The State of South Carolina,........................... Respondent

v.

Nakia Johnson,.. Appellant.

PROOF OF SERVICE

I certify that I have served the Petition for Extension of Time to file the INtial Reply Brief, by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

William M. Blitch, Jr., Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

March 28, 2018
Greenwood, South Carolina

The Grose Law Firm, LLC
404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: charles@groselawfirm.com
Web: GroseLawFirm.com

March 28, 2018

RECEIVED
MAR 29 2018
SC Court of Appeals

The Honorable, Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *State v. Nakia Johnson*
Court of Appeals Case No. 2015-001436

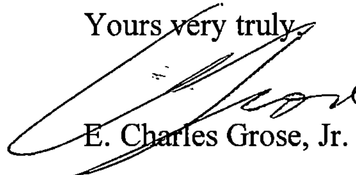
Dear Ms. Kitchings:

Enclosed please find the original and six copies of Mr. Johnson's Petition for Rehearing, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Mr. Nakia Johnson
William M. Blitch, Jr., Esquire