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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Richland County
Court of General Sessions

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JUN 14 2018

The Honorable Clifton Newman, Circuit Court Judge

Opinion No. 2017-UP-272 (S.C. Ct. App. filed 7/5/17)
Appellate Case No. 2017-001920

SC Court of Appeals

THE STATE,

RESPONDENT,

v.

WAYLAND PURNELL,

PETITIONER.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The Court of Appeals properly affirmed the trial judge's qualification of Dr. Allison Foster as an expert in child sex abuse dynamics, and the trial judge's findings that: (1) the subject matter of her testimony was sufficiently reliable, and (2) Dr. Foster's testimony was outside the realm of knowledge of a lay juror and was not offered to bolster the victims' credibility. (Petitioner's Issues I and II).

STATEMENT OF THE CASE

Petitioner was indicted at the October 2012 term of the grand jury for Richland County for two counts of criminal sexual conduct with a minor in the first degree and one count of lewd act upon a child. Petitioner proceeded to a trial by jury from July 7-10, 2014, in Columbia, South Carolina. At the conclusion of trial, he was found guilty of lewd act upon a child and one count of criminal sexual conduct with a minor. He was sentenced by the Honorable Clifton Newman to imprisonment for a term of twenty-five years for criminal sexual conduct with a minor in the first degree and fifteen years' imprisonment for lewd act upon a child, with all sentences running concurrently.

On July 5, 2017, the South Carolina Court of Appeals unanimously affirmed Petitioner's conviction and sentence. State v. Purnell, Op. No. 2017-UP-272 (S.C. Ct. App. filed July 5, 2017). Petitioner subsequently filed a petition for rehearing, which was denied on August 18, 2017. Petitioner subsequently submitted a Petition for Writ of Certiorari, which was granted on March 28, 2018. Petitioner submitted his brief on April 25, 2018. This Brief of Respondent follows.

STATEMENT OF FACTS

Sometime in 2010, Mother began dating Petitioner. ROA. p. 61. Mother explained that the two dated via Facebook and text message communications. ROA. p. 61. Mother and Petitioner married on March 18, 2011. ROA. p. 61. Once they were married, Petitioner permanently came to live with Mother and her children at her home in New Jersey. ROA. p. 61. Mother has five children: K.B., B.M., Victim 1, Victim 2, and B.S. ROA. p. 29. At the time Petitioner moved into Mother's home, B.M., Victim 1, Victim 2, and B.S. were all living with her. ROA. p. 62. Prior to moving into Mother's residence, Petitioner never stayed in or spent extended time at the home. ROA. pp. 61-62. On September 2, 2011, Mother and Petitioner moved to South Carolina with Mother's children. ROA. p. 63.

On April 30, 2012, D.H., a family friend, was at an after-school reading club with Victim 1. ROA. p. 40. During a conversation at the reading club, Victim 1 disclosed to D.H. that she knew what a man's private was. ROA. p. 42. D.H. was immediately concerned and told her mother. ROA, p. 43. D.H.'s mother, Danielle Jackson, is a friend of Mother. ROA. p. 46. Following D.H.'s disclosure regarding her concerns that Victim 1 was sexually abused, Jackson immediately called Mother. ROA. p. 49. Mother came directly to Jackson's house where Jackson detailed D.H.'s disclosure. ROA. p. 49. Mother then spoke with Victim 1 and took her home. ROA. p. 49.

After arriving home, Mother talked to both Victim 1 and Victim 2 who confirmed that they were abused. ROA. p. 69. Following the conversation at her home with Victim 1 and Victim 2, Mother contacted police. ROA. pp. 69-70. Mother testified she made contact with the police within half an hour of her conversation with Jackson. ROA. p. 70. Officer David Rogers, a patrolman with the City of Columbia Police Department, was dispatched to Mother's home on

April 30, 2012. ROA. p. 54. Officer Rogers testified he was dispatched to investigate a sexual assault. ROA. p. 54. Investigator Barbara Coleman was also dispatched to Mother's home on April 30, 2012. ROA. p. 160. Investigator Coleman advised Mother to not interview her daughters any further regarding the assault, as she was going to refer the girls to the Assessment Resource Center for a forensic interview and a medical interview. ROA. pp. 160-161. Investigator Coleman subsequently faxed the investigative report to the Assessment Resource Center and scheduled appointments for Victim 1 and Victim 2. ROA. p. 163.

While investigators were at Mother's home, Petitioner arrived at the home. ROA. p. 55. He was given a ride to police headquarters after he agreed to speak with investigators. ROA. p. 55. Petitioner told investigators he wanted to travel to Delaware to tend to his ill father. ROA. p. 164. Police had not set up the interview for Victim 1 and Victim 2 at the Assessment Resource Center at the time, so they agreed to let Petitioner travel to Delaware on the condition that he check in with investigators on a weekly basis. ROA. p. 164.

On May 22, 2012, Victim 1 was interviewed by Dr. Alicia Benedetto and Victim 2 was interviewed by Ray Olszewski at the Assessment Resource Center. ROA. pp. 179-180; ROA. p. 230. A videotape of the forensic interviews was played for the jury. ROA. p. 186; ROA. p. 231. Victim 1 and Victim 2 both testified at trial regarding Petitioner's inappropriate conduct that was disclosed in the interviews. ROA. pp.98-121; ROA. pp. 121-138. Victim 1 was eleven years old at the time of trial. ROA. p. 99. Victim 1 testified that Petitioner touched her "private part" with his "private part." ROA. p. 106. Victim 1 also testified that Petitioner touched her "butt" with his "private part." ROA. pp. 106-107. Victim 1 recounted one specific incident in South Carolina where Petitioner forced her to pull down her pants and "put his private part into my butt." ROA. p. 108. Victim 1 also recalled one specific incident when the family was living in New Jersey

where Petitioner attempted to penetrate her anus but was unable to. ROA. p. 108. After assaulting her, Petitioner told Victim 1 not to tell anyone about what he had done. ROA. p. 111. Victim 1 also witnessed Petitioner sexually abuse Victim 2. ROA. p. 110. Victim 1 testified that Petitioner entered the bedroom she shares with Victim 2 and “put his private part in her (Victim 2’s) butt.” ROA. p. 110.

Victim 2 was ten years old at the time of trial. ROA. p. 122. When asked to identify various parts of the body, Victim 2 identified both male and female genitals as “the middle part.” ROA. pp. 125-126. Victim 2 testified that Petitioner “sticks his middle part in my behind.” ROA. p. 127. According to Victim 2, Petitioner sexually abused Victim 2 on one occasion in New Jersey and on more than one occasion in South Carolina. ROA. p. 127. Victim 2 recounted the occasion in New Jersey where Petitioner sexually abused her, stating that “he pulled my pants down and stick his middle part in my butt.” ROA. p. 129. Victim 2 also detailed one of the occasions where Petitioner sexually abused her in South Carolina, stating “He was like fake playing with me and my sister tickling us and so as we got to our room he pulled my pants down and stuck his middle part in my behind.” ROA. p. 130. Petitioner told Victim 2 to never tell anyone what he did to her. ROA. p. 130. Victim 2 testified she never told her mother because she feared Petitioner would do something to them. ROA. p. 130.

Susan Luberoff, the pediatrician at the Assessment Resource Center, examined Victim 1 and Victim 2 on May 22, 2012. ROA. p. 143. Dr. Luberoff did not notice any injury to the genitals or anus of Victim 1 or Victim 2. ROA. pp. 146-147. Dr. Luberoff testified that when children are sexually abused, the sexual aggressor is usually someone that knows the child and takes some amount of care not to cause the child pain. ROA. p. 147. Dr. Luberoff further

testified that it is very rare to see an injury to the anus because children do not usually disclose the abuse immediately and that area of the body heals very quickly. ROA. p. 147.

Following the Assessment Resource Center interviews, Investigator Coleman reviewed the video and made contact with Petitioner to check in. ROA. p. 164. Petitioner told Investigator Coleman that his father's health had improved and that he wanted to come back to South Carolina for an interview. ROA. p. 164. Upon Petitioner's return, Investigator Coleman picked up Petitioner, took him to the police station, and placed him under arrest. ROA. p. 165.

During Petitioner's trial, Defense Counsel made a motion to exclude the qualification of any expert regarding child abuse accommodation syndrome. ROA. p. 189. Defense Counsel asserted the evidence was inadmissible on several grounds. First, the defense argued that any testimony regarding children's behavioral characteristics is an attempt to circumvent State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). ROA. p. 189. Second, Defense Counsel argued the testimony violated Rule 702, SCRE, as it did not assist the trier of fact in understanding some component of the trial. ROA. p. 191. Third, Defense Counsel made vague arguments concerning the reliability of the expert testimony, asserting it was a "junk science." ROA. pp. 245-246.

To clarify what her testimony would be, the State called its expert witness, Allison Foster, to testify *in camera*. ROA. p. 192. Dr. Foster is employed as the chief psychologist at the Assessment Resource Center and also maintains a private practice. ROA. p. 193. Dr. Foster completed her undergraduate studies at Emory University and received a Ph.D. in clinical psychology from the University of South Carolina. ROA. p. 195. Over 90% of her career has been devoted to children who have been abused. ROA. p. 195. Dr. Foster frequently conducts lectures and training outside of the Assessment Resource Center for organizations like the National Children's Advocacy Center in Huntsville, Alabama, the National District Attorney's

Association, and the National Child Protection Center. ROA. p. 195. Dr. Foster has conducted more than 1,000 forensic interviews and testified as an expert witness in more than 100 trials. ROA. p. 199. Dr. Foster's training includes the dynamics of child sexual abuse. ROA. p. 196. The study of the dynamics of child sexual abuse includes the disclosure of abuse by child victims, the study of how memories are encoded and retrieved, and child sexual abuse accommodation syndrome. ROA. p. 196.

Dr. Foster explained that the process of delayed disclosure is a professional terminology to describe the propensity of some children to not disclose instances of abuse. ROA. p. 197. There is also a phenomenon known as "piecemeal disclosure" where there are stages of disclosure that range from denial to more tentative or active stages of disclosure. ROA. pp. 197-198. Dr. Foster explained that her opinions regarding the process of disclosure are supported by research that is commonly accepted in the scientific community. ROA. p. 199. With respect to her expertise on how memories are encoded and retrieved, Dr. Foster testified there is research to back up the information she would provide to the jury and the research was peer reviewed. ROA. p. 197. The research supporting Dr. Foster's position is commonly accepted in the psychology community. ROA. p. 198.

Dr. Foster also explained the concept of child abuse accommodation syndrome. ROA. p. 200. Child sexual abuse accommodation syndrome is a term coined by psychiatrist Roland Summit. ROA. p. 200. Dr. Summit coined the term "child abuse accommodation syndrome" to describe the dynamics he observed in victims of interfamilial chronic child sexual abuse. ROA. p. 200. The phenomenon has five components: secrecy, helplessness, entrapment in accommodation, delayed tentative unconvincing disclosure, and recantation. ROA. p. 200. The concept of child abuse accommodation syndrome is a concept that continues to be considered

clinically acute and helpful. ROA. p. 201. It is commonly taught in forensic interview academies as an aspect that investigators should understand about the dynamics of child sexual abuse. ROA. p. 201. The five characteristics discussed above are not used for diagnostic purposes. ROA. p. 201. Dr. Foster explained she would not be testifying as to whether a child had been abused or if the child demonstrated any or all of the five characteristics of child abuse accommodation syndrome. ROA. p. 201.

In an effort to discredit the testimony of Dr. Foster, Petitioner called Dr. Julie Buck of San Diego, California, to testify *in camera*. Dr. Buck traveled from San Diego, California to testify in this case. ROA. p. 222. Dr. Buck has a Master's Degree in Research Psychology from the University of Tennessee-Chattanooga and a Ph.D. in psychology from Florida State University. ROA. p. 222. Dr. Buck currently works full time as a consultant in eyewitness memory cases. ROA. p. 222. Dr. Buck agreed with Dr. Foster's testimony that most children don't disclose during childhood, agreeing that around 60% of children wait until after childhood to disclose. ROA. p. 226. When a child is interviewed in a high-quality interview setting around 85% of children will disclose the abuse to their interviewer. ROA. p. 226. Dr. Buck opined that she believed the 1983 article written by Dr. Roland Summit on child abuse accommodation syndrome was not supported by research. ROA. pp. 225-226. Dr. Buck further explained that the scientific community is not likely to support the theory of child abuse accommodation syndrome because the research is not there.

After hearing the *in camera* testimony of Dr. Foster and Dr. Buck, the trial judge ruled:

I find that the testimony is admissible as far as this witness is allowed to testify as an expert witness in this case. I'm not prepared to go so far as to say that South Carolina should adopt this child abuse accommodation syndrome, I don't think that's particularly relevant to the issues in this case or the issues upon which the expert is likely to offer testimony. She is imminent qualified in the field of evaluating child sexual abuse cases and the behavioral characteristics of abused

children. She had the necessary expertise, training, experience and skills that involves the subject matter based on the testimony of both experts here today that clearly involved matters that would be helpful to the jury in understanding issues in this case, it's involving matters in which the trier of fact may be assisted by a person with specialized knowledge and training. Though the whole field of behavioral characteristics of children who may have been sexual assault victims, child sexual abuse victims, it's difficult to place a scientific knowledge test to evaluate the reliability of the testimony based on the fact that it involves a particularized area of expertise. But I believe that from what I've heard I believe the testimony to be offered is sufficiently reliable that it meets the test for the Court in its gatekeeper function. There has been an adequate amount of scientific research and skills employed to assess the nature of the problems with child sexual abuse victims, this witness can testify generally to those issues involved without seeking to usurp the decision making function of the jury.

ROA. p. 254.

At trial, Dr. Foster was qualified as an expert in the area of the dynamics of child abuse.

ROA. p. 260. Following her qualification as an expert, the trial judge provided the jury a limiting instruction, stating:

The testimony of this witness, Dr. Foster, is being offered to you and may be considered by you only for the purpose of understanding the behavior or the dynamics of the child sexual abuse victims in general and not as proof that molestation occurred as to any or more of the victims in this case.

ROA. p. 260. Dr. Foster's testimony before the jury mirrored her *in camera* testimony. Dr. Foster did not testify concerning specific details of Victim 1 and Victim 2's case. Dr. Foster did not review the interviews with Victim 1 or Victim 2. ROA. pp. 271-272. Dr. Foster also did not speak with Ray Olszewski or Alicia Benedetto, the forensic interviewers who interviewed Victim 1 and Victim 2, regarding the facts of the case nor did she discuss the facts of the case with the State or hear testimony from any of the fact witnesses in the case. ROA. p. 272. Dr. Buck was not called as a witness before the jury.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). “The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). Qualification of a witness as an expert and the subsequent admission of that witness’s testimony are matters within the sound discretion of the trial court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Pagan, 369 S.C. at 208, 631 S.E.2d at 265; State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

ARGUMENT

The Court of Appeals properly affirmed the trial judge's qualification of Dr. Allison Foster as an expert in child sex abuse dynamics, and the trial judge's findings that: (1) the subject matter of her testimony was sufficiently reliable, and (2) Dr. Foster's testimony was outside the realm of knowledge of a lay juror and was not offered to bolster the victims' credibility. (Petitioner's Issues I and II).

Petitioner contends the trial judge erred in qualifying Dr. Foster as an expert in the dynamics of child sexual abuse because there was insufficient evidence of reliability, the subject matter of her testimony was within the realm of lay knowledge and would not assist the trier of fact, and it improperly bolstered the victims' credibility. These arguments lack merit and have been correctly and conclusively resolved in recent cases from our appellate courts. The Court of Appeals thus correctly affirmed the trial judge's decision to allow Dr. Foster to testify, as the subject matter of her testimony was sufficiently reliable, outside the ken of the average lay juror, and did not impermissibly bolster the Victim's testimony.

A. Expert Qualification (Petitioner's Issue I)

Relying almost exclusively on this Court's recent decision in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), Petitioner asserts the trial judge erred in admitting Foster's testimony because "she failed to cite to any specific studies or explain the methods of peer review that were used," and "the subject matter of her testimony, particularly her testimony related to the child sexual abuse accommodation syndrome, is not supported by the research community," and thus the State failed to establish her testimony was reliable.¹

"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

¹ Petitioner makes no contention that Foster's qualifications, as reflected by her vast knowledge, experience and training, were insufficient.

matter falls outside the realm of ordinary lay knowledge.” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). In cases involving scientific expert testimony, the trial court should consider the following factors: (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. State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). However, in cases involving nonscientific expert testimony, the factors applied in an analysis of scientific evidence cannot readily be applied. See State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009) (“The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony.”). Accordingly, no formulaic approach can or must be applied to determine reliability in cases involving nonscientific expert testimony. Id. In State v. Chavis, this court concluded the testimony of child abuse assessment experts is nonscientific. 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015).

In Chavis, the trial court qualified two witnesses (Elliott and Griggs) as experts in child abuse assessment. Elliott, who had significant training and experience with the RATAC protocol for forensic interviews, and conducted a forensic interview of the victim, testified it was her expert opinion the victim’s disclosures reflected in a report issued by another forensic interviewer, who was unavailable to testify at trial, constituted disclosures of sexual abuse. 771 S.E.2d at 338-339.

This Court affirmed, with two justices finding Elliott was sufficiently trained in RATAC protocol, which she used during her forensic interviews, but there was no evidence her

conclusions or impressions from those interviews were accurate, and therefore, the trial court erred in qualifying her as an expert. As to Griggs, who also conducted a forensic interview of the victim, the two justices assumed there was sufficient evidence of reliability as to her expert qualification, but held her testimony about recommending the victim not be around the defendant for any reason improperly bolstered the victim's credibility. *Id.* at 339-340. Ultimately, however, the two justices concluded both errors were harmless beyond a reasonable doubt. *Id.* at 340-341.²

Unlike the expert testimony at issue in Chavis, Dr. Foster never interviewed the victims, Mother, or law enforcement, and did not render any opinions or recommendations that could even remotely be regarded as specific to the victims, Mother, or the allegations against Petitioner in this case. In fact, she never expressed any conclusions specific to the case at all. Therefore, the discussion of individual reliability referenced in Chavis simply does not apply to this case. See State v. Jones, 417 S.C. 319, 332, 790 S.E.2d 17, 24 (Ct. App. 2017) (“Jones primarily relies upon Chavis to support his argument that Galloway–Williams' testimony was unreliable. We find Chavis distinguishable, however, because the expert found to be unreliable in that case was qualified as a forensic interviewer and testified regarding the conclusions she reached after using the RATA method to interview the victims. In contrast, Galloway–Williams testified in general terms as to child sex abuse dynamics, focusing on delayed disclosures and the responses of nonoffending caregivers.”).

Critically, in cases such as Petitioner's case where there are allegations of juvenile sexual abuse, “[e]xpert testimony concerning child abuse typically comes from two sources: medical

²Two justices concurred in the result, but disagreed with the conclusions of error as to both Elliott and Griggs. *Id.* at 342-43 (Toal, CJ, concurring in part and dissenting in part). The fifth justice dissented, finding the errors were not harmless and the conviction should be reversed. *Id.* at 343-45 (Hearn, AJ, dissenting).

evidence provided by physicians and **behavioral science evidence** provided by psychiatrists, psychologists, and social workers.” State v. Morgan, 326 S.C. 503, 508, 485 S.E.2d 112, 115 (Ct. App. 1997) (emphasis added), overruled on other grounds by State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). Dr. Foster had specialized knowledge regarding the common behavioral characteristics exhibited by juvenile victims of sexual abuse based on her education, knowledge, training, and experience. Dr. Foster is the chief psychologist at the Assessment Resource Center at the Children’s Advocacy Center in Columbia. She has a Ph.D. in clinical psychology from the University of South Carolina and was the program director at the Assessment Resource Center from 1995 to 2012. She conducted forensic interviews, therapy with child victims of sexual abuse, and training on things like child development, language, memory, dynamics of child sexual abuse, and the process of disclosure. Dr. Foster has conducted more than 1,000 forensic interviews and testified as an expert witness in more than 100 trials. In addition to testifying in South Carolina, she has testified in Utah, District Courts in Chicago, Colorado, Iowa, Georgia, and proceedings in the U.S. court martial system. ROA. pp. 259-260. Dr. Foster testified there was research to back up the information she would provide to the jury and that research was peer reviewed. ROA. p. 197. Dr. Foster specifically testified her position is commonly accepted in the psychology community. ROA. p. 198.

The primary focus of Petitioner’s argument regarding reliability is Foster’s alleged inability to recall from memory the citations to specific studies and articles supporting her position, aside from a 1983 article by Roland Summit. This argument ignores her superb qualifications and significant field experience working with children and examining their behavioral characteristics, as well as her assurances that the research supporting her testimony was in fact commonly accepted in the psychology community and the studies were subject to

peer review. Petitioner also fails to acknowledge the lack of any studies indicating the mass of studies supporting her testimony were unreliable, and the so-called expert produced by the defense to rebut Dr. Foster's claim was an expert in a different field. There is significant evidence in the record to support the trial judge's finding that Dr. Foster's expert testimony was based on accepted principles in the field of child sex abuse assessment and treatment, and was reliable.³ Petitioner's convictions and sentences should be affirmed.

B. Necessity of Expert Testimony and Improper Bolstering (Petitioner's Issue II)

Petitioner also erroneously contends the subject matter of Dr. Foster's testimony would not assist the trier of fact as required by Rule 702, SCRE, and that Dr. Foster's testimony improperly bolstered the victims' testimony. Petitioner avers the only purpose of Dr. Foster's testimony was to circumvent the mandate of State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), and improperly bolster the testimony of the Victims.

Expert testimony concerning common behavioral characteristics of sexual assault victims, and the range of responses to sexual assault encountered by experts, is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787, 794 (Ct. App. 1999). It assists the jury in understanding some of the aspects of victims' behavior, and provides insight into a sexually abused child's often strange demeanor. Id. See also State v. Anderson, 413 S.C. 212, 776 S.E.2d 76, 79 (2015) ("Certainly we recognize that there is such an expertise [child abuse assessment]:

³This type of expert testimony is recognized and admissible in numerous jurisdictions, and discussed in legal publications. See John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45-46 (2010) ("[F]rom a psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such testimony is not worrisome." [footnotes omitted]); see also Elizabeth Trainor, Admissibility of Expert Testimony on Child Sexual Abuse Accommodation Syndrome (CSAAS) in Criminal Case, 85 A.L.R. 5th 595 §3 (Originally published in 2001) (discussion of testimony regarding general behavioral characteristics of sex abuse victims and list of cases addressing the issue).

this is the type of expert who can, for example testify to the behavioral characteristics of sex abuse victims.”) (citing State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859, 862 [1993]; Weaverling, and State v. White, 361 S.E. 407, 605 S.E.2d 540 [2004])⁴; State v. Smith, 411 S.C. 161, 767 S.E.2d 212, 217-18 (Ct. App. 2015) (cert. denied June 17, 2015) (“When sexual abuse occurs, particularly if the victim is a child, the victim may not be able to immediately disclose the abuse for numerous reasons, including the victim’s feelings of shame over what happened and the victim’s fear of or intimidation by the perpetrator. We find this was an appropriately general explanation [by an expert witness] of the medical or scientific reasons a child might not immediately disclose sexual trauma.”)

Contrary to Petitioner’s assertions, as expressly recognized by the Supreme Court in Anderson, the behavioral characteristics of child sex abuse victims is **not** a subject familiar to the common juror. In the absence of experience dealing with child sex abuse, it is unreasonable to think a lay person has sufficient knowledge regarding the impact of sex abuse on children and their behavior for even a basic understanding of how abused children may respond to the abuse and/or the perpetrator. Indeed, much of victims’ actions seem counter-intuitive or outlandish to people who have never experienced the horror of sexual abuse. Therefore, an expert with specialized training and experience dealing with child sex abuse victims, such as Dr. Foster, can assist the jury in understanding their behavior. See White, 605 S.E.2d at 544 (expert testimony and behavioral evidence may be **more** crucial when the victims are children, whose inexperience and impressionability often render them unable to effectively articulate events giving rise to criminal sexual behavior); State v. Brown, 411 S.C. 332, 342 768 S.E.2d 246, 251 (Ct. App. 2015) (cert. denied August 6, 2015) (“We believe the unique and often perplexing behavior

⁴Petitioner continues the defense bar’s attempts to relegate Weaverling and Schumpert to “outdated” status after State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). This argument completely ignores this Court’s affirmation of those cases in Anderson.

exhibited by child sex abuse victims does not fall within the ordinary knowledge of a juror with no prior experience—either directly or indirectly—with sexual abuse. The general behavioral characteristics of child sex abuse victims are, therefore, more appropriate for an expert qualified in the field to explain to the jury, so long as the expert does not improperly bolster the victims' testimony.”). See generally People v. Baenziger, 97 P.3d 271, 275 (Colo. Ct. App. 2004) (“Because the ‘lay notion of what behavior logically follows the experience of being raped may not be consistent with the actual behavior which social scientists have observed from studying rape victims,’ expert testimony explaining these reactions is helpful to the jury in determining whether this delay should support the conclusion that the sexual assault did not occur.” (citations omitted)).

The current case presents circumstances similar to this Court’s analysis of battered woman’s syndrome in State v. Hill, 287 S.C. 398, 339 S.E.2d 121 (1986). In Hill, this Court explained battered woman’s syndrome is “a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives.” Id. at 400, 339 S.E.2d at 122 (citing State v. Kelly, 97 N.J. 178, 193, 478 A.2d 364, 371 (N.J. 1984)). The Hill Court concluded expert testimony regarding battered woman’s testimony was not only relevant to the defendant’s claim of self-defense in the case, but critical, because it was relevant to the issue of self-defense and highly probative of the defendant’s state of mind. Similarly, expert testimony about general behavioral characteristics of children who have been sexually abused gives the jury critical insight into a victim’s state of mind and provides context about their psychological responses. As in Hill, this Court should find that Dr. Foster’s testimony was not only relevant, but critical.

Dr. Foster's testimony in this case was the type of expert general behavioral testimony recently affirmed in Anderson, Jones, and Brown, and previously approved in Schumpert and Weaverling. Despite Petitioner's continued insistence the substance of Dr. Foster's testimony was not outside the realm of ordinary lay jurors, a contention already soundly rejected by South Carolina courts, her testimony was relevant, and assisted the jury in understanding the evidence and determining a fact in issue. See Rule 702, SCRE (expert with specialized knowledge may testify if it will assist the trier of fact to understand the evidence or determine a fact in issue).

Petitioner's contention that the only purpose of Dr. Foster's testimony was to improperly bolster Victim 1 and Victim 2's testimony is also similarly rebutted by recent cases. See Brown, 411 S.C. 332, 345, 768 S.E.2d 246, 252-53 (distinguishing improper bolstering when the expert conducted the forensic interview compared to independent mental health experts who address general behavioral characteristics."); Jones, 417 S.C. 319, 335, 790 S.E.2d 17, 226 ("Because Galloway-Williams never commented on the credibility of Mother or the Victims, but rather offered admissible expert testimony regarding the general behavioral characteristics of child sex abuse victims and nonoffending caregivers, we find her testimony did not improperly bolster their testimonies. The fact that her testimony corroborated some of the Victims' reasons for delaying disclosure of the abuse, or Mother's failure to act when she became aware of it, does not mean Galloway-Williams' testimony improperly bolstered their accounts."). Brown and Jones support the position that Petitioner's reliance on State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989), State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000), and State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) is misplaced. In Jennings, this Court held the report prepared by a forensic interviewer regarding her interviews of the victims was inadmissible hearsay, and impermissibly

vouched for the victims' credibility by concluding the victims "provided a 'compelling disclosure of abuse.'" 394 S.C. 480, 716 S.E.2d at 94. See also McKerley, 397 S.C. at 467, 725 S.E.2d 139 ("In this particular case, none of this testimony has any relevance except insofar as it informs the jury Smith believes the story told by the victim. As Justice Pleicones explained in Jennings "[t]here is no other way to interpret the language used in [Smith's testimony] other than to mean [she] believed the [victim was] being truthful.") (citing Jennings, 394 S.C. at 480, 716 S.E.2d at 94). Both Dawkins and Dempsey involved testimony from therapists who were actually treating the victims, and their testimony clearly indicated they believed the victims were telling the truth. Dawkins, 297 S.C. 386 at 393, 377 S.E.2d at 302 (therapist testified his impression was that victim's symptoms were genuine); Dempsey, 340 S.C. 656 at 57-72, 532 S.E.2d at 308-10 (therapist testified children alleging sexual abuse were truthful 95% to 99% of the time, and he concluded victim was reliable). In this case, Dr. Foster was not testifying as a forensic interviewer. She never interviewed the victims, did not prepare a report, and did not express any opinion or belief regarding the credibility of victims' allegations in general or these victims in particular. Therefore, the analysis and holdings in Jennings, Dawkins, Dempsey, and McKerley do not apply to this case.

Dr. Foster's testimony about general behavioral characteristics did not rise to the level of improper bolstering. "Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror." State v. Taylor, 404 S.C. 506, 745 S.E.2d 124, 128 (Ct. App. 2013) (quoting State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006), rev'd in part on other grounds, 380 S.C. 499, 671 S.E.2d 606 (2009)). Dr. Foster gave general testimony on the dynamics of child sexual abuse,

specifically testifying about the disclosure of abuse by child victims, the study of how memories are encoded and retrieved, and child sexual abuse accommodation syndrome. This testimony is wholly admissible under South Carolina jurisprudence. See State v. Barrett, 416 S.C. 124, 133, 785 S.E.2d 387, 391 (Ct. App. 2016) (finding expert's testimony as a mental health professional on general behavioral characteristics of sexually abused children was in line with our current jurisprudence). Dr. Foster gave no testimony where she offered any opinion on whether the victims were telling the truth. In fact, she specifically testified she had not reviewed the forensic interviews, spoken with the forensic interviewers about the facts of the case, or heard any testimony from the fact witnesses in the case. Cf Chavis, 412 S.C. at 109, 771 S.E.2d at 340 (finding the expert's recommendation that the defendant not be around Victim for any reason, could **only** be interpreted as the expert believing Victim's claim that the defendant sexually abused her) (emphasis added). This establishes that Dr. Foster was testifying generally and was disengaged from the facts in this particular case. The fact that Dr. Foster's testimony provided insight into the behavioral characteristics of abused children does not constitute improper bolstering. Petitioner's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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June 14, 2018

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Richland County
Court of General Sessions

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JUN 14 2018

SC Court of Appeals

The Honorable Clifton Newman, Circuit Court Judge

Opinion No. 2017-UP-272 (S.C. Ct. App. filed 7/5/17)
Appellate Case No. 2017-001920

THE STATE,

RESPONDENT,

v.

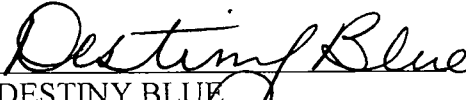
WAYLAND PURNELL,

PETITIONER.

PROOF OF SERVICE

I, Destiny Blue, certify that I have served the Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Lara M. Caudy, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.
This 14th day of June, 2018.


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