STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from 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

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 24, 2018. App. 21.

QUESTION PRESENTED

Did the Court of Appeals err by concluding the testimony provided by Allison Foster in the area of child abuse assessment was reliable?

STATEMENT OF THE CASE

Petitioner met his future wife, Tammy, in third grade. R. 198, ll. 1-2. At the age of seventeen, Tammy gave birth to twins, the couple's first children. R. 198, ll. 10-12. The pair went on to have three more children. R. 197, ll. 6-14.[1] Petitioner worked construction, providing for his growing family. R. 102, ll. 1-2; R. 200, ll. 8-12. Tammy stayed home with the children, and even homeschooled them for the most part. R. 101, ll. 1-21; R. 200, ll. 17-25.

The couple's twins were girls – Complainant and Breana. Breana was "[v]ery passive, quiet. A follower." R. 203, ll. 7-9. She enjoyed "[d]rawing and painting" and being inside with her mother. R. 102, ll. 16-18; R. 203, ll. 14-16. Complainant preferred to be "outside," "[c]limbing trees, skinning foxes." R. 102, ll. 18-19; R. 203, ll. 20-24. Petitioner taught Complainant how to build things – "cut tile, cut wood, measure and put down laminate flooring." R. 104, ll. 2-8; R. 204, ll. 1-6.

Around July 4, 2011, Petitioner and his family visited friends in Camden, and as a result of the visit, they decided to move from Summerville to Camden. R. 104, ll. 21-24; R. 204, ll. 11-20. The family found a house on the lake in which they could move, but it needed a little work. R. 205, ll. 1-13. Tammy and all the children except Complainant returned to Summerville to pack for the move. Petitioner and Complainant stayed in Camden in a camper preparing the house for the family's eventual return. R. 106, ll. 7-12; R. 205, ll. 14-19. Within two weeks, the entire family was re-united in the house on the lake in Camden. R. 208, ll. 3-6.

When the family first moved in, Complainant and Breana, who were sixteen-years old at the time, "shared the big room" upstairs, the youngest daughter had her own room, and the two boys shared a third bedroom. R. 208, ll. 7-12; R. 210, ll. 13-14; R. 116, ll. 11-16. However, this

[1] In 2006, Tammy's father went to prison when it was learned he had been sexually abusing one of the couple's sons.

arrangement did not last long because the twins could not get along. Eventually, Complainant got her own room, while Breana shared with her younger sister. R. 118, ll. 1-21; R. 208, ll. 13-21.

The allegations

On August 11, 2012, the family planned to visit their friends, the Harrelsons. R. 224, ll. 22-25. However, Petitioner and Complainant had an argument, and Petitioner said Complainant was not permitted to go to the Harrlesons' home. R. 226, ll. 5-13. Upset, Complainant walked to the end of the family's dock over the lake. R. 227, ll. 2-6. Tammy went to talk to Complainant who was crying. R. 227, ll. 7-25. When Tammy reached Complainant, Tammy asked, "[I]s he touching you?" R. 228, l. 1. Complainant responded, "[E]veryday." R. 228, l. 2. Tammy then called her sister, who called the police to report the allegations. R. 228, ll. 10-12.

Within two months of Petitioner's arrest, Tammy had sold everything the family owned and moved to Pensacola, Florida. R. 242, ll. 15-23. Two months later, she was dating Jason Price, the man who would eventually become her second husband. R. 266, ll. 12-17. Six months later, Tammy sent Breanna and two of the younger children to live with Tammy's sister. R. 244, ll. 16-21. In 2013, Price moved in with Tammy and Complainant. R. 267, ll. 1-2. Complainant continued living with Tammy until 2014, when she moved in with her boyfriend. R. 244, ll. 23-25; R. 245, ll. 4-10.

Eventually, Breana got married and moved to California. R. 246, ll. 5-9. Complainant married too, and moved to Virginia. R. 246, ll. 5-9; R. 97, ll. 16-25. Tammy filed for a divorce from Petitioner in 2014, and the pair was divorced in 2015. R. 266, ll. 4-11. Tammy married Price in June of 2015. R. 197, ll. 15-19.

The trial

A Kershaw County grand jury indicted Petitioner for criminal sexual conduct in the second degree (2012-GS-28-1381) and incest (2012-GS-28-1382).[2] R. 602-603; R. 605-606. The state, represented by Kathryn Cavanaugh and Karlen Senn, called the case for trial on March 14, 2016, before the Honorable Tanya A. Gee and a jury. R. 1. Anna Good represented Petitioner. R. 1.

At the trial, Complainant claimed Petitioner first sexually abused her while she and Complainant were staying in a camper in Camden while the rest of the family was in Summerville preparing for the move. She claimed she woke up "to [Petitioner] performing oral sex on" her. R. 108, ll. 12-13. After pushing Petitioner away, she ran to a bathroom. R. 108, ll. 17-20. She claimed Petitioner apologized so she exited the bathroom and went to the couch. R. 109, ll. 10-23. However, at some point, she returned to bed and fell asleep. R. 110, ll. 1-6. Nevertheless, according to Complainant, she woke up again – this time to find Petitioner on top of her trying to have sex with her. R. 110, ll. 6-7. According to Complainant, Petitioner had sex with her, despite her protests. R. 110, ll. 17-23.

Complainant alleged the sexual abuse continued, even when the family moved into the house on the lake. R. 113, ll. 5-7; R. 114, ll. 11-15; R. 116, ll. 9-10. According to Complainant, Petitioner had sex with her even while she was sharing a room with her twin sister, Breana. R. 117, ll. 9-19. Complainant alleged that when she got her own room, Petitioner slept in her room

[2] According to the face of the indictments, the grand jury convened on October 17, 2012. R. 602-603; R. 605-606. However, the signature lines indicating the grand jurors true-billed the indictments were dated March 9, 2016. R. 602-603; R. 605-606. Further, the indictments were filed on March 9, 2016, with the Kershaw County Clerk of Court. R. 602-603; R. 605-606. Although the indictments were marked "Amended," there was nothing in the record to indicate why the indictments were amended or whether such an amendment required re-submission to a grand jury. Nevertheless, there were no objections made at the trial regarding the indictments or the grand jury process.

every night. R. 121, ll. 19-21. Incredibly, according to Complainant, Petitioner raped her in the houses where the two worked on remodeling projects, including when other people were present. R. 125, ll. 11-14; R. 126, ll. 2-21; R. 127, ll. 21-25. Essentially, Complainant alleged Petitioner had sex with her whenever the two were together and even the slightest opportunity presented itself. R. 132, ll. 1-5; R. 133, ll. 6-14; R. 136, ll. 7-12; R. 142, ll. 1-3; R. 142, ll. 15-23. Despite what Complainant alleged were very open and easily detectable acts of sexual abuse, no one in Complainant's family knew of the abuse or observed a sex act between the two. R. 124, ll. 21-23.

The jury began its deliberations on March 17, 2016, at 1:50 p.m. R. 558, ll. 9-11. Within an hour, the jury sent a note requesting transcripts of the testimony from the Complainant, Complainant's mother, Complainant's twin sister, from three police officers, a doctor, and the state's closing argument. R. 559, ll. 3-11; R. 598. The judge informed the jurors that transcripts could not be provided, but that testimony could be re-played. R. 560, l. 22 – R. 561, l. 3. She permitted the jury to discuss the request further, but did provide a computer so the jurors could watch videos as requested. R. 561, l. 24 – R. 562, l. 10. Approximately two hours later, the jury requested to hear the testimony from the Complainant, her mother, and three police officers, along with the law on reasonable doubt. R. 563, ll. 2-13; R. 599. The judge re-instructed the jury on reasonable doubt. R. 565, ll. 6-22. The court reporter began playing the testimony for the jurors at 5:55 p.m. R. 567, ll. 16-20. At 7 p.m., the judge ordered a break for the jury to have dinner. R. 567, ll. 21-25. At 8 p.m., the court reporter resumed playing the testimony. R. 568, ll. 7-9.

During this time, a juror asked what would happen if the jury could not reach a unanimous verdict. R. 568, ll. 12-21; R. 600. The judge instructed the jury "if it's not going to

be an all guilty or an all not guilty, if you can't come to a unanimous verdict, then I would have to declare a mistrial. When I declare a mistrial, nobody wins." R. 568, ll. 22-25. She further explained the case would have to be "retried" in front of twelve other people selected from the same county who would receive the same evidence. R. 568, l. 25 – R. 569, l. 5. The judge expressed her "hope" that the jury would "continue to deliberate" and instructed them "to keep an open mind, to listen to each other and to continue to try." R. 569, ll. 7-16. She told the jury to "try" their "hardest to come to a unanimous verdict because ... nobody wins when there's a mistrial." R. 570, ll. 17-19. At midnight, the judge allowed the jury to go home for the evening and reconvene the following day at noon. R. 571, ll. 5-9.

The following day, the jury requested to hear testimony from the doctor who examined Complainant, a hard copy of the definitions of the charges, and instructions on how to interpret the law. R. 572, l. 17 – R. 574, l. 6; R. 600. The judge provided the instructions to the jury in written form and then allowed the jury to hear the requested testimony. R. 578, l. 16 – R. 581, l. 6. Finally, at 3:45 p.m., the jury requested the definitions of cunnilingus and fellatio, which the judge provided. R. 581, l. 19 – R. 582, l. 3; R. 601. The jury returned with a verdict at 4:42 p.m. R. 582, ll. 19-20.

The jury found Petitioner guilty as charged. R. 583, ll. 7-19. After the jury returned its verdict, but prior to imposing the sentence, the judge noted that she thought her "sentence speaks for itself." R. 593, ll. 16-17. However, there was "one thing" she thought was "important" to say to Complainant: "I believe you. I believe you." R. 593, ll. 17-19. Thereafter, on March 18, 2016, the judge sentenced Petitioner to twenty years imprisonment for criminal sexual conduct and ten years imprisonment for incest. R. 593, l. 20 – R. 594, l. 1; R. 604; R. 607. She ordered the sentences to be served consecutively. R. 594, ll. 1-2; R. 604; R. 607.

The appeal

On March 24, 2016, Petitioner filed and served his notice of appeal. On appeal, Petitioner challenged the trial court's erroneous decision to permit Allison Foster to testify as an expert where there was insufficient evidence of the reliability of the subject matter of her testimony. On March 21, 2018, the Court of Appeals affirmed Petitioner's convictions in an unpublished *per curiam* opinion. State v. Miller, 2018-UP-121 (S.C. Ct. App. filed Mar. 21, 2018); App. 1-4. The court held "the trial court did not abuse its discretion by allowing Dr. Foster to testify as an expert witness in child abuse assessment." Specifically, the court found that "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." App. 1-4. On April 5, 2018, Petitioner filed a petition for rehearing. App. 5-20. On May 24, 2018, the Court of Appeals denied the petition. App. 21.

Petitioner now files this petition for writ of certiorari.

ARGUMENT

The Court of Appeals erred by concluding the testimony provided by Allison Foster in the area of child abuse assessment was reliable.

Reasons to grant certiorari

In State v. Chavis, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015), this 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." Chavis, 412 S.C. at 106, 771 S.E.2d at 339 (2015). At the time, this Court acknowledged "no formulaic approach for determining the foundational requirements of qualification and reliability in non-scientific evidence." Id.

This Court should grant certiorari in this case to adopt an evidentiary framework, such as the one adopted in White, to guide the bench and bar and foster uniformity concerning the qualifications of child abuse assessment experts. The ever-increasing attempts by parties to qualify individuals as child abuse assessment experts or the like demonstrates the need for action.[3]

Petitioner humbly suggests that at a minimum, the framework should include (1) that the subject matter of the testimony is the topic of peer-reviewed research, (2) that the subject matter and research are based upon objectivity, and (3) that there exists the ability to draw reliable conclusions regarding the subject matter from the research. This case presents a good vehicle in which to establish this framework to assist the bench and bar when confronted with a request to qualify a witness as a child abuse assessment expert or the like.

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[3] On May 3, 2018, this Court heard argument in State v. Roy Jones, Appellate Case No. 2016-001933. One of the issues presented concerned the qualification of an expert in child sex abuse dynamics. The subject of an evidentiary framework was discussed during the argument.

Relevant facts

Motion to exclude

Prior to trial, the state informed the judge of its intent to call Dr. Allison Foster as an expert witness "in the field of child abuse assessment." R. 16, ll. 19-22. According to the state, Foster was "a completely blind witness. She's never met [Complainant], the victim, in this case. She has never reviewed any of The CARE House interviews or even seen those recordings so she has had no direct interaction with this case." R. 16, l. 22 – R. 17, l. 2. The solicitor clarified the intent to "qualify her as an expert in child abuse assessment" to permit testimony on "just the different range of responses and the factors that play into victims of sexual abuse." R. 17, ll. 7-24.

Defense counsel objected, explaining the state proposed to have the witness testify to "child sexual abuse accommodation syndrome," which was not a recognized disorder. R. 18, ll. 1-19. Defense counsel explained the subject of Foster's testimony was "not peer reviewed, ... not done in a clinical setting to determine how these different things affect children." R. 18, ll. 19-22. The judge agreed to permit the state to proffer Foster's testimony prior to ruling on its admissibility. R. 19, ll. 16-24.

Proffer

Later in the trial, the state proffered Foster's testimony. 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 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.

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 the "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 state, 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.

Argument on the motion to exclude

Additionally, defense counsel objected to evidence of child sexual abuse accommodation syndrome because the so-called syndrome was not recognized in the scientific community. Specifically, counsel noted the studies referenced by Foster had not been "peer reviewed enough" to show "the dynamics that are definitely something that fall within Rule 702." R. 423, ll. 1-9. As Foster admitted, the behavioral characteristics comprising the syndrome were "not a diagnostic tool" and were "not tested in the clinical sense." R. 423, ll. 13-16.

The solicitor argued Foster had not testified "anything about a syndrome," "just ... as to behavioral characteristics that are often displayed in victims that have come forward related to sexual abuse." R. 424, ll. 7-11. She further argued "this behavioral science ... fall[s] outside of the normal understanding or the general knowledge of the jury." R. 424, ll. 12-18. Turning to the reliability of Foster's testimony, the solicitor pointed to the testimony "that [for] over 30 years there have been studies conducted of victims that come forward with allegations of sexual abuse." R. 424, ll. 21-25. She stated "that a portion of that sample that have been studied are further substantiated." R. 425, ll. 1-2. The solicitor claimed "it is a recognized field" that "is heavily researched." R. 425, ll. 8-9.

Ruling

In ruling on defense counsel's objection to Foster's testimony, the trial judge noted that everyone agreed Foster satisfied the qualifications requirement of the evidentiary rule. R. 426, l.

22 – R. 427, l. 1. The judge then found that "child abuse assessment is reliable" based upon the testimony of Foster that the behavioral characteristics "are based on 30 years of research," of which "some" "are from a clinical setting" and "[m]any ... are from data analysis." R. 427, ll. 2-7. She determined the "journal articles ... are peer reviewed" that discuss "this particular science." R. 427, ll. 7-9.

Testimony before the jury

Thereafter, the solicitor called Foster as a witness in front of the jury. R. 430, ll. 17-18.[4] 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.

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[4] Defense counsel did not object to Dr. Allison Foster's testimony contemporaneously. However, no objection was necessary to preserve this error for appellate review because the judge entertained the *in camera* testimony and ruled upon its admissibility immediately prior to the state calling Foster as a witness to testify before the jury. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001); State v. Govan, 372 S.C. 552, 557, 643 S.E.2d 92, 94 (Ct. App. 2007).

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 choose 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.

State's closing argument

After defining the elements of the charged offenses, the solicitor told the jurors that the South Carolina "legislature recognizes that these are crimes of secrecy and they are shameful so unlike armed robberies and unlike murders, sometimes, oftentimes there are no other witnesses." R. 491, ll. 5-10. Accordingly, "the law does state as it relates to criminal sexual conduct in the State of South Carolina, the testimony of the victim need not be corroborated." R. 491, ll. 14-17. Thereafter, 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, Petitioner 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.

Discussion

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).

As previously mentioned, in Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), this Court held that 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. This 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 this Court established "no formulaic approach for determining the foundational requirements of qualification and reliability in non-scientific evidence," this 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.

This Court found that one of the "expert" witnesses 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 RATAC protocol. Id. at 108, 771 S.E.2d at 339. This Court also found the testimony of the other so called "expert" 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.

While this Court expressed hesitancy to establish a "formulaic approach" to qualifying experts in the field of child abuse assessment or child abuse dynamics, the growing number of cases in which the parties attempt to qualify such an expert requires this Court establish an evidentiary framework to guide the bench and bar and to foster uniformity in the qualification of such individuals. In Chavis, this Court rejected the witness's use of RATAC protocol during her interviews and the review of the witness's use of RATAC protocol by one other interviewer to ensure she was using the protocol as sufficient to establish reliability. Id. at 108, 771 S.E.2d at 339. This 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. Thus, a framework for determining the qualifications of child abuse assessment experts must include that the subject matter is the subject matter of peer-reviewed research and there exists the ability to draw reliable conclusions regarding the subject matter from the research.

In Graves v. CAS Medical Systems, Inc., 401 S.C. 63, 75, 735 S.E.2d 650, 656 (2012), this Court examined whether the opinion testimony by several purported experts that a software defect caused an alarm to fail was reliable. The experts arrived at their opinions using "the best inference methodology" or a "differential diagnosis methodology." Id. The experts opined that a software defect caused the alarm not to work by eliminating other potential causes. Id. This Court held that "an expert relying on a differential diagnosis must provide a reasonable, objective explanation for the rejection of possible alternative causes in order for the opinion to be admissible under Rule 702." Id. at 76, 735 S.E.2d at 656. According to this Court, "this objective requirement" was "consistent with the quality control element" necessary for scientific testimony. Id. Thus, a framework for determining the qualifications of child abuse assessment experts must include that

the research is based upon objectivity and that the opinion proffered by the expert is based upon objectivity.

Petitioner respectfully requests this Court grant certiorari in this case to establish an evidentiary framework for the admissibility of child abuse assessment experts. Further, petitioner respectfully requests that at a minimum, the framework should include (1) that the subject matter of the testimony is the subject of peer-reviewed research, (2) that the subject matter and research are based upon objectivity, and (3) the ability to draw reliable conclusions regarding the subject matter from the research.

Like the "experts" 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. There was no testimony that the research was based upon objectivity or that Foster's conclusions were based upon objectivity. Finally, there was no evidence that Foster, or anyone, could draw reliable conclusions regarding the subject matter from the research. 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 child abuse assessment.

The admission of this testimony in this case, where the jury's decision depended upon Complainant's credibility and the record evidence demonstrates the jury's struggle with rendering a verdict, was prejudicial error that requires reversal. The qualification of Foster as an "expert" in "child abuse assessment" was erroneous and prejudicial to Petitioner. "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 this 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 beyond a reasonable doubt.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition and dispenses with further briefing, Petitioner respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully Submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of July, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from 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

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on 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 July, 2018.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

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

Notary Public for South Carolina (L.S)
My Commission Expires: May 12, 2027