STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HAROLD BENNON CARTWRIGHT, III,

PETITIONER.

APPEALLANT CASE NO. 2016-000005

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Harold Bennon Cartwright, III, Appellant.

Appellate Case No. 2013-000894

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Unpublished Opinion No. 2015-UP-466
Heard September 17, 2015 – Filed September 30, 2015

AFFIRMED

Chief Appellate Defender Robert Michael Dudek and Appellate Defender Susan Barber Hackett, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Deputy Attorney General David A. Spencer, both of Columbia; and Solicitor James Strom Thurmond, Jr., of Aiken, for Respondent.

PER CURIAM: Harold Cartwright appeals his convictions for nine counts of criminal sexual conduct with a minor in the first degree, two counts of criminal sexual conduct with a minor in the second degree, one count of criminal sexual conduct in the third degree, and sixteen counts of a lewd act upon a child. Cartwright argues the trial court erred in (1) admitting evidence of his suicide attempt while he was in jail awaiting trial and (2) qualifying a witness and allowing her to testify as an expert in child sexual abuse dynamics. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in admitting evidence of Cartwright's suicide attempt: Rule 401, SCRE ("Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); *State v. Orozco*, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011) ("An appellate court reviews 403 rulings, balancing whether the probative value of evidence was substantially outweighed by its prejudicial effect, pursuant to the abuse of discretion standard, and gives great deference to the trial court's decision."); *State v. Gray*, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014) ("Probative means tending to prove or disprove."); *Gray*, 408 S.C. at 610, 759 S.E.2d at 165 ("[A] court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates."); *Orozco*, 392 S.C. at 219-20, 708 S.E.2d at 231 ("[E]vidence of a suicide attempt is probative of a defendant's consciousness of guilt and is generally admissible for whatever value the jury decides to give it."); *Orozco*, 392 S.C. at 220-21, 708 S.E.2d at 231-32 (finding evidence of a defendant's suicide attempt can be admissible to establish consciousness of guilt where the defendant has knowledge of the criminal charges against him and there is a nexus between the suicide attempt and the charges).

2. As to whether the trial court erred in qualifying a witness and allowing her to testify as an expert in child sexual abuse dynamics: Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."); *State v. Chavis*, 412 S.C. 101, 106, 771

S.E.2d 336, 338 (2015) ("The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion."); *State v. Schumpert*, 312 S.C. 502, 505, 435 S.E.2d 859, 861 (1993) ("The party offering the expert has the burden of showing his witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony. Generally, however, defects in the amount and quality of education or experience go to the weight of the expert's testimony and not its admissibility."); *State v. Anderson*, Op. No. 27558 (S.C. Sup. Ct. filed Aug. 5, 2015) (Shearouse Adv. Sh. No. 30 at 44) (finding though it is an error to qualify a witness as an expert in forensic interviewing, a witness can "certainly" be qualified to testify to the behavioral characteristics of sex abuse victims); *Anderson*, Op. No. 27558 at 48, n. 8 (Toal, C.J., concurring) (indicating it is not improper bolstering for "an expert in child abuse assessment to testify regarding behavioral characteristics, such as delayed disclosure of abuse").

AFFIRMED.

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

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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

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APPEALLANT CASE NO. 2013-000894

Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

Opinion No. 2015-UP-466

PETITION FOR REHEARING

Petitioner requests rehearing pursuant to Rule 221 (a), SCACR because this Court apparently overlooked the many reasons why State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct.App. 2011) should be reconsidered. There was there was no South Carolina authority supporting admission of evidence of a suicide attempt as evidence of consciousness of guilt as this Court recognized in Orozco.

This Court, in its summary opinion, did not address the argument that the analogy of a suicide attempt to flight and guilty knowledge were deeply troubling for purposes well beyond the

defendant being aware of charges against him or that he is being sought by the police for purposes of arrest. Cf. State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006); (without proof that the accused was aware of the charges against him at the time of his flight, the evidence of flight was irrelevant and its admission was erroneous). State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982); See, also, State v. Brown, 528 A.2d 1098 (R.I.1987); Commonwealth v. Jones, 457 Pa. 563, 576, 319 A.2d 142, 150 (1974) (circumstances justify inference that accused's actions were motivated as result of his belief that officers were aware of his wrongdoing and *were seeking him* for that purpose), cited in State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999).

Beyond the nexus of attempted suicide to the awareness of an accusation or an arrest warrant or that police are looking for a person, *this evidence is troubling not only at as a legal matter but as a moral matter.* As defense counsel argued, Petitioner turned himself in to face the charges in this case. This indicated a belief in the criminal justice system, and a belief he would be exonerated. However, suicide is often a matter of despair rather than desperation. Meaning, it is *many times much more complicated than understanding the sad case of a suspect surrounded by armed police killing himself rather than being captured.* This case provides such an example. Petitioner thought that life was no longer living at "that time."

Suicide, as in this case, is often attributable to the feeling that the sheer number of obstacles in one's life have become too much to overcome. Here, Petitioner mourned the fact that his own daughter had turned on him.

To use a suicide attempt in a court of law in this state as evidence of guilt of a criminal offense to achieve a conviction should *most respectfully*, be distasteful and not allowed. This Court can take judicial notice that all Five Justices of the Supreme Court in Orozco voted to decide this very important legal and moral question before Petitioner Orozco decided to drop his appeal.

Petitioner does not want to repeat the arguments in the brief, and those made at oral argument. Suffice it to say that other jurisdictions have held such evidence inadmissible. See State v. Onorato, 171 Vt. 577, 762 A.2d 858 (2000); State v. Mann, 132 N.J. 410, 625 A.2d 1102 (1993); Pettie v. State, 316 Md. 509, 560 A.2d 577 (1989); People v. Foster, 56 Ill.App.3d 22, 371 N.E.2d 961, 13 Ill.Dec. 869 (1977); State v. Coudotte, 7 N.D. 109, 72 N.W. 913 (1897);

Photographs

The same argument against admission of this evidence applies to the two photographs corroborating the fact Petitioner attempted to commit suicide. Those photographs are on file with this Court. The Court is not engaging a "gruesome photographs analysis" in this case. Rather, the photographs simply drew further attention to the fact that Petitioner attempted suicide.

The solicitor mocked Petitioner 's testimony about his despondent feelings at the time he attempted to kill himself. R. p. 322. Defense counsel had correctly argued the suicide evidence diluted the presumption of innocence that is fundamental in a criminal case. This Court should respectfully address this argument.

Issue 3: Dr. Alicia Benedetto should not have been qualified as an expert in "child sexual abuse dynamics" which allowed her to give her opinion testimony.

Petitioner also requests rehearing on this issue because the Supreme Court in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499, n.5, (2011) noted that there was no objection to the qualifications of the witness *in that case*. However, the Court wrote it had previously observed that

the witness might not even need to be qualified as an expert. See, State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009).

The Supreme Court held that it could "envision no circumstance where their qualification as an expert at trial would be appropriate" in the *"forensic interviewer" type context.* Although it is difficult from the summary opinion to ascertain the application of the facts to the law, petitioner reiterates that the testimony of Benedetto here on "child abuse dynamics" was offered *for the same purpose, which was to imply to the jury that someone who worked in this "specialty" of abused children could offer expertise which allegedly would assist the jury in deciding whether the minors were being truthful.* Defense counsel correctly argued that Benedetto would simply have the jury conclude that the alleged minor victims in this case acted consistently or shared behavioral characteristics with other victims of sex abuse. As seen, Benedetto was unapologetic that she was a forensic interviewer and not a research professional. She should not have been qualified as an expert in this case. See, State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009).

Issue 4: The opinion testimony itself

Petitioner seeks rehearing on the opinion issue itself because State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), which *is cited by this Court in the opinion*, does not support the admission of this testimony about recantations not meaning sexual abuse did not occur, about abusers buying gifts for the abused, and about the abused being threatened about disclosure of the abuse. All of this supposed "expertise" certainly struck the jury as the **same evidence** was what occurred in this very case.

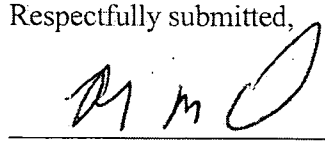
The same was true of Benedetto's testimony that sexual abuse can cause minors begin drinking or using drugs which have a negative influence on their health. R. p. 225, ll. 9-13. Benedetto also added that minors "acting out" was also not unusual when they were being sexually

abused. R. p. 225, l. 14 – 226, l. 17. This Court is aware that solicitors are seeking to avoid allegations of bolstering by no longer putting up forensic interviewers as experts. *However, the same bolstering occurred here under the guise of "child abuse dynamics."* State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).

Petitioner reiterates that this "child sexual abuse dynamics" evidence served the same evil that State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499, n.5, (2011), held can no longer exist. Again, State v. Weaverling and Kromah can no longer be reconciled and Weaverling should respectfully be overruled as it is the pre-gatekeeping case that is being used to justify impermissible bolstering such as occurred in this case. This Court cited State v. Schumpert, 312 S.C. 502, 505, 435 SW.E.2d 859, 861 (1993) in its opinion, and Schumpert likewise should be overruled because it cannot be reconciled in an intellectual honest way with State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), and Kromah.

The jury in this case heard that the actions of the state's complaining alleged child sexual abuse witnesses were on all fours with the actions and characteristics of other victims of child sexual abuse. The witness should not have been qualified as an expert and her testimony was extremely prejudicial. Rehearing should respectfully be granted on these issues.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 15th day of October, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HAROLD BENNON CARTWRIGHT, III,

PETITIONER .

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of October, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day of October, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

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The South Carolina Court of Appeals

The State, Respondent,

v.

Harold Bennon Cartwright, III, Appellant.

Appellate Case No. 2013-000894

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:
Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
David A. Spencer, Esquire
James Strom Thurmond, Jr., Esquire

FILED
December 4, 2015

Susan Barber Hackett, Esquire
The Honorable Doyet A. Early, III