

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Greenville County

Perry H. Gravely, Circuit Court Judge

RECEIVED

JUL 8 2018

SC Court of Appeals

FREDERICK ROBERT CHAPPELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000283

BRIEF OF PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to enter a specific improper vouching objection to the portion of the child sex abuse expert's testimony that informed the jury that children do not lie about sex abuse incidents because this constituted impermissible bolstering of the testimony of the prosecutrix and in effect the state's case as well.

STATEMENT

Petitioner Frederick Robert Chappell was convicted of lewd act upon a child and first degree criminal sexual conduct per jury trial held during the August 2012 term of the Greenville County General Sessions Court before Judge D. Garrison Hill, who sentenced petitioner to imprisonment for a period of fifteen years. Susannah C. Ross represented petitioner at trial, and Assistant Solicitor L. Mark Mayer appeared on behalf of the state. App. 1 - 273. Petitioner appealed, and after briefs were filed, his convictions and sentences were affirmed. Supp. Appendix. 1 – 14. See State v. Chappell, Unpublished Opinion No. 2014-UP-272 (Ct. App. June 30, 2014). See Supp. Appendix 15 – 17. Assistant Appellant Defender Katherine Haggard Hudgins, of the S.C. Office of Appellate Defense, represented petitioner on direct appeal.

On November 5, 2014, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 275 - 281. The respondent filed a return dated March 31, 2015, requesting that a PCR hearing be held in the case. App. 282 – 285. A PCR hearing was held on December 17, 2015, at the Greenville County Courthouse before Judge Perry H. Gravely. App. 287 – 306. Petitioner was present at the PCR hearing and represented by Brian P. Johnson, and Assistant Attorney General Karen Ratigan appeared on behalf of the state.

On January 14, 2016, Judge Gravely issued an Order of Dismissal therein denying and dismissing petitioner's allegations of ineffective assistance of trial counsel in the case. App. 308 – 312. Petitioner appealed Judge Gravely's Order of Dismissal and filed a petition for writ of certiorari on October 3, 2016, which was granted on May 2, 2018, by Order of the South Carolina Court of Appeals. This brief of petitioner follows.

STANDARD OF REVIEW

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting Douglas, 369 S.C. at 429–30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct.App.2001)). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

ARGUMENT

Trial counsel erred in failing to enter a specific improper vouching objection to the portion of the child sex abuse expert's testimony that informed the jury that children do not lie about sex abuse incidents because this constituted impermissible bolstering of the testimony of the prosecutrix and in effect the state's case as well.

This case involved allegations by the prosecutrix that petitioner touched her "private" and her "bottom" with his hand and mouth while visiting at her grandmother's house when she was six and/or seven years old, and that petitioner made her touch his "private" as well. Apparently, petitioner was her grandmother's boyfriend at that time. App. 103, l. 24 – p. 117, l. 7; App. 123, lines 18-25. Petitioner did not testify at trial.

A summary of the state's witnesses' testimony follows:

- 1.) The prosecutrix testified that petitioner touched her private parts at her grandmother's house when she was six and/or seven years old. App. 103, l. 24 – p. 117, l. 7.
- 2.) The mother of the prosecutrix testified that she caught the prosecutrix "in an act with [another child]" in March 2010, and when questioned, the prosecutrix stated that "it" happened to her at grandma's house. A report in the matter was made by the mother of the prosecutrix on March 24, 2010. App. 146, l. 3 – p. 147, l. 25.
- 3.) Investigator Cheryl Cromartie was assigned to this case and subsequently interviewed the prosecutrix who told her that the above incident happened when she was six and/or seven years old and that it happened at her grandmother's house. App. 202, l. 25 – p. 204, l. 8.
- 4.) Forensic Interviewer Christie Carlbery interviewed the prosecutrix on April 20, 2010, and submitted a CD of the same, which the jury viewed. App. 167, l. 14 – p. 169, l. 8.

- 5.) Shauna Gallaway Williams, who did not interview the prosecutrix, testified about delayed and accidental disclosure of sex abuse by children and why sexually abused children do not lie. App. 178, l. 12 – p. 196, l. 5.
- 6.) Dr. Nancy Ann Henderson conducted a physical examination of the prosecutrix and stated that the results were normal and that there were no signs of abuse, although she was told by the prosecutrix that a sexual assault against her occurred at her Grandma's house when she was six/seven. App. 213, l. 20 – p. 225, l. 13.
- 7.) Investigator Phillip Perry testified about how petitioner's cell phone had the capacity to make videos.¹ App. 155, l. 16 – p. 159, l. 17.

On direct appeal, appellate counsel raised the following issue:

The trial judge erred in allowing an expert in child abuse and treatment to testify generally about "child abuse dynamics" when the witness had no knowledge of the specific child in question and the expert testimony was relevant. See Supp. Appendix 1-13

The appellate issue was framed as an impermissible vouching violation based on the expert's following testimony:

Children don't often lie about sexual abuse incidents. They don't often lie about things that are beyond their real scope of knowledge. And children often are unable to anticipate what the next question is that someone is going to ask them. So if a child is – you know, has been interviewed by law enforcement, and they've been – talked to DSS, and they've talked to a forensic interviewer, you know, generally, if the child is lying, there are going to be some – someone is going to - at some point, the child is going to – it's going to become apparent among those interviewers. They're just not sophisticated enough to carry a story out over multiple interviews like that. App. 189, l. 22 – p. 190, l. 9.

¹ The prosecutrix testified that petitioner took pictures and made videos of their physical contact via his cell phone. App. 127, l. 2 – 19.

In other words, the expert in effect advised the jury that the prosecutrix in this case was not lying, which improperly vouched for and bolstered her testimony and allegations.

With respect to this issue, the Court of Appeals affirmed per the following rationale:

State v. Weaverling, 337 S.C. 460, 474-75, 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....Such testimony is relevant and helpful in explaining to the jury the typical behavioral patterns of adolescent victims of sexual assault.”); *id.* at 475, 523 S.E.2d at 794 (“There is no requirement the sexual assault victim be personally interviewed or examined by the expert before the expert can give behavioral evidence testimony.”).

Chappell’s contention that the expert’s testimony was improper because it constituted improper vouching for the victim is not preserved for our review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (noting “[i]ssues not raised and ruled upon in the trial court will not be considered on appeal” and “[a] party may not argue one ground and trial and an alternate ground on appeal”). See Supp Appendix p. 17.

Note trial counsel’s objection to the expert’s testimony in question regarding the inadmissibility of the same follows:

Ross: I’d simply object on grounds of relevancy since she hasn’t actually had any experience with this case.

Court: I find she is qualified. App. 184, l. 13 – 17.

During the PCR hearing, petitioner’s PCR counsel argued that counsel erred in failing to specifically object to the expert’s testimony on the specific ground of improper vouching by the expert witness. App. 289, l. 23 – p. 290, l. 21. Petitioner testified at the PCR hearing and admitted that “there wasn’t any objection to the improper vouching and [as a result], the Court of Appeals didn’t get to hear it” because trial counsel in effect failed to object on that specific basis

(improper vouching) in reference to the expert's testimony as to whether children lie about sex abuse. App. 293, lines 6 – 25; Tr. 296, lines 4 – 5; Tr. 297, lines 2 – 7.

Trial counsel testified during the PCR hearing and explained that she “didn’t have a ground for objecting to vouching because [the expert in question] hadn’t really said anything” and that she “didn’t hear any vouching” violation. App. 302, l. 18 – p. 303, l. 25.

The PCR judge denied petitioner’s allegation of ineffective assistance counsel on the ground that trial counsel should have made an impermissible vouching objection to pertinent portions of the sex expert’s testimony as follows:

This Court finds Applicant failed to meet his burden of proving trial counsel should have objected to Shauna Galloway-Williams’ testimony. This Court notes trial counsel is an experienced criminal defense attorney and finds she would be aware of the risks of potential vouching by expert witnesses in cases involving the sexual abuse of a child. This Court finds there was not error in trial counsel’s lack of objection during Galloway-Williams’ testimony because her testimony did not contain vouching statements. The recent appellate decision in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) is instructive in this case (and, in fact, deals with the same expert witness testifying about the same topic of delayed disclosure of abuse by minors). This Court finds Galloway-Williams’ testimony in the Applicant’s case was permitted under the holding in Brown. This Court finds there was no basis for trial counsel to have made an objection to vouching.

However, the Brown case was inapplicable here because the sex expert never commented on that child’s credibility; but in the case at bar, the sex expert indeed commented on the credibility of the prosecutrix’s sex allegations, and the error was not harmless since a swearing contest existed between the prosecutrix and petitioner, and no forensic evidence was offered at trial in the case. App. 310 – 311.

The sex expert in question, who was called to explain the dynamics in child sex abuse cases involving delayed and accidental closure, went beyond this topic and added that “children

don't often lie about sexual abuse incidents" and that "they don't often lie about things that are beyond their real scope of knowledge." This was error as the assessment of a witness' credibility is within the exclusive province of the jury. State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012). Also, even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others and furthermore, bolstering by a witness imbued with imprimatur of an expert witness end up improperly invading the province of the jury. State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015); State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). In Chavis, the sex expert's statement that she recommended that the minor not be around the defendant for any reason was tantamount to her belief in the accuser's claim of sex abuse and was therefore deemed to be improper vouching. In State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), the Court held that the introduction of the children's videotapes and reports of the forensic interviewers sessions which contained conclusions of a compelling disclosure of abuse constituted a comment on the veracity and truthfulness of the accuser's allegations, which in turn constituted improper vouching that was not considered harmless error because the children's credibility was crucial in the case.

It is improper for an expert to comment on the veracity of a child's accusations of sex abuse. State v. Jennings, *supra*, citing to State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) and State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000). In Dawkins, the Court held that it was improper for the therapist to indicate that he believed the victim's allegations were genuine; and in Dempsey, the Court held that improper vouching occurred when the therapist testified that ninety-five percent of children's sex allegations were true.

In Kromah, the Court held that the forensic interviewer's testimony that the minor had given a compelling finding of child abuse was the equivalent of stating that the child told the

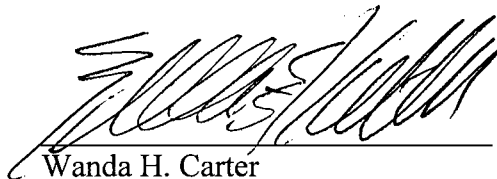
truth and was thus improper. In Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), the Court ruled that the testimony from the sex expert that he believed the child's abuse allegations constituted improper bolstering of the child's testimony. View below the Kromah Court's list of impermissible vouching examples of testimony that must be avoided in sex abuse cases:

- That the child was told to be truthful;
- A direct opinion as to a child's veracity or tendency to tell the truth;
- Any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a "compelling finding" or abuse;
- Any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or
- An opinion that the child's behavior indicated the child was telling the truth.

Additionally, any sex expert's testimony that yields improper vouching is not harmless where no physical evidence exists and the case turns on the victim's credibility. In the case at bar, there was no physical evidence (cellular phone evidence) presented and the assessment of the prosecutrix's credibility was key in the case. Therefore, the sex expert's testimony in the instant case wherein she advised that children of sex abuse are not liars constituted improper vouching that was not harmless error here because this case was the classic swearing contest case sans any physical evidence. As a result, trial counsel's error in failing to object to the expert's testimony in question at petitioner's trial constituted deficient legal representation in violation of the Sixth Amendment to the extent that but for counsel's error in question, a reasonable probability exists that the outcome of petitioner's trial would have been different. See Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984).

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court reverse his convictions and sentences in this case and remand for a new proceeding.

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of June, 2018.