

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Charleston County

Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V:

BRIAN CHRISTOPHER DAUGHERTY,

APPELLANT

APPELLATE CASE NO. 2017-000738

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by qualifying a state witness as an expert in the dynamics of child sexual abuse when the subject matter of her testimony was well within the realm of lay knowledge and did not assist the jury in understanding the evidence presented or in determining a fact in issue as required by Rule 702, SCRE, and where her testimony improperly bolstered the minor complainants' credibility?

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant on September 14, 2015 for three counts of first degree criminal sexual conduct (CSC) with a minor, three counts of second degree CSC with a minor, and two counts of lewd act upon a child, and on March 13, 2017 for an additional count of first degree CSC with a minor. R. 512. His case was called to trial on March 13, 2017 before the Honorable Roger Couch, and a jury. R. 1. Assistant Solicitors Deborah Herring Lash and Daniel Poulos represented the state, and Charles Cochran and Jessica Birt represented Appellant. R. 1.

Based on the state's concession, Judge Couch directed a verdict for one count of second degree CSC with a minor. R. 324, l. 4 – 325, l. 19. On March 16, 2017, the jury found Appellant guilty of four counts of first degree CSC with a minor, two counts of second degree CSC with a minor, and two counts of lewd act. R. 501, l. 10 – 502, l. 9. Judge Couch sentenced Appellant to twenty-five years for each count of first degree CSC with a minor, twenty years for each count of second degree CSC with a minor, and fifteen years for each count of lewd act. All sentences were ordered to be served concurrently. Appellant was also ordered to register as a sex offender and is subject to mandatory GPS monitoring upon his release from incarceration pursuant to S.C. Code § 23-3-540. R. 508, l. 11 – 509, l. 15.

This appeal follows.

STATEMENT OF THE FACTS

Appellant began dating Older Sister and Younger Sister's aunt in August 2008, and shortly thereafter moved into the family's two bedroom apartment in North Charleston. The apartment was shared by Older Sister, Younger Sister, their grandmother, Rhonda Young, their mother, Lisa Batten, their aunt, Ashley Young, their younger sister, M.H., and eventually Appellant. R. 44, l. 5 – 45, l. 16; R. 94, l. 23 – 96, l. 3; R. 156, ll. 7-23; R. 207, l. 18 – 208, l. 20. Their grandmother Rhonda and Older Sister shared the master bedroom, and Appellant and Ashley shared the second bedroom. Younger Sister, M.H., and their mother, Lisa, slept in the living room. R. 45, ll. 17-23. All seven family members lived in this two bedroom apartment until May 2011 when Lisa and her daughters, Older Sister, Younger Sister, and M.H., moved into a single family home in Goose Creek with Lisa's fiancée, Benson Gomez. R. 94, ll. 13-17; R. 98, ll. 15-23; R. 155, l. 11 – 156, l. 6. Before moving out of the apartment, Gomez often spent the night at the apartment and slept in the living room. R. 96, ll. 20-24; R. 156, l. 13 – 157, l. 1; R. 163, ll. 6-7.

Younger Sister claimed Appellant sexually assaulted her when she was between the ages of six and eight years old while Appellant was living with the family. She claimed Appellant digitally penetrated her vagina, attempted penile penetration, and engaged in oral sex with her in the bedroom he shared with Ashley. She also alleged Appellant digitally penetrated her vagina on numerous occasions while the two were traveling alone in the car together. R. 85, l. 2 – 91, l. 1; R. 93, l. 8 – 96, l. 13. Younger Sister testified that during these alleged encounters Appellant showed her pornographic videos either on his cell phone or his laptop computer. R. 49, ll. 14-24; R. 59, l. 13 – 60, l. 9. She claimed Appellant told her that if she told anyone about the alleged abuse, he would hurt her. R. 52, ll. 4-8.

Older Sister likewise claimed Appellant digitally penetrated her vagina, attempted penile penetration, and engaged in oral sex with her in the bedroom he shared with Ashley. She also alleged Appellant sexually assaulted her in the car, exposed his penis to her while the two were alone at the community pool, and fondled her breasts while the two were in the apartment kitchen. Older Sister claimed this abuse occurred when she was between the ages of nine and eleven years old. R. 99, l. 2 – 109, l. 4; R. 115, l. 1 – 156, l. 10; Tr. 159, ll. 18-19. Like Younger Sister, she also testified that Appellant made her watch pornographic videos on his cell phone and laptop computer. Tr. 140, l. 19 – 141, l. 6; Tr. 155, l. 20 – 118, l. 10. According to Older Sister, the abuse allegedly stopped once Older Sister and her family moved to Goose Creek in May 2011. R. 124, ll. 12-14.

The indictments alleged the conduct occurred between April 2009 and May 2011. R. 512. However, Older Sister and Younger Sister did not disclose the alleged abuse until February 2015, nearly four years after the alleged abuse had stopped. They first told each other and then their stepfather, Benson Gomez. R. 65, ll. 8-24; R. 128, l. 16 -129, l. 22; R. 159, l. 8 – 160, l. 13; R. 220, l. 15 – 224, l. 11. After law enforcement was contacted, the two attended a forensic interview at Dorchester Children’s Center. R. 66, ll. 19-25; R. 130, ll. 3-11; R. 226, ll. 1-3. A recording of Younger Sister’s interview was played for the jury pursuant to S.C. Code Ann. § 17-23-175 without objection. R. 273, l. 11 – 275, l. 9.

Before Older Sister and Younger Sister disclosed to their stepfather, they each told a friend about the alleged abuse. When she was in the fifth grade, likely in 2012, Younger Sister told her friend L.B. R. 62, l. 23 – 63, l. 8. When L.B. said “he would have to tell his parents,” Younger Sister told L.B. that she “was just kidding” and nothing became of the alleged disclosure. R. 64, l. 16 – 65, l. 4; R. 202, l. 22 – 205, l. 13. Older Sister first told her friend Z.R. through text message when she was in the seventh grade during the 2011 to 2012 school year. Z.R. told her mother about

the allegations and her mother contacted authorities at Older Sister's school. When a law enforcement officer responded to Older Sister's home and questioned her about the allegations, Older Sister denied being sexually abused. R. 125, l. 8 – 127, l. 20; R. 196, l. 8 – 200, l. 8.

For whatever reason, neither Older Sister nor Younger Sister ever underwent a physical examination despite being referred to do so by the forensic interviewer. R. 242, l. 20 – 243, l. 23; R. 276, l. 18 – 277, l. 14. Needless to say, there was no physical or forensic evidence of sexual abuse. The sole evidence against Appellant was Older Sister and Younger Sister's allegations.

Appellant testified in his own defense and vehemently denied sexually assaulting Older Sister and Younger Sister. R. 331, ll. 10-20; R. 334, ll. 16-24; R. 337, l. 20 – 338, l. 1. Ashley Young and Rhonda Young, who were still living with Appellant at the time of trial, both testified that there was little opportunity for Appellant to sexually assault the complainants given the number of people who lived in the apartment and their schedules, and that he was rarely alone with either Older Sister or Younger Sister. They also disputed specific portions of the girls' accounts, such as the allegation that Appellant was alone at the pool with Older Sister. R. 369, l. 21 – 370, l. 14; R. 397, l. 17 – 399, l. 7; R. 401, l. 12 – 402, l. 9.

ARGUMENT

The trial judge abused his discretion by qualifying a state witness as an expert in the dynamics of child sexual abuse when the subject matter of her testimony was well within the realm of lay knowledge and did not assist the jury in understanding the evidence presented or in determining a fact in issue as required by Rule 702, SCRE, and where her testimony improperly bolstered the minor complainants' credibility.

How the Issue was Presented Below

When the state moved to qualify Carole Swiecicki as an expert in the dynamics of child sexual abuse, after her initial *voir dire*, defense counsel objected. R. 283, l. 24 – 284, l. 8. After the judge excused the jury, counsel argued:

Typically in these cases this type of expert witness will testify to delayed disclosure, typical or atypical behavior of child abuse victims, family members, things like that. Basically what ends up happening is there is testimony that essentially all behavior is normal, no behavior excludes the possibility of sexual abuse. That some children delay their disclosure. Some children disclose immediately. Some family members don't believe them. Some family members do believe them. And what our argument is is not that she doesn't deal with this at an expert level necessarily, but **what she is testifying to, what she's being offered for is not anything that a common juror wouldn't know.**

That sometimes people would delay a disclosure about sexual trauma. Sometimes they will disclose immediately. Sometimes their parents will believe them, sometimes they wouldn't. Sometimes it would affect their behavior, sometimes it wouldn't. That's basically the gist of the testimony. Every single time. And **it's just not [an] expertise. It does not help the jury decide something that they did not already know.**

R. 284, l. 4 – 285, l. 23 (emphasis added).

While emphasizing that the testimony of forensic interviewers has been severely limited by our appellate courts, defense counsel acknowledged there is some recent unfavorable case law in South Carolina concerning his objection, but that “because the case law is changing so rapidly

and drastically” in the area of child sexual abuse prosecutions, he believed the objection was necessary and warranted. R. 286, ll. 1-13.

The assistant solicitor cited to State v. Brown, 411 S.C. 332, 341, 768 S.E.2d 246, 250 (Ct. App. 2015), where this Court, quoting State v. Weaverling, 337 S.C. 460, 474-475, 523 S.E.2d 787, 794 (Ct. App. 1999), held “[e]xpert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible.” R. 286, l. 17 – 287, l. 12. The solicitor asserted that in Brown the Court held blind expert testimony concerning the dynamics of child sexual abuse, like that of Carole Swiecicki, the state’s proposed expert, is beyond the common knowledge of the lay juror and admissible. R. 286, l. 17 – 287, l. 12.

After confirming that Swiecicki had no knowledge of the allegations made by Older Sister and Younger Sister, the trial judge qualified her as an expert in the dynamics of child sexual abuse pursuant to this Court’s holding in Brown. R. 288, l. 18 – 290, l. 15. The state did not proffer any of her testimony beyond her statement that she did not know anything about the specific allegations raised by Older Sister and Younger Sister. R. 289, l. 16 – 290, l. 4.

Swiecicki’s Testimony Before the Jury

After being qualified as an expert in the dynamics of child sexual abuse, Carole Swiecicki testified about delayed disclosures. She claimed that “between 25 and about 40, 43 percent of children disclose immediately within that first month [after the abuse occurred]. So slightly over half of children delay more than one month. And pretty consistent in those studies about 25 percent of children who are abused as children don’t tell anyone until they’re adults.” R. 292, ll. 9-22. Based on studies where children merely told researchers why they delayed disclosing abuse, Swiecicki maintained that children delay disclosing due to “anticipated

negative consequences.” For example, “they don’t tell because they think they are going to get in trouble. They are afraid that their parents will be mad at them . . . They also talk about feared consequences to the offender. The vast majority of times with sexual abuse the offender is someone that the child and family knows.” R. 293, l. 8 – 294, l. 13.

Throughout her direct examination, the assistant solicitor blatantly tailored her questions to fit the allegations made by Older Sister and Younger Sister. For example, the solicitor asked whether the relationship between the offender and the child can impact disclosure. R. 294, ll. 20-22. Swiecicki claimed “when the offender is somebody that’s in the family, be it an uncle, stepparent, someone that’s within the family, the child is more likely to delay their disclosure.” R. 294, l. 23 – 295, l. 3.

Defense counsel objected to this specific question and answer as improper bolstering. The court overruled the objection finding Swiecicki was “testifying generally.” R. 295, ll. 5-15.

Swiecicki then asserted, “Also if the abuse starts before the child is ten, so in younger children when the abuse started they are likely to delay disclosure. And then when the abuse is chronic as opposed to a one time incident, they are more likely to delay disclosure.” R. 295, ll. 16-21.

Defense counsel again objected to this testimony as improper bolstering and requested a “standing objection” based on bolstering grounds. R. 295, ll. 22-24. The judge overruled the objection, but granted the request for a “standing objection” as to bolstering. R. 295, l. 25.

When prompted by the solicitor, Swiecicki claimed children may not disclose abuse because of threats made by the alleged offender. R. 296, ll. 3-17. She also testified, based on another leading question from the solicitor, that just because a child is “away from an abuser totally” does not mean the child will necessarily disclose at that point. She stated, “The factors

related to delayed disclosure really apply regardless of whether the abuse is still going on. It's really just characteristics that impact the timing of that disclosure regardless of whether they are still in touch with that person." R. 298, ll. 8-16.

Again when asked a tailored leading question concerning whether children often tell friends or peers before disclosing to their parents, Swiecicki claimed "mothers and peers, are the two most common first people that children tell. And it depends on their age. Younger children are more likely to tell mother first. And then teens and older children are more likely to tell a peer first." R. 299, l. 19 – 300, l. 3. Swiecicki went on to testify about purposeful disclosures versus accidental disclosures, and her opinion that disclosure is a process, meaning a child discloses more details "over time as opposed to everything coming out at once." R. 300, l. 4 – 302, l. 6. She also discussed the impact of chronic abuse on memory. R. 302, l. 7 – 304, l. 4.

Lastly, Swiecicki testified about "common behavioral reactions" to sexual abuse, or the lack thereof. She claimed, "So sexual abuse victims are at higher risk for several behavior outcomes. Things like outbursts, self-injurious behavior, thoughts of self harm and then acting on those thoughts. For younger children temper tantrums, defiance, they are at higher risk for that." She maintained that there is "a range of possibilities and behavioral outcomes" and that "about 16 to 40 percent of children who have been abused experience those types of things." R. 304, ll. 5-18.

As far as "common emotional reactions" to sexual abuse, Swiecicki testified that "children who have been sexually abused are also at higher risk for things like sadness, nervousness, being jumpy, having nightmares, diagnosis of depression and post-traumatic stress disorder. They are at higher risk for those. Again, not all of them experience that, but they are at higher risk." R. 305, ll. 1-9. When prompted by the solicitor again with a tailored leading

question, Swiecicki claimed children who have been sexually abused often have a “flat affect,” especially during an interview about the abuse with someone the child does not know. She testified, “[A]ffect itself is the expression of emotion that we show sort of on our bodies and faces. Flat affect would be sort of looking none and having no emotion that you are really showing. It’s really considered to be part of the constellation of symptoms of post-traumatic stress disorder and depression. Both seem to have flat affect which is really kind of a numbing, looking numb emotionally.”¹ R. 305, l. 18 – 306, l. 5.

Closing Arguments

Capitalizing on Carole Swiecicki’s “expert” testimony, the assistant solicitor asserted during her closing argument:

But perhaps [the] most important and most difficult [difference between “child sexual assault cases” and other prosecutions] is that children as you heard commonly most often don’t tell right away. Whether that be fear of the Defendant, fear of hurting someone they love, fear of the unknown, fear of not being believed, or just using their common, everyday experience as a child which most of us have probably forgotten. When you’re a child, when you’re a kid you are at the mercy of those that take care of you. Adults do not take the word of children over adults most of the time. And kids know that.

R. 422, l. 1 – 423, l. 1.

Throughout her argument, the assist solicitor repeatedly used Swiecicki’s “expert” testimony to make excuses for the inconsistencies in Older Sister and Younger Sister’s accounts of the alleged sexual abuse and lend credibility to their allegations. For example, the solicitor asserted:

Dr. Swiecicki explained to you, one of the things she explained to you is that when events occur chronically or routinely or over more than a couple times and they are kind of the same, they are in the same place on the bed or in the

¹ This question and answer was likely a result of the fact that Younger Sister showed little to no emotion during her forensic interview when discussing the alleged sexual abuse. See State’s Exhibit No. 11.

bedroom kneeling on the floor, she didn't talk about that. The example she gave was driving to work. But that memories can mesh unless there is a unique things like the ankles of - - the bathing suit around the ankles when someone comes. That happened one time. That stands out. Going off in the car to the flea market happened one time so that kind of stands out. The first time stands out because it was the first time. Others more kind of blend together and become hard to distinguish.

R. 426, ll. 11-25.

She later argued:

Now, Younger Sister did tell them [the forensic interviewer] about the first incident and there was nothing in that that was inconsistent with what she told you in here. She told them [the forensic interviewer] and you about cunnilingus, which is licking her, fellatio, which is him putting his penis in her mouth, so she told you about the same things. And she left out in the interview about the flea market trip, but as Dr. Swiecicki explained, sometimes disclosure is a process and you may depending on the interview or how much time you may remember one of them. She may come in here again and say I forgot that and tell you about something else because she is retrieving her memory as it happens.

R. 427, l. 13 - 428, l. 2.

Lastly, the solicitor told the jury:

Ashley [Older Sister and Younger Sister's aunt] would expect the kids to stay away from someone if they were doing this. She would expect them not to want to go with someone if they were doing this. You know, that's not an unusual expectation. I understand totally why she would think that. That's what a lot of people think.

And that is exactly why Dr. Swiecicki came here and talked to you. Because that is what you want to think. She doesn't know - - to make it clear - - anything about this case or these people. She has talked about things that don't relate to this case. But in general children continue to stay around the person that is assaulting them. They go years without telling sometimes until adulthood she said. They just don't tell. They stay around the person. They learn to live with it. Because what's the option? They don't know what the option is. So they learn to live with it.

R. 440, ll. 3-23.

As seen, the solicitor frequently used Swiecicki's testimony to overcome the shortcomings and inconsistencies in Older Sister and Younger Sister's testimony and lend credibility to their allegations against Appellant.

During his closing argument to the jury, defense counsel attempted to challenge Swiecicki's testimony the best he could. He asserted:

Because all of this is about whether or not these things were possible, whether or not there was an opportunity, whether or not there's evidence of proof of it beyond the girls['] stories. These specifics of the girls['] stories, these details that the State talked about. They brought in an expert [Carole Swiecicki], somebody they called an expert, something I objected to as only focusing on the thing that you know as jurors. An expert comes in, the gentleman who came in, Dr. Melville. He comes in and testifies to things that most people probably don't know about, medicine and treatment, therapy, but we all know that memories can be defective. We all know that we can forget things and that as we tell stories we can added to them or take away from them as we talk about them. That's common sense. That's not expertise.

Now, why do I say that? Why do I bring that up? **Because this woman [Swiecicki] is brought in as an expert to explain away discrepancies, to explain away contradictions, to explain away failures, exaggerations and lies.**

Now, she got up here and tried to say that the studies that they perform can determine how often kids behave in a certain way or whatnot. And I asked her is it possible for a kid to exaggerate? I asked her is it possible for a kid to lie? And she seemed to really quibble with me over that point as though we don't all know that little kids exaggerate and little kids low sometimes. This is an expert? How ridiculous is that?

R. 449, l. 4 – 450, l. 22.

Discussion

The trial judge abused his discretion by qualifying Carole Swiecicki as an expert in the dynamics of child sexual abuse because the subject matter of her testimony was well within the realm of lay knowledge and did not assist the jury in understanding the evidence presented or in determining a fact in issue as required by Rule 702, SCRE. Swiecicki's testimony also improperly bolstered Older Sister and Younger Sister's credibility, which was highly prejudicial

to Appellant since the state failed to present any physical or forensic evidence that the children had been sexually abused and Appellant vehemently denied the allegations.

“The label of expert should be jealously guarded by the court and never loosely bandied about.” State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013). As our Supreme 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. Even before Kromah, the Supreme Court asserted, “Trial courts should be cautious in conferring an expert label upon a witness because juries may accord excessive or undue weight to ‘expert’ testimony.” Watson v. Ford Motor Co., 389 S.C. 434, 449, 699 S.E.2d 169, 176 (2010).

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.

Rule 702, SCRE (emphasis added).

“Expert testimony may be used to help the jury to determine a fact in issue based on the expert’s specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is required *where a factual issue must be resolved with scientific, technical, or any other specialized knowledge.*” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010) (emphasis added). In Watson, our Supreme Court provided a three prong test that a trial judge must consider in executing his gatekeeping duties before allowing a jury to hear expert testimony. Id. at 446, 699 S.E.2d 169, 175. The Court asserted:

[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 (emphasis added and internal citations omitted).

Here, the trial judge abused his discretion by qualifying Carole Swiecicki as an expert in the dynamics of child sexual abuse because the subject matter of her testimony did not assist the jury in understanding the evidence or determining a fact in issue as required by Rule 702, SCRE. Swiecicki's generalized opinions and conclusions on the behavior and memory of child sexual abuse victims could not properly assist the jury in determining whether Older Sister and Younger Sister were telling the truth about being sexually abused, which was the sole issue in the case. 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 state's frequent use in the past several years of so called "experts" in the dynamics of child sexual abuse is in direct response to our Supreme Court's holding in State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 500-501 (2013), where the Court held a forensic interviewer should never be qualified as an expert, and the testimony of such witnesses should be limited to laying the foundation for the admission of the recording of a forensic interview and any personal observations of the complainant's behavior and demeanor. In so holding, the Court strongly asserted, "[W]e state today that we can envision no circumstance where [a forensic

interviewer's] qualification as an expert at trial would be appropriate. Forensic interviewers might be useful as a tool to aid law enforcement officers in their initial investigative process, but this does not make their work appropriate for use in the courtroom. The rules of evidence do not allow witnesses to vouch for or offer opinions on the credibility of others, and the work of a forensic interviewer, by its very nature, seeks to ascertain whether abuse occurred at all, i.e., whether the victim is telling the truth, and to identify the source of the abuse." Kromah, 401 S.C. at 357 n. 5, 737 S.E.2d at 499 n. 5.

Because the state can no longer rely on the "expert" testimony of a forensic interviewer to bolster the testimony and credibility of a minor complainant and explain away any inconsistencies in the child's statements, the state has turned to so called "experts" in the dynamics of child sexual abuse to serve this same purpose. See Smith v. State, 386 S.C. 562, 689 S.E.2d 629, 633 (2010) (where the Court emphasized that the state relied heavily upon the forensic interviewer's testimony to overcome inconsistencies in the complainant's testimony); see also Kromah, 401 S.C. at 358, 737 S.E.2d at 499 ("It is undeniable that the primary purpose for calling a 'forensic interviewer' as a witness is to lend credibility to the victim's allegations.").

So called "experts" in the dynamics of child sexual abuse, like Carole Swiecicki, are used by the state, as evidenced in this case by the assistant solicitor's repeated references to Swiecicki's testimony during her closing argument, to indirectly comment on the credibility of the complainants, explain away any inconsistencies in their allegations or behavior, and bolster their testimony. As defense counsel asserted during his closing argument to the jury, "[T]his woman [Swiecicki] is brought in as an expert to explain away discrepancies, to explain away contradictions, to explain away failures, exaggerations and lies." R. 450, ll. 2-5.

The critical determination in this case was the credibility of Older Sister and Younger Sister since the state failed to present any physical or forensic evidence that the children had been sexually abused, or any other corroboration evidence to prove the alleged assaults occurred, such as eyewitness testimony. This improper “expert” testimony was therefore highly prejudicial to Appellant who vehemently denied sexually abusing the complainants. Appellant also presented evidence through the testimony of Ashley Young and Rhonda Young that discredited Older Sister and Younger Sister’s accusations and contradicted their testimony.

Swiecicki’s testimony was very likely interpreted by the jury to express that they should believe Older Sister and Younger Sister 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 Older Sister and Younger Sister’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.” State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)).

The existence of prejudice is also clear from the jury’s deliberations. After deliberating for nearly five hours, the jury asked the trial judge, “We know that we need 12 votes for a guilty verdict. But do we need 12 votes for a not guilty verdict? If we do not have 12 votes either way, does that result in a hung jury or in a not guilty verdict?” R. 494, l. 10 – 495, l. 9; R. 510. This question is evidence that the jury was struggling with reaching a unanimous verdict. The jury later told the judge, “We cannot reach an agreement tonight. We plan to reconvene tomorrow

morning to reach a verdict.” R. 497, ll. 6-11; R. 511. It was not until the jury reconvened the following morning, and had been deliberating for almost eight hours, did it finally reach a verdict. R. 498, ll. 15-16; R. 499, ll. 17-20.

In ruling that Swiecicki was qualified as an expert in the dynamics of child sexual abuse, the trial judge relied in part on this Court’s opinion in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015). While not mentioned at trial, this Court’s opinion in State v. Jones, 417 S.C. 319, 790 S.E.2d 17 (Ct. App. 2016), mirrors the holding in Brown.² This Court’s opinions in Brown and Jones in turn are based largely in part on our Supreme 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 also 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 good law in light of our Supreme Court’s holdings in Watson, White, and Kromah. Consequently, Jones and Brown were wrongly decided.

Appellant respectfully requests this Court hold the trial judge abused his discretion by qualifying Carole Swiecicki as an expert in the dynamics of child sexual abuse where the subject


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

matter of her testimony was well within the realm of lay knowledge, did not assist the jury in determining a fact in issue, and improperly bolstered Older Sister and Younger Sister's allegations against Appellant. Respectfully, this Court should reverse Appellant's convictions and sentence and grant him a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,


for Lara M. Caudy
Appellate Defender


ATTORNEY FOR APPELLANT

This 30th day of April, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

April 30, 2018


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