

5

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Aiken County

\_\_\_\_\_  
Doyet A. Early, III, Circuit Court Judge

**RECEIVED**

OCT 09 2014

**SC Court of Appeals**

THE STATE,

RESPONDENT,

V.

WILLIAM POU,

APPELLANT

APPELLATE CASE NO. 2012-213617

\_\_\_\_\_  
FINAL BRIEF OF APPELLANT  
\_\_\_\_\_

ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS .....	1
TABLE OF AUTHORITIES .....	2
STATEMENT OF ISSUES ON APPEAL .....	3
STATEMENT OF THE CASE .....	4
ARGUMENT	
The court erred by qualifying Dr. Benedetto as an expert and allowing her to testify over appellant’s objection that her testimony would improperly bolster the testimony of the accusing minors, particularly when her testimony directly discussed how domestic violence and a “non-supportive” parent allegedly affected the timing of the “disclosure of abuse” since domestic violence and lack of support were both allegedly involved here, and her testimony was meant to bolster the testimony of the complaining stepdaughters as counsel alleged .....	5
Relevant Facts .....	5
Discussion .....	10
CONCLUSION .....	13
CERTIFICATE OF COUNSEL .....	14

TABLE OF AUTHORITIES

**Cases**

<u>State v. Douglas</u> , 380 S.C. 499, 671 S.E.2d 606 (2009).....	10, 11
<u>State v. Jennings</u> , 394 S.C. 473, 716 S.E.2d 91 (2011).....	11
<u>State v. Kromah</u> , 401 S.C. 340, 737 S.E.2d 490 (2011).....	10
<u>State v. McKerley</u> , 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).....	11

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by qualifying Dr. Benedetto as an expert and allowing her to testify over appellant's objection that her testimony would improperly bolster the testimony of the accusing minors, particularly when her testimony directly discussed how domestic violence and a "non-supportive" parent allegedly affected the timing of the "disclosure of abuse" since domestic violence and lack of support were both allegedly involved here, and her testimony was meant to bolster the testimony of the complaining stepdaughters as counsel alleged?

STATEMENT OF THE CASE

Appellant was indicted at the July 2012 of the Aiken County Grand Jury for three counts of criminal sexual conduct with a minor in the first degree, four counts of lewd act upon a minor, two counts of criminal solicitation of a minor and criminal sexual conduct with a minor. R. P. 217. Appellant's case was called to trial on December 4, 2012 before the Honorable Doyet A. Early, III, and a jury. C. David Hayes and Wallis Alves represented appellant. Ashley Agnew and Elizabeth Young were the assistant solicitors. R. p. 1.

On December 7, 2012 the jury found appellant guilty on each count except one count of criminal solicitation of a minor on which appellant was acquitted. R. p. 208, l. 9 – 214, l. 25. Judge Early then sentenced appellant to concurrent sentences totally thirty years imprisonment. R. p. 215, l. 11- 216, l. 15.

This appeal follows.

## ARGUMENT

The court erred by qualifying Dr. Benedetto as an expert and allowing her to testify over appellant's objection that her testimony would improperly bolster the testimony of the accusing minors, particularly when her testimony directly discussed how domestic violence and a "non-supportive" parent allegedly affected the timing of the "disclosure of abuse" since domestic violence and lack of support were both allegedly involved here, and her testimony was meant to bolster the testimony of the complaining stepdaughters as counsel alleged.

### **Relevant Facts**

In her closing statement, apparently worried the jury may not believe the complaining stepdaughters; the solicitor told the jurors that appellant was "a horrible man" and "a bad man." She asked the jury to find appellant guilty of the charges the government chose to bring against him. The solicitor also told the jurors that the mother of the two alleged victims did not do anything to support them in their accusations, and the police had to intervene. R. p. 177, l. 24- 178, l. 2. ; R. p. 179, ll. 11 -13; R. p. 182, l. 21- 183, l. 8.

As will be seen infra, there was also evidence of domestic violence between appellant and the alleged victim's mother. The accusing victims admitted they did not like appellant. He was their stepfather and they wanted him out of their lives.

The first accusing minor was eleven years old and was being home schooled at the time of the trial. R. p. 32, ll. 12-23. She lived with appellant, her mother, her sister and two step-sisters that her mother had with appellant. R. p. 34 ll. 3-25. The first accusing minor testified appellant asked her to perform oral sex, and she refused. She claimed she was then sent to room. R. p. 36, l. 10 – 38, l. 22.

The accusing minor said she told her mother about the incident. Her reaction, according to the minor was to force appellant to leave for a week. Her mother then let appellant move back into the house. It was unclear whether the mother believed the minor's accusation. R. p. 39, l. 5- 40, l. 4.

On cross-examination the minor claimed that appellant told her the sex he allegedly elicited was punishment for not listening to him. R. p. 44, ll. 6-22. The child admitted that appellant and her mother fought a lot about "cheating" and "the title to the house." The minor said she did not like appellant, and she alleged that appellant once cut her mother with a screwdriver during one of their arguments. R. p. 44, l. 6 - 49, l.7.

The second accusing stepdaughter was twelve years old. R. p. 50, ll. 7 – 23. She was also being home-schooled at the time of the trial. R. p. 53, ll. 6 - 22. She identified appellant as her former stepfather. R. p. 55.

The minor witness went to Aiken Middle School before she was homeschooled. She remembered a policeman came to talk to her about appellant at her school. R. p. 56, ll. 6-10. The policeman asked her if appellant had ever beaten her or her sister or whether he had he ever touched them. R. p. 56, l. 6 – 57, l. 23.

The stepdaughter said when she was ten years old that appellant gave her a "bad touch." She said appellant also elicited sex from her. R. p. 60, l. 5 – 68, l. 25.

After she went to the Child Advocacy Center she began keeping a journal and she wrote a letter to her grandmother that her mother found. The minor said her mother gave the letter accusing appellant of abuse to appellant. She speculated that appellant then hid the letter. R. p. 68, l. 16 – 70, l. 7.

The second stepdaughter also testified that appellant often fought with their mother. She maintained they were looking for a “new place” to move so they could get away from appellant. The minor also said appellant wanted “the title” to the house because he wanted them to move. R. p. 73, l. 3 – 78, l. 7.

On cross-examination the minor said she thought she had been informed that appellant had gotten in trouble when he was nineteen-years-old for having sex with a fourteen-year-old. She admitted she knew if she told the police an adult had sex with her she would that adult in trouble. R. p. 80, ll. 10-19.

The forensic interviews were then played for the jury. They are on file with this Court for viewing. R. p. 84, l. 5 – 87, l. 18.

Mandy Fredell was the mother of the two accusing minors. She maintained that she did not tell the daughters what to say in their testimony against appellant. R. p. 91, l. 8 – 92, l. 13.

She admitted that she and appellant “argued over a lot of things” including “the title” to the house. Her children were present during the fights. R. p. 94, ll. 6-24.

Fredell acknowledged she found the letter her daughter wrote to her grandmother alleging abuse: “I asked my daughter about it.” R. p. 95, ll. 11-24.

She denied she was trying to move and leave appellant. She also said appellant was never forced to leave the home as a result of her daughter’s accusation of abuse. “We were in the process of taking care of things when all of this went down. This just happened.” Fredell said she was told of the allegations “like a day or two before the police was contacted.” R. p. 95, l. 11 – 98, l. 7.

Katherine Chappell testified as an expert in pediatric nursing and child wellness examination. R. p. 135, l. 15 – 136, l. 6. She testified she was not able to do a complete examination on one of the accusing witnesses because she began sobbing and crying. The judge sustained the defense objections to whether she was surprised by the minor's tearful reaction, and what "her reaction meant to you in your field." R. p. 143, l. 6 – 144, l. 15. It was apparent the solicitor wanted Chappell to testify that such reactions from a person that had been abused were "normal." Chappell testified the child never returned to finish the examination. R. p. 144, ll. 17-18.

After Chappell's testimony, the judge noted the defense had made a motion to exclude the "expert testimony" of the next witness, Dr. Benedetto, on the grounds that her testimony would only improperly bolster the alleged veracity of the complaining minors. It was an impermissible attempt to convey to the jury that the minors were being truthful. R. p. 109, ll. 8-22. R. p.241 (motion to exclude testimony)

The solicitor, not surprisingly, stated Dr. Benedetto had not met with the children or viewed their interviews and alleged Benedetto was an expert in the area of "child abuse dynamics." The solicitor claimed her testimony was necessary because there had been assertions of "recanting" and "inconsistencies" in the testimony of the children. R. p. 146, l. 14 - 147, l. 20. In short, that their testimony apparently needed bolstering.

The judge said he was in all likelihood going to allow the testimony. Defense counsel responded that whether the jury believed the minor stepdaughters was the critical issue in this case and this "expert" testimony was not necessary. R. p. 147, l. 21 - 148, l.14. The judge overruled the objection, and allowed Benedetto to testify. R. p. 147, l. 21- 149, l.1.

Benedetto then testified that she worked at the Department of Mental Health at the Assessment and Resource Center in Columbia. She also was the chief psychologist at the Children's Advocacy Center. R. p. 150, ll. 6- 13.

She had an undergraduate degree in psychology and a masters and doctoral degrees from St. John's University in psychology. R. p. 150, ll. 17- 22. She had done forensic evaluations and had done between 1,500 and 2,000 interviews with children. She had been working and training with "finding words." R. p. 151, l. 16 – 157, l. 8.

When the solicitor offered Benedetto as an "expert" in "child sexual abuse dynamics", defense counsel again objected to her testifying as an expert correctly noting her testimony in reality involved the "finding words" model. R. p. 155, ll. 10 - 24. The judge qualified Dr. Benedetto as an expert and allowed her to testify over objection. Dr. Benedetto then testified she had not become "personally involved with the children in this trial." R. p. 155, l. 10 – 156, l. 20.

Benedetto maintained that the way children reacted to abuse seemed "counter-intuitive." She said adults tended to think as adults "they would run away and scream" if they were abused. However, she opined that "children reacted differently, delay disclosure." However, she said "every child is different, every family is different..." R. p. 146, l. 1 – 148, l. 10.

The solicitor then asked how watching domestic violence among adults could affect a child disclosing abuse. Dr. Benedetto answered: "If a child has seen domestic violence in the home, of course, they may be fearful there might be danger if they told because, in fact, they have seen dangerous things happen; so they may be fearful for their own safety or the other parent's safety." R. p. 158, ll. 14 - 24.

The solicitor then asked for her opinion on how the reaction of the non-offending parent may affect “disclosure.” Dr. Benedetto then said the response of the other parent was very important as to whether the “child feels important, whether they feel that they are believed, whether they feel they are going to be protected or not.” She said if the child did not receive support the child may “[f]eel, well, you know, if my parent doesn’t believe me, who will? And if I don’t feel my parent will protect me, you know, then nobody will.” R. p. 159, l. 14 - 160, l. 16.

Dr. Benedetto also testified that the body language of the children being interviewed was important because their emotions were different than adults. “One of the things that surprises us sometimes even as many interviews as I have done is that children are not always as emotional as we might expect them to be in an interview.” R. p. 164, ll. 13- 25.

After Dr. Benedetto’s testimony the solicitor read a stipulation that appellant had a prior conviction for criminal sexual conduct in the second degree from 1998, thirteen years before this trial. R. p. 172, l. 23 – 173, l. 6.

### **Discussion**

In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499, n.5, (2011) the Supreme Court noted that there was no objection to the qualifications of the witness *in that case*. However, the Court noted it had previously observed that the witness may 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 the Court was speaking of forensic interviewers, 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. The testimony would allegedly assist the jury within the confines of Rules 702 and 703, SCRE.

Defense counsel correctly objected that Benedetto’s testimony was meant to bolster the testimony of the minor witnesses while dressed up as “expert testimony.” It was just another version of the “finding words” method. It was not needed and it was highly prejudicial. The hook allegedly was that Benedetto did not interview the minors, and her being allegedly “unprepared” was really a virtue.

Benedetto gave her opinions once clothed as an “expert” over appellant’s objection about how domestic violence and having a non-supporting parent would affect disclosure of abuse. The solicitor had already offered evidence about the domestic abuse the minors had viewed, and how their mother allowed appellant to live with them after they alleged appellant had abused them or elicited sexual favors.

While the judge noted that appellant’s objection cited State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), in support of its position he nonetheless stated he was going to allow Benedetto to testify as an expert. Once Benedetto was qualified as an expert she was entitled to give her opinions about child abuse. It was error to qualify her as an expert so she could give her opinions to the jury. See State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009). Her testimony bolstered the allegations of the minors as defense counsel stated. See, also, State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).

The state will undoubtedly argue the evidence here is sufficiently different, but **it is not**. Further, this is South Carolina and **our** Supreme Court has spoken clearly on this issue regardless of what some other jurisdictions may allow.

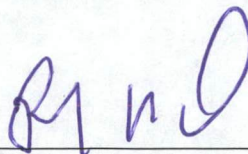
The jury was told that the viewing of domestic violence and having a non-supporting mother would cause the children to fear disclosing abuse. Again, domestic violence and a non-supporting mother were allegedly factors in this case. The solicitor told the jurors: “After the couch incident Adrianna says she tried to tell her mom. Nothing happened. Briana told you that she wrote her mom a letter and her mom sat right there and said, yeah, I got the letter. The letter was for her grandmother, but it never made it because William got it. Those girls then found help from someone else. The police came finally. They went and were interviewed at the Child Advocacy Center and they **told the same story** to the women at the Child Advocacy Center . . . Find him guilty.” R. p. 182, l. 19 – 183, l. 8 (emphasis added).

Benedetto should not have qualified as an expert which allowed her to impermissibly bolster the testimony of the complaining stepdaughters. Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed and this case remanded to the Aiken County Court of General Sessions for a new trial.

Respectfully submitted,



---

Robert M. Dudek  
Chief Appellate Defender

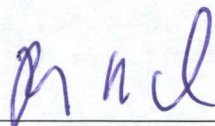
ATTORNEY FOR APPELLANT

This 9th day of October, 2014.

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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 9, 2014



---

Robert M. Dudek  
Chief Appellate Defender

S.C. Commission on Indigent Defense  
Division of Appellate Defense  
1330 Lady Street, Suite 401  
Post Office Box 11589  
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

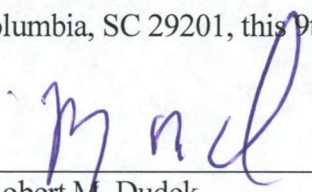
WILLIAM POU,

APPELLANT

APPELLATE CASE NO. 2012-213617

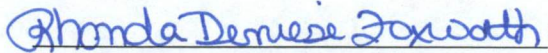
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of October, 2014.

  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 9th day of October, 2014.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 17, 2021