STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CESAR PORTILLO,

APPELLANT

APPELLATE CASE NO. 2011-196447

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

In March of 2010, the Dorchester County Grand Jury indicted Portillo for criminal sexual conduct with a minor first degree, indictment #10-GS-18-357. On July 19, 2011, Portillo proceeded to jury trial before the Honorable Diane S. Goodstein. Mitch Farley and Mary LeMatty represented Portillo at trial. Meghan Hall and Russell Hilton prosecuted the case. The jury returned a verdict of guilty and Judge Goodstein sentenced Portillo to 25 years. A timely notice of intent to appeal was filed. This appeal follows.

ARGUMENTS

1. The trial judge erred in qualifying a witness as an expert in child sexual assault cases and child sexual assault forensic interviewing.

During the trial the State moved to qualify Dr. Donald Elsey as an expert in child sexual assault cases and child sexual assault forensic interviewing. (R. pp. 184-204). Earlier, counsel for Portillo objected to qualifying Dr. Elsey as an expert in forensic interviewing based on State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009). (R. p. 77, lines 1-15). The judge withheld ruling until the time of Dr. Elsey's testimony. (R. p. 78, lines 3-4). After hearing testimony outside the presence of the jury, the judge found Dr. Elsey qualified. (R. p. 206, lines 2- p. 207, lines 1-6). Counsel for Portillo again argued that it was not necessary to qualify Dr. Elsey as an expert. (R. p. 205, lines 5-15). The State then moved, before the jury to qualify Dr. Elsey as an expert in child sexual assault cases and child sexual assault forensic interviewing. (R. p. 214, lines 19-22). Counsel for Portillo objected based on the earlier objection. (R. p. 215, line 1). The judge overruled the objection and qualified Dr. Elsey as an expert in child sexual assault cases and child sexual assault forensic interviewing. (R. p. 283, lines 3-7). Dr. Elsey proceeded to testify about the methodology of forensic interviewing. Dr. Elsey defined a forensic interview as "an interview where you're trying to find out what happened, if anything, to a child by following certain protocol and asking developmentally appropriate questions." (R. p. 215, lines 11-16). Dr. Elsey testified about the significance of the language used by the child during the forensic interview and symptoms she exhibited consistent with post traumatic stress disorder [PTSD]. (R. pp. 216-242). The trial judge erred in qualifying Dr. Elsey as an expert in child sexual assault cases and child sexual assault forensic interviewing.

In State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009), the South Carolina Supreme Court found that it was unnecessary for the trial judge to qualify the forensic interviewer as an expert. The Court, however, found that "Douglas suffered no prejudice either as a result of Herod's testimony or by her qualification as an expert." Id. at 503, 671 S.E.2d at 608-09. In Douglas, the Court wrote, "Moreover, the only **opinion** given by Herod was that she concluded Victim needed a medical exam. A pediatric nurse practitioner thereafter examined Victim and determined she had vaginal tearing and scarring consistent with past penetration. In light of this evidence, there is no conceivable prejudice to Douglas from Herod's testimony." Id. at 504, 671 S.E.2d at 609.

The trial judge improperly and unnecessarily qualified Dr. Elsey as an expert in forensic interviewing. Unlike Douglas, Portillo was prejudiced by the improper qualification. The only physical evidence in the present case was some redness between the labial lips. (R. p. 177, lines 7-22). Additionally, the doctor testified that the words used by the child witness during the interview were significant and that the child had symptoms of PTSD. The testimony in regard to the significance of the language used and the symptoms of PTSD constituted an opinion, by the doctor as an expert witness, that the child witness was truthful in her disclosure of abuse. The expert testimony was improper.

In Watson v. Ford Motor Co., 389 S.C. 434, 445-447, 699 S.E.2d 169, 175 (2010), the South Carolina Supreme Court wrote:

> The admission of expert testimony is governed by Rule 702, SCRE, which provides:
>
> 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.

Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge. Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions. See Rule 703, SCRE. On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training. See Rules 602 and 701, SCRE.

For these reasons, expert 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. See State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim). 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. See Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). Finally, the trial court must evaluate the substance of the testimony and determine whether it is

> reliable. See State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements).
>
> Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability. Thus, only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate. See State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) (observing that the "familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence"). It is against this backdrop that we analyze whether the trial court erred in admitting the challenged expert evidence.

Dr. Elsey's testimony fails to meet the requirements for the admission of expert testimony. The trial judge, as gatekeeper, failed to make the findings required by Rule 702, SCRE. As the Court found in Douglas, his testimony was not necessary to assist the jury in resolving factual questions. A video tape of the interview was introduced in evidence and played for the jury. (R. p. 233, lines 11-23). The jury alone was to make a determination of the credibility of the child witness without the expert testimony from Dr. Elsey and without his opinions and conclusions regarding the child's use of language and symptoms of PTSD.

In State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App. 2012), the South Carolina Court of Appeals wrote:

> The assessment of witness credibility is within the exclusive province of the jury. State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977). Therefore, witnesses are generally not allowed to testify whether another witness

> is telling the truth. See Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (holding it is improper "pitting" to ask a witness "to comment on the truthfulness ... of an adverse witness"); State v. Sapps, 295 S.C. 484, 485–86, 369 S.E.2d 145, 145–46 (1988) (holding it was improper for solicitor to "ask[ ] appellant if each of the other three witnesses was lying"). Similarly, witnesses may not improperly bolster the testimony of other witnesses. 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 Jennings, Justice Pleicones stated: "For an expert to comment on the veracity of a child's accusations of sexual abuse is improper." 394 S.C. at 480, 716 S.E.2d at 94; see also State v. Hill, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct.App.2011) ("The law is clear that it is improper for a witness to give testimony as to his or her opinion about the credibility of a child victim in a sexual abuse matter.").

Appellant was prejudiced by the improper qualification. After Dr. Elsey was improperly and unnecessarily qualified as an expert and the video tape of the forensic interview was played for the jury, the State asked the doctor, "And – and I want to focus just a little bit on some of the language that [the child witness] used in – in her disclosure to you – or during that forensic interview. As an expert in the field of – of child-sexual assault cases, what, in your opinion – that description that she used as 'shaking or slapping the privates,' what does that mean to you, in terms of her language?" (R. p. 236, lines 4-10). Dr. Elsey answered, "To me it – she was just telling what she was seeing. She didn't really know what it was. She didn't describe what it – what – what it would be called. She just described something that she said she saw." (R. p. 236, lines 17-20).

The State asked the doctor, "In your expert opinion, is there any significance to her use of that type [childlike] of language?" (R. p. 237, lines 11-12). Dr. Elsey testified, "Yes. It appeared to me she, again was just describing what she said she was seeing. She wasn't

using language that it seemed somebody else had given to her. It was just what she said she experienced." (R. p. 237, lines 13-16). When asked about the significance of hand gestures used by the child witness during the interview, Dr. Elsey testified, "Yes. Again, I think she was just trying to help me understand what she was trying to tell me, because I don't think she fully understand – understood what she was describing." (R. p. 237, lines 17 – p. 238, lines 1-2).

Finally, the State asked Dr. Elsey, "And similarly, when she described what came out of Uncle Cesar's privates as – as 'yellow and smushy' or 'mushy' – I – I couldn't really tell – in – in your opinion as an expert, is there any significance to that description as well?" (R. p. 238, lines 9-13). Dr. Elsey responded, "Yes. Again, she never had a name for it. She just described it." (R. p. 238, lines 14-15).

Dr. Elsey's testimony was a comment on the veracity of the child witness's testimony. While not specifically testifying that he believed the child witness, he opined that, by using childish, unsophisticated terms and gestures, she was being truthful in her disclosure. The testimony was improper.

Appellant Portillo was further prejudiced by Dr. Elsey's testimony that the child witness had symptoms of PTSD. Dr. Elsey testified, "There were concerns about her having some behavior changes they've noticed since she originally disclosed these things happening: not being able to sleep; some nightmares; affecting her school work, her ability to focus in school." (R. p. 239, lines 23 – p. 240, lines 1-2). The State then asked, "And – and in your opinion as an expert, what are those symptoms, I guess – what did – what is the significance of those symptoms to you as an expert?" (R. p. 240, lines 3-5). Dr. Elsey answered, "Well, they're – they're concerning because they're disturbing to the child. Is

there a connection between what she – what she said happened to her and these? She said there was. She said there was a connection. So as a professional I would want to get help for that child and that family so she could help control those behaviors and not interrupt her sleep, her school, any aspect of her life." (R. p. 240, lines 6-13).

Dr. Elsey testified that the symptoms described could be part of PTSD but admitted that it would be inappropriate for him to make that diagnosis at that point in time because he saw the child witness relatively soon after the incident and a PTSD diagnosis requires symptoms to be present for at least 30 days. (R. p. 240, lines 17-22). Instead, Dr. Elsey referred the child witness for "trauma-focused cognitive behavioral therapy." Dr. Elsey testified that the symptoms could be indicative of a traumatic experience. (R. p. 242, lines 15-24). As with the expert testimony in regard to the significance of the child's language, the expert testimony in regard to the significance of the child's PTSD symptoms is an improper comment on the veracity of the child witness's testimony.

In State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94, (2011) the South Carolina Supreme Court wrote:

> For an expert to comment on the veracity of a child's accusations of sexual abuse is improper. See State v. Dawkins, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper); see also State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct.App.2000) (finding therapist's testimony children were being truthful in ninety-five percent of instances in which sexual abuse was alleged was improper vouching for child); but see State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (forensic interviewer did not vouch for the victim's veracity where she never stated she believed the victim and gave no other indication concerning the victim's veracity).

The trial judge improperly and unnecessarily qualified Dr. Elsey as an expert in child sexual assault cases and child sexual assault forensic interviewing. The error is not harmless. The doctor testified, as an expert, as to the significance of the language used by the child witness and the significance of the child's symptoms. As in McKerley and Jennings, there is no other way to interpret the doctor's testimony than to mean that he believed that the child witness was telling the truth. The credibility of the child witness was a key factor to be determined by the jury. The error constitutes an abuse of discretion requiring reversal.

2. The trial judge erred in allowing a witness to testify as an expert about the significance of words used by the child witness when the testimony exceeded the scope of purported expertise.

Without conceding the argument presented by issue one, if child sexual assault and child sexual assault forensic interviewing met the requirements for admission of expert testimony, allowing the expert to attach significance to words used by the child witness in the forensic interview exceeds the scope of any purported expertise. Counsel for Appellant Portillo objected to questioning Dr. Elsey about the significance of the language and hand gestures used by the child witness during the forensic interview as outside the scope of his qualification as an expert. (R. p. 205, lines 16 – p. 206, line 1). The judge overruled the objection. (R. p. 206, lines 2- p. 207, lines 1-6). The judge stated, "With regard to that testimony, I notice that Dr. Elsey was quite careful not to interpret what that meant. But what he was saying was that that was this child's language and that sometimes you can tell where adults have given the language to a child. But he talked about the fact that this was her language. It's just the way she was describing something that she very well had no – no

basis to know what she was describing. And – and I noticed that he was very careful to describe – to describe what the alleged victim was doing." (R. p. 206, lines 4-13). The judge erred.

In her ruling the judge indicates that the doctor was simply testifying that the child was using her own language and had not been coached. As discussed in issue one, there is no way to interpret this other than to mean that the doctor believed that the child witness was telling the truth because she had not been coached. The judge's reasoning supports that the doctor's testimony improperly vouches for the credibility of the child witness.

Dr. Elsey was qualified, over objection, as an expert in child sexual assault and child sexual assault forensic interviewing. The doctor, however, was allowed, over objection, to give his opinion on the significance of words and gestures used by the child witness. The doctor's testimony attaching significance to the child witness's child like and unsophisticated words and gestures used during the forensic interview exceeded the scope of his purported expertise. The doctor was not qualified to render his opinion that the child witness was telling the truth.

In State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001), the South Carolina Supreme Court found that a police officer qualified as an expert in crime scene processing and fingerprint identification was not qualified to render an opinion that the victim was astride a bicycle when he was shot. The Court in Ellis wrote, "In effect, Sergeant Walters was allowed to give his opinion on the ultimate issue: Whether appellant was acting in self-defense when he shot and killed the victim. This was error. See Rule 704, SCRE; State v. Wilkins, 305 S.C. 272, 407 S.E.2d 670 (Ct.App.1991) (opinion may be offered on

ultimate issue only where witness is otherwise qualified)." 345 S.C. at 178, 547 S.E.2d at 491.

In the present case the doctor was allowed to give his opinion on the ultimate issue: Whether the child witness was telling the truth. This was error and exceeded the scope of his expertise. The doctor was not qualified as a human lie detector. The error was not harmless as the child's credibility was a critical factor for determination by the jury.

3. The trial judge erred in allowing the expert to testify that the child witness had symptoms of post traumatic stress disorder without being able to make the actual diagnosis.

Counsel for appellant objected to allowing the doctor to testify about the child showing symptoms of PTSD. "With regard to his opinion regarding posttraumatic stress disorder, I believe he said that he said he saw symptoms of that. He did not provide any diagnosis for this child at any point along the way. I think, since he did not diagnose her with that particular affliction or any other affliction, it wouldn't be proper for him to testify as to her showing signs of such a thing. I think it would, in essence mislead, the jury in terms of dealing with that particular set of issues." (R. p. 207, lines 8-16). The judge overruled the objection to the testimony stating, 'I understand. I really think that – that what you're – that what you're addressing now goes to the weight on cross-examination, rather to the admissibility of his ability to testify to that. I think that – that is an area for cross-examination." (R. p. 207, lines 17-21). The judge erred.

Dr. Elsey testified, "There were concerns about her having some behavior changes they've noticed since she originally disclosed these things happening: not being able to sleep; some nightmares; affecting her school work, her ability to focus in school." (R. p.

239, lines 23 – p. 240, lines 1-2). Dr. Elsey testified that the symptoms described could be part of PTSD but admitted that it would be inappropriate for him to make that diagnosis at that point in time because he saw the child witness relatively soon after the incident and a PTSD diagnosis requires symptoms to be present for at least 30 days. (R. p. 240, lines 17-22). Dr. Elsey testified that the symptoms could be indicative of a traumatic experience. (R. p. 242, lines 15-24).

Again, without conceding the argument addressed in issue one, the doctor was not qualified to testify about the child witness exhibiting symptoms of PTSD when the doctor admitted it would not have been appropriate for him to diagnose her with PTSD at that point in time. The judge failed to make the requisite finding pursuant to Rule 702, SCRE.

CONCLUSION

Based on the above arguments, the conviction and sentence should be reversed and the case remanded for anew trial.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 17h day of July, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

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V.

CESAR PORTILLO,

APPELLANT

APPELLATE CASE NO. 2011-196447

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of July, 2013.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of July, 2013.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

July 17th, 2008

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