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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Kershaw County
Tanya A. Gee, Circuit Court Judge

Opinion No. 2018-UP-121 (S.C. Ct. App. filed Mar. 21, 2018)
2012-GS-28-1381; -1382

THE STATE,

RESPONDENT,

V.

JAMES WAYNE MILLER,

PETITIONER

APPELLATE CASE NO 2018-001178

APPENDIX

SUSAN B. HACKETT
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
P. O. Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEY FOR PETITIONER

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit
Post Office Box 192
Columbia, South Carolina 29202
(803) 576-1800

ATTORNEYS FOR RESPONDENT

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

James Wayne Miller, Appellant.

Appellate Case No. 2016-000642

Appeal From Kershaw County
Tanya A. Gee, Circuit Court Judge.

Unpublished Opinion No. 2018-UP-121
Submitted February 1, 2018 – Filed March 21, 2018.

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson, Senior
Assistant Deputy Attorney General Megan Harrigan
Jameson, and Solicitor Daniel Edward Johnson, all of
Columbia, for Respondent.

PER CURIAM: James Wayne Miller appeals his convictions for second-degree criminal sexual conduct and incest, arguing the trial court erred by (1) denying his motion for a continuance and failing to order a competency examination to

determine if he was competent to stand trial and (2) permitting Dr. Allison Foster to testify as an expert in child abuse assessment because the subject matter of her testimony was unreliable and her testimony improperly bolstered the victim's credibility. We affirm.¹

1. We find the trial court did not abuse its discretion by denying Miller's motion for a continuance. *See State v. Yarborough*, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005) ("The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion."); *State v. Meggett*, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) ("An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." (quoting *State v. Greer*, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010))); *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) ("There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."); *Yarborough*, 363 S.C. at 266, 609 S.E.2d at 595 ("Reversals of refusals of continuances 'are about as rare as the proverbial hens teeth.'" (quoting *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002))).

We also find the trial court did not abuse its discretion by failing to order a competency examination of Miller. *See* S.C. Code Ann. § 44-23-410(A) (2017) (providing a court shall order a competency evaluation whenever it "has reason to believe that a person on trial before [it], charged with the commission of a criminal offense or civil contempt, is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity"); *State v. Locklair*, 341 S.C. 352, 364, 535 S.E.2d 420, 426 (2000) ("Despite the mandatory language of the statute requiring a [court] to order a competency examination if there is reason to believe that a person charged with a criminal offense is not fit to stand trial, ordering a competency examination is within the discretion of the trial [court] and a refusal to grant an examination will not be disturbed on appeal absent a clear showing of an abuse of discretion."); *State v. Burgess*, 356 S.C. 572, 575, 590 S.E.2d 42, 44 (Ct. App. 2003) ("Factors to be considered in determining whether further inquiry into a defendant's fitness to stand trial is warranted include evidence of his or her

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

irrational behavior, his or her demeanor at trial, and any prior medical opinion on his or her competence to stand trial.").

2. We find the trial court did not abuse its discretion by allowing Dr. Foster to testify as an expert witness in child abuse assessment. *See State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion."); *State v. Strokes*, 381 S.C. 390, 398, 673 S.E.2d 434, 438 (2009) ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."). First, based on Dr. Foster's testimony regarding the field of child abuse assessment, her work in the field, and the sources of her testimony, we find the subject matter of Dr. Foster's testimony was reliable. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (stating before allowing a jury to hear expert testimony, the trial court must (1) "find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury," (2) "find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter," and (3) "evaluate the substance of the testimony and determine whether it is reliable"); *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (providing to determine if scientific expert testimony is reliable, the trial court must consider "(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"); *White*, 382 S.C. at 274, 676 S.E.2d at 688 (stating in cases with nonscientific expert testimony, the factors applying to scientific testimony cannot be readily applied, and there is no formulaic approach to determine reliability); *State v. Jones*, 417 S.C. 319, 331, 790 S.E.2d 17, 23 (Ct. App. 2016), *cert. granted*, S.C. Sup. Ct. Order dated Aug. 22, 2017, ("[T]he testimony of child abuse assessment experts is nonscientific.").

Second, we find Dr. Foster's testimony did not improperly bolster the victim's credibility because she did not interview the victim prior to trial and did not comment on the victim's credibility during her testimony. *See State v. Weaverling*, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999) ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible."); *id.* at 475, 523 S.E. 2d 794 ("Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault."); *id.* ("It assists the jury in understanding some of the aspects of the behavior of victims and

provides insight into the sexually abused child's often strange demeanor."); *State v. Brown*, 411 S.C. 332, 342, 768 S.E.2d 246, 251 (Ct. App. 2015) ("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."); *State v. Kromah*, 401 S.C. 340, 358-59, 737 S.E.2d 490, 500 (2013) ("[I]t is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter."); *State v. Barrett*, 416 S.C. 124, 130, 785 S.E.2d 387, 390 (Ct. App. 2016) ("[T]he practice of qualifying the forensic interviewer who conducted the alleged victim's forensic interview as an expert in child abuse assessment" has not been "prohibit[ed] outright."); *State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) ("The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert.").

AFFIRMED.

LOCKEMY, C.J., and WILLIAMS and KONDUROS, JJ., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JAMES WAYNE MILLER,

APPELLANT

APPELLATE CASE NO 2016-000642

Appeal from Kershaw County

Tanya A. Gee, Circuit Court Judge

Opinion No. 2018-UP-121

PETITION FOR REHEARING

On March 21, 2018, this Court affirmed Appellant's convictions in an unpublished *per curiam* opinion. State v. Miller, 2018-UP-121 (S.C. Ct. filed Mar. 21, 2018). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests rehearing in light of the points overlooked and/or misapprehended by this Court in arriving at its opinion. In addition to the points described below, Appellant further notes, as this Court did in rendering its opinion, that the South Carolina Supreme Court has granted certiorari in State v. Jones, 417 S.C. 319, 790 S.E.2d 17 (Ct. App. 2016), *cert. granted*, S.C. Sup. Ct. Order dated Aug. 22, 2017. Oral argument is scheduled for May 3, 2018, in Jones. The issues presented in Jones are very similar to the issues

raised on appeal by Appellant.¹ Thus, the South Carolina Supreme Court's ruling in Jones may impact any decision in the instant matter.

On appeal, Appellant challenged the trial court's erroneous decision to permit Allison Foster to testify as an expert in child abuse assessment where her testimony improperly bolstered the complaining witness's credibility. Additionally, Appellant challenged the trial court's erroneous decision to permit the expert qualification and testimony where there was insufficient evidence of the reliability of the subject matter of her testimony. This Court held "the trial court did not abuse its discretion by allow Dr. Foster to testify as an expert witness in child abuse assessment." Specifically, this Court found (1) "Dr. Foster's testimony did not improperly bolster the victim's credibility because she did not interview the victim prior to trial and did not comment on the victim's credibility during her testimony" and (2) "based on Dr. Foster's testimony regarding the field of child abuse assessment, her work in the field, and the sources of her testimony," "the subject matter of Dr. Foster's testimony was reliable." This was error.

Foster's testimony

When called as a witness by the state during an *in camera* hearing, Allison Foster explained that she was a licensed clinical psychologist employed as the chief psychologist at the Assessment and Resource Center (ARC), a children's advocacy center, and as a psychologist in private practice. R. 406, ll. 10-19. Additionally, she served as "senior faculty for a five day forensic interview training course called Child First," which had been in existence for fifteen years. R. 408, ll. 4-6. According to Foster, she had "been conducting forensic interviews of

¹ The issues presented in Jones concern whether a trial judge properly qualified an individual as an expert in child abuse dynamics where the testimony improperly bolstered the complainants' credibility and whether the individual could have been qualified at all because there was insufficient evidence of reliability of the subject matter of her testimony and whether those matters had ever been subjected to peer review. These issues are substantially similar to the issue raised on appeal in the instant matter.

children who are suspected of being victims for 21 years.” R. 407, ll. 7-14. When asked if she developed training and programs for different agency personnel regarding suspected child abuse, Foster responded that she trained “in national conferences,” developed “the curriculum for the Child First forensic interview training course,” and taught others, including other forensic interviewers, regarding the techniques. R. 408, ll. 7-15. Regarding her publications, Foster explained she had “published a monograph for the American Prosecutors Research Institute on child development,” published “a book chapter” “about the assessment of mental disorders in custody evaluations,” and had “research in preparation on a couple of matters involving forensic interview techniques,” which were not published. R. 408, ll. 16-25.

Foster claimed the “subject” of her “field” of study was “child abuse assessment or dynamics of child abuse.” R. 409, ll. 11-14. She further claimed the field is studied because “there are a lot of factors that are not necessarily a lay person, within a lay person’s understanding and also because it’s important for us to understand children’s development, linguistics, how memory works, how processes like coercion, parent/child relationships or offender/child relationships, how those play into the dynamics of abuse.” R. 409, ll. 15-23. Foster claimed “there are a lot of behavioral issues as well as developmental issues that are researched in the behavioral science literature to help us understand the best way to evaluate these situations as well as the best way to explain to lay people dynamics that they might not otherwise understand.” R. 409, l. 23 – R. 410, l. 3.

An example of “dynamics” included “things like the fact that delay in reporting by victims is a very robust finding in the research.” R. 410, ll. 4-7. Foster claimed, “We know behaviorally that the majority of substantiated cases of child sexual abuse include a very large delay even into adulthood before victims often report childhood sexual abuse.” R. 410, ll. 7-10.

Such was “not necessarily logical to somebody who is not trained in the field,” she asserted. R. 410, ll. 10-12. Other examples of the “dynamics” were “[s]ome of the ways children accommodate abuse in situations they can’t control,” and “recantation,” which “jurors might not otherwise understand if they didn’t have the benefit of education.” R. 410, ll. 15-18. Finally, “secrecy” was a dynamic. R. 410, ll. 19-20.

Continuing with the proffer of testimony, Foster testified regarding what she claimed were some of the behavioral characteristics not known to the average individual, including that “a lot of child sexual abuse occurs at the hands of a family member, an adult who is in a role of an authority figure, a parental figure or step parent figure.” R. 412, ll. 8-20. In those situations,

[T]he abuse tends to be chronic meaning that it occurs over a sustained period of time and so for that relationship to be sustained without the offending behavior being detected there are certain dynamics that are known to occur in those cases along the lines of how an offender exploits his authority, the sense of love, dependency, the complexities of that kind of relationship and how they can manipulate that to maintain a victim’s secrecy and cooperation or compliance.

R. 412, l. 20 – R. 413, l. 3. She continued to explain they “dynamics that the victims experience,” typically described as “helplessness,” “entrapment and the fact that they need to accommodate the abuse because they’re really in a situation that they feel powerless to change.” R. 413, ll. 4-8.

Next, Foster delved into “about 30 years of ... retrospective research.” R. 413, ll. 19-21. She described this as “where researchers have looked back over a 30 year time span of studies that conclude that two-thirds of child sexual abuse victims in America don’t come to anybody’s attention until adulthood.” R. 413, ll. 21-24. She claimed these “statistics [] come from cases that have been well substantiated.” R. 414, ll. 3-12. This led her to draw the conclusion that “delayed disclosure is a common aspect to the experience of child sexual abuse.” R. 414, ll. 1-2. When questioned about the “reliability of the behavioral science” on which she was basing her

testimony, she claimed there were “a lot of studies,” but she mentioned only “a meta analytic study that was published a few years ago by Steven Ceci, Carl London, Maggie Roth,” which involved the review of “research spanning this 30 plus year time frame” with any specificity. R. 415, ll. 9-22. She then shifted to discuss the work of Roland Summit on “the phenomenon of chronic sexual abuse and delayed disclosure.” R. 416, ll. 6-8. In this publication, Summit explained “the manner in which children become trapped first by a stage of secrecy ... they are manipulated, lured, threatened into believing they need to keep the behavior secret.” R. 416, ll. 8-12. According to Foster, the child enters a “stage of helplessness,” which causes the child to “live in some period of time that’s described as a state of entrapment and accommodation.” R. 416, ll. 18-19. During this stage, the child is “still going along with the business of life,” including school, visiting friends, participating in activities, doing chores, and otherwise acting normally. R. 416, ll. 19-25.

The “dynamics and the behavioral characteristics” described by Foster were not used as “a diagnostic tool,” but were used to “describe phenomenon that could otherwise seem illogical or counter intuitive.” R. 417, ll. 12-18. She posited that understanding “some of those behavioral dynamics that have to do with manipulation, coercion, the different sort of power dynamics that are in relationships, it can assist the trier of fact in understanding the phenomenon.” R. 417, l. 22 – R. 418, l. 1.

On cross-examination, Foster revealed that the five factors identified in the Summit article comprising child sexual abuse accommodation syndrome were secrecy, entrapment, helplessness, delayed disclosure, and potential recantation. R. 418, ll. 13-21. According to Foster, studies following Summit’s article included those conducted in a clinical setting, but more involved “data analysis from forensic cases.” R. 419, ll. 1-6. When asked if the studies

she referenced were “peer reviewed,” Foster responded they were “absolutely” “peer reviewed” because “[a]nything that’s published in a journal” is peer reviewed and she would not cite research unless it were the product of peer review and had been published in a journal or a book that would be considered a treatise edited by experts in their field. R. 419, ll. 13-23.

Thereafter, the solicitor called Foster as a witness in front of the jury. R. 430, ll. 17-18. Much of Foster’s testimony mirrored her *in camera* testimony. In describing “child abuse assessment,” Foster told the jurors that the field “encompasses a lot of things from understanding children and their developmental states [to] understanding how abuse can affect children at different developmental stages.” R. 434, ll. 17-22. The “field” also included how children “can remember and relate information.” R. 434, ll. 22-23. According to Foster, the “field” also encompassed the “[p]sychological effects of abuse depending on the relationship between the perpetrator and the victim and the age of the victim.” R. 434, ll. 23-25. Related to all of this was “the process of how to gather information from children and understanding the process of disclosure. How children tell and when they tell and that sort of thing.” R. 435, ll. 2-5.

She told the jurors about delayed disclosure and that according to the research, “two-thirds of [people known to have been victimized as children] won’t come to anyone’s attention until adulthood.” R. 435, l. 20 – R. 436, l. 6; R. 439, ll. 7-10. Related to delayed disclosure, Foster explained stages of disclosure, including denial, tentative, and active. R. 439, l. 20 – R. 440, l. 14. She told the jurors about “entrapment” and “accommodation” during child abuse. R. 441, ll. 5-24. She also told the jurors about children of abuse entering a state of helplessness. R. 442, ll. 1-20. Those stages, she explained, were called “child sexual abuse accommodation dynamics.” R. 442, ll. 16-18.

Foster then told the jurors about the most common situation for child sexual abuse was for it to occur in the home. R. 442, l. 21 – R. 443, l. 2. Regarding whether all children in the home would be abused, Foster claimed that if the abuser were a parent, then the abuser would chose the child over whom the parent had a particular emotional and/or behavioral relationship. R. 443, ll. 3-17.

Importantly, Foster told the jury that her testimony was based upon the research in the “field” and from her experience as a psychologist who had “evaluated about 2000 children suspected of sexual abuse.” R. 446, ll. 2-8.

Improper bolstering

In ruling upon the issue concerning improper bolstering, this Court relied solely upon two points. The first was that Foster did not interview the complaining witness prior to trial. The second was that Foster did not comment directly on the credibility of the complaining witness during her testimony. These points simply cannot support this Court’s holding.

Starting in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the South Carolina Supreme Court proclaimed: “[W]e state today that we can envision no circumstance where [a forensic interviewer’s] qualification as an expert at trial would be appropriate.” Id. at 357 n.5, 737 S.E.2d at 499 n.5. In State v. Douglas, 380 S.C. 499, 502-503, 671 S.E.2d 606, 608 (2009), the South Carolina Supreme Court found the trial court erred in qualifying a forensic interviewer as an expert because the testimony simply did not require expert qualification. The forensic interviewer’s testimony concerned only “her personal observations and experiences, and her interview with the Victim in th[e] case.” Id.

“It is undeniable that the primary purpose for calling a ‘forensic interviewer’ as a witness is to lend credibility to the victim’s allegations. When this witness is qualified as an expert the

impermissible harm is compounded.” Kromah, 401 S.C. at 358, 737 S.E.2d at 499. “[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others.” State v. Portillo, 408 S.C. 66, 71, 757 S.E.2d 721, 724 (Ct. App. 2014)(quoting Kromah, 401 S.C. 340 at 358, 737 S.E.2d at 499). “The 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). Therefore, it is improper for a witness to bolster the testimony or credibility of another witness. See Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010)(finding a “forensic interviewer’s . . . opinion testimony improperly bolstered the victim’s credibility”).

In McKerley, the trial court allowed a witness to testify as an expert in “forensic interviewing and child abuse assessment.” 397 S.C. at 463, 725 S.E.2d at 141. The witness had interviewed the alleged victim twice and concluded that both interviews were “compelling” for sexual abuse. Further, the witness determined that the alleged victim’s statements were consistent with other information in the case. Id. at 466, 725 S.E.2d at 142. The Supreme Court determined that there was no other way to interpret the language used in the expert’s testimony other than to mean she believed the victim was being truthful. The Court further held, “In light of [the expert’s] extensive inadmissible testimony bolstering the credibility of the victim . . . we cannot say the erroneous admission of [the expert’s] testimony did not contribute to the jury’s decision,” therefore finding harmful error. Id. at 467, 725 S.E.2d at 143.

The Supreme Court has also held that it is improper “for an expert to comment on the veracity of a child’s accusations of sexual abuse.” State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). Jennings involved a challenge to the testimony of Shauna Galloway-Williams. Galloway-Williams interviewed the three alleged victims of sexual abuse and issued separate

reports for each child that were admitted into evidence. She concluded in her reports that each child provided a “compelling” disclosure of abuse by the defendant and that the children provided details that were consistent with the background information received. 394 S.C. at 476-481, 716 S.E.2d at 92-95. The Court held the conclusions in Galloway-Williams’ reports improperly vouched for the children’s veracity and thus the trial court abused its discretion by admitting the reports into evidence. It further held the error was not harmless because there was no physical evidence presented at trial and the children’s credibility was the sole issue in the case. *Id.* at 94-95, 716 S.E.2d at 480.

Recently, in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), the South Carolina Supreme Court found the testimony of one of the state’s purported “expert” witnesses that the child should not be allowed around Chavis anymore, for any reason, could only be interpreted as the “expert” believing the victim’s claim that Chavis sexually abused her. *Id.* at 109, 771 S.E.2d at 340.

The solicitor’s closing argument exemplified how Foster’s testimony improperly bolstered Complainant’s testimony and allegations. More specifically, the solicitor used the testimony from Foster to bolster Complainant’s credibility and argue to the jury that she should be believed because her conduct mirrored the conduct of those individuals who suffered child sexual abuse, as described by Foster.

According to the solicitor, Appellant had selected Complainant because of his close relationship with her, “[j]ust like Dr. Foster said.” R. 504, ll. 17-21. To explain why Complainant did not tell about the alleged abuse earlier, the solicitor implored the jurors to rely on Foster’s explanation “that the large majority of people, of children do disclose a lot later.... Two-thirds of the population that has been studied relating to sexual abuse child victims come forward later. It is not an uncommon situation.” R. 510, ll. 2-12. She then talked to the jury

about “latent disclosure” and partial disclosures. R. 510, ll. 13-23. To explain why Complainant did not “tell the entire story” initially, the solicitor relied upon “the research, the studies” and told the jurors to rely on their “common sense and knowledge of human nature” to determine that “the very first time she’s not going to sit there and give it all out there.” R. 511, ll. 9-19. According to the solicitor, “[t]he first day she told what she needed to tell her. Not unusual. Dr. Foster’s been in this field for 30 years. Not unusual.” R. 511, ll. 20-23.

Next, the solicitor reminded the jury of “the factors that play into that delayed disclosure” as testified to by Foster. R. 511, ll. 24-25. Specifically, the solicitor talked about “helplessness and accommodation and the secrecy.” R. 511, l. 25 – R. 512, l. 1.

Helplessness. The family is all she had. ... [T]hey have had very few friends. They have moved over 20 times. They’re home schooled. They’re in that house. ... So when he threatens her, I’m gonna ruin you. You’re gonna ruin this family. You’re gonna have no one, why wouldn’t she believe that? That’s all she’s ever known is her family.

Accommodation. Dr. Foster ... talked about accommodation. What that means is that after the first couple of times that it happened, even if it’s against your will, even if you fight it off, but once it happens, you feel like it, she feels like it’s something that she just has to succumb to essentially. Blames herself. That is a factor that also comes into play with child sexual abuse of victims.

R. 512, ll. 2-23. Continuing to rely upon Foster’s testimony to bolster Complainant’s testimony, the solicitor noted that Foster “also testified ... that just because as far as who the particular perpetrator chooses, which child the perpetrator chooses has a lot to do with the relationship.” R. 512, l. 24 – R. 513, l. 2; see also R. 522, ll. 8-19.

The solicitor boldly told the jurors that Foster did not interview Complainant or watch the forensic interviews, and yet she “corroborate[d] everything” that was presented by the state. R. 513, ll. 2-6. The solicitor described Foster’s testimony concerning memory as corroborative of Complainant, especially in light of Complainant’s repeated testimony regarding events, not just

allegations of sexual abuse, that she could not remember. According to the solicitor, “Dr. Foster testified about the fact that the first memory is often very clear and [Complainant] has a very clear memory when that first time it happened.” R. 514, ll. 23-25. The solicitor offered nothing more than Foster’s testimony to explain away the inexplicable – why Complainant could not remember simple things like what she liked to hunt or why her testimony contrasted with that of others concerning whether she wore bikinis.

The admission of this testimony in this case, where the jury’s decision depended upon Complainant’s credibility, was prejudicial error that requires reversal. The qualification of Foster as an “expert” in “child abuse assessment” was erroneous and prejudicial to Appellant. “The label of expert should be jealously guarded by the court and never loosely bandied about.” Kromah, 401 S.C. at 357, 737 S.E.2d at 499. As our Supreme Court noted 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. In light of the prosecutor’s capitalization of the testimony during her closing argument to argue the jury should believe Complainant due to the testimony of an “expert” witness who had been doing this type of work for thirty years and described Complainant’s situation without having any knowledge of Complainant, this Court must find the error was not harmless. 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).

Thus, while it is true that Foster did not interview Complainant prior to trial and Foster did not comment directly on the credibility of Complainant, Foster’s testimony improperly

bolstered Complainant's credibility. The image painted by Foster of an individual suffering sexual abuse was a mirror image of what Complainant alleged and the solicitor capitalized on the testimony to convince the jury that Complainant was telling the truth. Foster's failure to interview Complainant and her failure to comment directly on Complainant's credibility did not inhibit Foster's testimony from being a comment on Complainant's veracity. Simply requiring the purported "expert" to not interview the complaining witness prior to trial is not a panacea for the afflictions of permitting opinion testimony from individuals who are essentially forensic interviewers.

Lack of reliability

In ruling upon this issue, this Court found the subject matter of Foster's testimony was reliable based on her "testimony regarding the field of child abuse assessment, her work in the field, and the sources of her testimony." This holding is not supported by the law.

The South Carolina Rules of Evidence and case law govern the admission and scope of expert testimony. Pursuant to the Rule, "[i]f 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. In Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), the South Carolina Supreme Court specified the following three-prong test for expert testimony:

[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 (internal citations omitted) (emphasis added). “All expert testimony must satisfy the Rule 702, SCRE, criteria, and that includes the trial court’s gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury’s ultimate consideration.” State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

Recently, in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), the South Carolina Supreme Court held that State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) should apply in qualifying child abuse assessment experts because their testimony is non-scientific. “Under White, two threshold determinations must be made. First, the qualifications of the expert must be sufficient, and second, there must be a determination that the expert’s testimony will be reliable.” Id. (citing White, 382 S.C. at 273, 676 S.E.2d at 688). The Court found that the trial court improperly qualified the child abuse assessment expert in Chavis because there was “simply no evidence that her conclusions or impressions taken from [the] interviews were accurate.” Id. Although the Court established “no formulaic approach for determining the foundational requirements of qualification and reliability in non-scientific evidence,” the Court explained “evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies.” Id. Put simply, the “expert” witness should not have been qualified as an expert because there was no evidence that her conclusions or impressions taken from the forensic interviews she conducted were accurate and her only peer review was another interviewer reviewing her work to ensure she was using the RATAAC protocol. Id. at 108, 771 S.E.2d at 339.


This Court found the subject matter of Foster's testimony was reliable based on her "testimony regarding the field of child abuse assessment, her work in the field, and the sources of her testimony." However, this was legal error because none of those factors indicated Foster's conclusions or impressions were correct. Like the "expert" in Chavis, there was no evidence that Foster's conclusions and claims were accurate or reliable. Foster admitted that her testimony was the product of what she had read and what she had learned from her experience as a psychologist who had "evaluated about 2000 children suspected of sexual abuse." R. 446, ll. 2-8. The state presented no evidence regarding the methodologies employed by Foster in arriving at the conclusion she drew from her reading or from her own practice. In light of the dearth of evidence of the reliability of Foster's conclusions and statements, the court failed to properly execute its gatekeeping function by qualifying her as an expert in "the dynamics of child sexual abuse."

In her closing argument, the solicitor explained that the state had presented "several expert witnesses" during the trial. R. 508, l. 7. Then, the solicitor described the testimony by an "expert in the field of serology." R. 508, ll. 19-21. Next, the solicitor discussed the testimony of "child abuse pediatric specialist." R. 509, ll. 18-19. Finally, the solicitor delved into the testimony of Foster, an "expert" placed into the same category as a serologist and a physician by the solicitor. Thereafter, the solicitor went through Foster's testimony in painstaking detail to arrive at her ultimate coup de grâce – "Foster didn't interview [Complainant]. She didn't review the forensic interviews. She testified as what's called a blind expert. She's talking about her knowledge of the field. But she corroborates everything that everyone has told you." R. 513, ll. 2-6.

In conclusion, Appellant respectfully requests hearing concerning the second issue presented in his brief in light of the significant points overlooked and/or misapprehended by this

Court as well as the potential impact the Supreme Court's opinion in State v. Jones may have on Appellant's case.

Respectfully Submitted,


SUSAN B. HACKETT
Appellate Defender

This 5th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

Tanya A. Gee, Circuit Court Judge

THE STATE,

RESPONDENT,

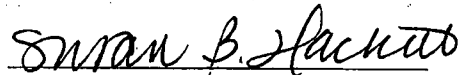
V.

JAMES WAYNE MILLER,

APPELLANT

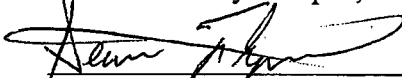
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and James Wayne Miller, #367454, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 5th day of April, 2018.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 5th day of April, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

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The South Carolina Court of Appeals

The State, Respondent,

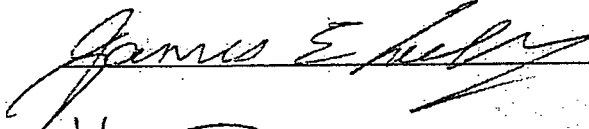
v.

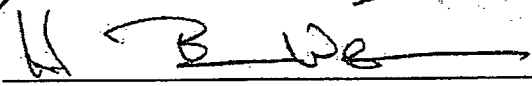
James Wayne Miller, Appellant.

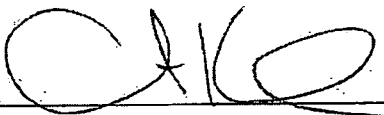
Appellate Case No. 2016-000642

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.

 J.

 J.

Columbia, South Carolina

cc:
 Alan McCrory Wilson, Esquire
 Susan Barber Hackett, Esquire
 Megan Harrigan Jameson, Esquire
 Daniel Edward Johnson, Esquire
 Janet C. Hasty

FILED

May 24, 2018