STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
JUN 06 2019
S.C. SUPREME COURT

Appeal from Pickens County
The Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SUZANNA BROWN SIMPSON,

PETITIONER

Appellate Case No. 2019-000500

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General
SC Bar No. 68383

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-0265

W. WALTER WILKINS, III
Solicitor, Thirteenth Circuit
305 East North Street
Greenville, SC 29601
(864) 467-8282
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S QUESTIONS PRESENTED

I. Did the trial court err in admitting expert forensic testimony where the state failed to timely disclose the forensic examination or testimony to the defense?

II. Did the trial court err in admitting expert forensic testimony where the documents underlying the expert's testimony were unlawfully seized?

III. Did the trial court err in admitting forensic testimony where state expert was not qualified as a forensic expert?

IV. Did the trial court err in excluding comment by defense expert that the treating physician concurred in his analysis?

RESPONDENT'S SUMMARY OF ARGUMENTS PRESENTED

I. The State was not required to disclose its expert, but did so as a courtesy, and was certainly not required to disclose the substance of the expert's testimony. The State committed no discovery violation because the expert's opinion was based, in part, on documents already within Simpson's possession and submitted to their own experts.

II. The trial court properly admitted the testimony of Simpson's treating psychiatrist in the State's reply when Simpson placed her mental health at issue with an insanity defense, revealed the contents of the psychiatrist's notes during the defense's expert testimony, and waived her privacy interest in her remaining mental health records by disclosing that information to her experts. The manner in which the records were initially obtained has no bearing on the expert's testimony.

III. Dr. Smith's qualification as an expert in psychiatry allowed him to opine on Simpson's criminal responsibility, even though he was not qualified as an expert in forensic psychiatry, because Dr. Smith had the requisite knowledge and skill to offer his opinion of Simpson's capacity to distinguish right from wrong.

IV. The trial court properly sustained the State's objection to the defense witness' bolstering of his own testimony by claiming the State's expert "agreed with his opinion," when Dr. Smith's purported agreement was not used as a basis for Dr. Price's opinion of Simpson's sanity.

STATEMENT OF THE CASE

A Pickens County Grand Jury indicted Petitioner, Suzanna Brown Simpson, in February of 2014 for two counts of murder, possession of a weapon during the commission of a violent crime, and attempted murder. (App. pp. 867-876.) On June 20, 2016, Simpson's case proceeded to trial before the Honorable Brian M. Gibbons and a jury. (App. p. 139.) John Mauldin, Esq., Teal Johnson, Esq., and Jacob Goldstein, Esq. represented Simpson. (App. p. 139.) Solicitor W. Walter Wilkins and Deputy Solicitor Betty Strom represented the State. (App. p. 139.) At the conclusion of the trial, the jury returned a verdict of guilty on all charges. (App. p. 859, lines 1-11.) Judge Gibbons sentenced Simpson to consecutive life sentences for the two counts of murder, a consecutive term of thirty years' imprisonment for attempted murder, and a consecutive term of five years' imprisonment for the possession of a weapon during the commission of a violent crime. (App. p. 865, lines 2-18.)

Simpson filed a timely notice of appeal. Following briefing, the Court of Appeals affirmed Simpson's conviction and sentence in published Opinion No. 5619 (Ct. App. January 23, 2019). (App. pp. 3-17.) A Petition for Rehearing followed and was denied on February 12, 2019, (App. p. 1.)

Simpson next timely sought a Petition for Writ of Certiorari, to which Respondent makes the instant Return.

STANDARD OF REVIEW AND WHY CERTIORARI SHOULD BE DENIED

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242 (b), SCACR. General reasons for granting a petition include to review a Court of Appeals decision that: (1) reflects a novel question of law; (2) included a dissent; (3) conflicts with this Court's precedent; (4)

addressed a substantial constitutional right; or (5) decided a matter of federal law in a way that conflicts with federal precedent. *Id.* The foregoing list is not exclusive, and this Court may exercise its discretion in the absence of these facts.

Simpson argues the decision by the lower courts were contrary to state and federal law. Simpson merely disagrees with the Court's holding, however. There are no "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this case. The Court of Appeals found no error in the admission of the treating physician's testimony in reply, as an expert, and without prior notice to Simpson of the substance of his testimony. The Court also agreed Simpson waived her privacy interest in her medical records when she raised the defense of insanity. These findings are consistent with state law.

Therefore, Respondent respectfully requests the Petition for a Writ of Certiorari be denied and dismissed because the Court of Appeals properly found no error from the admission of forensic expert testimony in reply by the State and no error in excluding some testimony of the defense's expert.

STATEMENT OF FACTS

The Court of Appeals summarized the facts of the crime as follows:

> On May 14, 2013, a neighbor of Suzanna and Michael Simpson heard a noise in his yard and found Suzanna Simpson's truck in a ditch near some downed trees. When the neighbor approached the truck, Simpson told him her back hurt. The neighbor repeatedly asked Simpson where her husband and children were, and Simpson only responded "I don't know" and "Am I going to be okay?" According to the neighbor, Simpson was coherent, and he had no trouble communicating with her.
>
> Simpson was transported to the hospital for treatment. According to a nurse who treated Simpson, Simpson told him, "I shot my husband and kids . . . [a]nd then I had an accident." When the nurse asked Simpson why she shot her family, she responded, "because it's an awful world." When the nurse asked why Simpson did not kill herself instead, she replied, "I thought about it and tried, but

> I couldn't do it." According to the nurse, Simpson was alert, knew where she was, and spoke clearly. Simpson refused to talk to the police at the hospital.
>
> While Simpson was receiving treatment, police went to the Simpson home and found the bodies of Simpson's five-year-old son and seven-year-old daughter in their bedrooms, both with gunshots to the head. Michael Simpson was also shot and found still breathing on the floor of the master bedroom. Police later found a .40 caliber handgun at the scene of Simpson's wreck.

(App. p. 4.)

The Expert Testimony at Trial

Dr. Leonard William Mulbry, a defense expert, testified he met with Simpson three times and examined her medical records prior to the shootings. (App. p. 519, line 10 – p. 520, line 10.) Dr. Mulbry outlined her medical treatment in the years before the shooting, beginning with some mild depression in college, followed by episodes of post-partum depression. (App. pp. 525-527.) In 2010, Simpson began seeing Dr. Smith, a local psychiatrist, who treated Simpson with several medications in an effort to control her symptoms. (App. p. 528, line 15 –p. 529, line 12.)

According to her medical records and Dr. Smith's notes, Dr. Mulbry opined Simpson was unable to distinguish right from wrong at the time of the shootings. (App. p. 532, line 21 – p. 533, line 6.) Dr. Mulby also acknowledged he never consulted with Dr. Smith, instead, relying on Smith's notes for the basis of his opinion. (App. p. 550, line 12 – p. 551, line 7.)

Simpson's second expert, Dr. David Price, also evaluated Simpson's "criminal responsibility" by reviewing her extensive medical records. (App. p. 578, line 15 – p. 579, line 16.) Dr. Price met with Dr. Smith to discuss Simpson's diagnosis and, "as part of reaching [his] opinion ... Dr. Smith agreed with [his] opinion." (App. p. 585, lines 8-12.) Dr. Price also acknowledged Simpson was a patient of Dr. Smith when the shootings occurred. (App. p. 586, lines 6-14.)

Dr. Frierson, the court appointed psychiatrist, also examined Simpson. Dr. Frierson opined Simpson could not distinguish right from wrong at the time of the shootings. (App. p. 635, lines 16-19.)

Dr. Smith's Testimony in Reply

Dr. Smith began treating Simpson in March of 2010. Over the course of his treatment, he saw Simpson as a patient 34 times. (App. p. 730, lines 4-17.) At times over the years, Simpson's condition appeared stable, and at other times Dr. Smith would adjust her medications to treat her bipolar disorder, ADD, and anxiety. (App. p. 726, lines 7-17; p. 730, line 21 – p. 731, line 3.) Dr. Smith reviewed the report of Dr. Frierson, and he spoke to Dr. Price, but told Dr. Price that Simpson presented entirely differently in the 34 visits with Smith than she did during their evaluation. (App. p. 734, line 17 – p. 735, line 3.) Dr. Smith said he told Dr. Frierson, "it was like we were talking about two different individuals." (App. p. 738, lines 11-12.) Smith said the extensive delusions reported by Simpson and her family were never mentioned to him during the course of his treatment. (App. 735, lines 17-25.)

Dr. Smith noted the hospital records from the treating emergency room psychiatrist, who saw Simpson directly after the shootings, did not indicate Simpson wanted to kill herself or heard any voices. (App. p. 738, lines 1-23.) Further, Dr. Smith believed Simpson's rapid resolution of symptoms, both during the earlier admission and during the treatment after the shootings, was an unusual response to a functional psychosis. In other words, typically, a functional psychosis such as schizophrenia, bipolar disorder with psychosis, or depression with psychosis would not react that quickly and positively to medication. (App. p. 739, lines 7-21.) Dr. Smith opined Simpson knew right from wrong but was unable to conform her conduct to the behavior of the law. (App. p. 741, lines 14-17.)

ARGUMENT

I. The State was not required to disclose its expert, but did so as a courtesy, and was certainly not required to disclose the substance of the expert's testimony. The State committed no discovery violation because the expert's opinion was based, in part, on documents already within Simpson's possession and submitted to their own experts.

At trial, Simpson sought to limit the testimony of her treating psychiatrist, even though three of her witnesses told the jury about the information in Dr. Smith's notes and based their expert opinions on his assessment of Simpson. In effect, Simpson sought to use Dr. Smith's notes and treatment to her advantage, but did not want the jury to hear Dr. Smith's interpretation of his own treatment notes. In support of this argument, Simpson claims she was not given notice of the substance of Dr. Smith's testimony. However, although it was not required, the State notified Simpson it might call Dr. Smith, depending on the defense testimony. As the Court of Appeals correctly found, no discovery violation occurred.

The State is not required to provide its witness list to a criminal defendant, and the disclosure of a witness to the defense before trial is nothing more than a professional courtesy. *State v. Nicholson*, 366 S.C. 568, 579, 623 S.E.2d 100, 105-106 (2005). There is no right to discovery in a criminal trial in South Carolina beyond what is provided by statute, case law, or court rule. *See State v. Miller*, 289 S.C. 316, 317, 345 S.E.2d 489, 490 (1986); *State v. Flood*, 257 S.C. 141, 184 S.E.2d 549 (1971) (holding there is no general discovery in criminal cases in South Carolina). *See also, Brady v. Maryland*, 373 U.S. 83 (1963) (requiring the State to divulge to a criminal defendant material exculpatory or mitigating information); Rule 5, SCRCrimP (requiring the State to disclose, *upon request of the defendant*, certain statements of the defendant, the defendant's prior record, certain documents and tangible objects, and certain reports of examinations or tests and witnesses to be called in response to an alibi defense).

The defense was fully aware of Dr. Smith as a potential witness because he was the only treating psychiatrist of Simpson. Further, the defense's own experts relied on Dr. Smith's records in performing their evaluation. Dr. Price even sought out Dr. Smith to discuss the case. The solicitor informed the court he might call Dr. Smith, depending on the defense's evidence, but he could not be certain.

Simpson argues the State was required to disclose the substance of Dr. Smith's opinion, pursuant to Rule 5, but the law does not support this contention. Rule 5 does not obligate the solicitor to notify the defendant of the substance of the expert's testimony, particularly when the expert is relying on information within Simpson's possession. Simpson argues the State was required to disclose Dr. Smith's forensic evaluation, so that the defense experts could "comment on Smith's qualifications, analysis, or opinions. (Petition, p. 4.) However, even if the State had disclosed the entire basis for Dr. Smith's opinion, Simpson would not have been permitted to pit witnesses against each other by having his experts comment on Dr. Smith's conclusions. *See State v. Benning*, 338 S.C. 59, 524 S.E.2d 852 (Ct. App. 1999) (it is improper to cross-examine in a way that requires a witness to attack another witness's credibility).

In sum, although the State was not required to turn over the information prior to trial, Simpson's counsel was well aware of the possible expert testimony available for reply by the State. The solicitor committed no discovery violations, nor was Simpson's right to due process violated, for failing to disclose Dr. Smith's opinion, particularly when that basis for the opinion and notice of his appearance was presented to the defense.

II. The trial court properly admitted the testimony of Simpson's treating psychiatrist in reply when Simpson placed her mental health at issue with an insanity defense, revealed the contents of the psychiatrist's notes during the defense's expert testimony, and waived her privacy interest in her remaining mental health records by disclosing that information to her experts. The manner in which the records were initially obtained has no bearing on the expert's testimony.

Simpson opened the door to the disclosure of the privileged information within her medical records when she raised the defense of insanity. Before trial, Simpson waived any statutorily protected information when the trial judge ordered the appointment of a psychiatrist to examine Simpson following notice of her defense of insanity. As the Court of Appeals correctly found, Simpson waived her confidential communications with her treating physician by presenting that evidence to the jury through the testimony of the defense experts. Because Simpson waived her claim of privilege in her records and her confidences to her treating physician, Simpson's argument SLED obtained her records improperly had no bearing on the issue before the trial court.

Two things are evident from the record: 1) SLED submitted a form requesting medical information from Simpson's providers and the form cited an inapplicable state statute, and 2) the solicitor's office was unaware of the document submitted by SLED to Simpson's providers. (App. pp. 658-668.) What is not clear from the record is whether the hospitals complied with the request in violation of state law, whether SLED obtained the records via warrant or other means at a later time, or whether the hospitals complied with the request from SLED only after consulting Simpson's signed release to her defense attorneys. Simpson made no request for a suppression hearing, no records custodian from the hospital testified about when the documents were disclosed, and no representative from SLED testified about how the information ultimately came into its possession. The trial court specifically refrained from making a finding on that

issue undoubtedly because the evidence before the court supporting Simpson's claim was inadequate to make that determination. (App. p. 683, lines 18-24.)

However, the trial court did find Simpson waived her privilege to protect her medical information by disclosing the information to her own experts, then calling those experts to testify to the contents at trial. (App. p. 682, line 21- p. 683, line 7-17.) The court's finding that Simpson's mental health record was necessary for the conduct of the proceedings, both prior to trial and following the defense's case, were supported once Simpson opened the door to her mental health by claiming an insanity defense. *See* S.C. Code Ann. § 44-22-90 (A)(4)(allowing disclosure of information related through the course of a court-ordered psychiatric examination); *and* S.C. Code Ann. § 4-22-100 (A)(2) ("mental health records may be disclosed when a court directs that disclosure is necessary for the conduct of proceedings before the court and that failure to make the disclosure is contrary to public interest.") Further, S.C. Code Ann. § 19-11-95 (D) (mandating disclosure by court order when the patient's mental illness are reasonably at issue in a proceeding) authorized the trial court to find Simpson waived her confidences in Dr. Smith. In allowing Dr. Smith to testify, the trial court found Simpson placed the issue of her mental health squarely before the jury.

The trial court in Simpson's case found Simpson constructively consented to the release of her medical records when she raised insanity as a defense and turned over her information to defense experts. In its reasoning, the court noted, as a matter of "fundamental fairness," Simpson used the records "to help establish her defense" and "opened the door" for the State to use the evidence. (App. p. 683, lines 5-16.) South Carolina's rules of discovery and statutory framework for disclosure support this policy. Rule 705, SCRE allows a party to require the disclosure of the underlying facts or data supporting an expert opinion. The South Carolina Court of Appeals

confronted the admissibility of protected information under this rule in *State v. Slocumb*, 366 S.C. 619, 521 S.E.2d 507 (1999). In *Slocumb*, the Court discussed the disclosure of otherwise inadmissible evidence of prior bad acts referenced in a psychiatric report when the defendant put his mental health at issue by raising an insanity defense to a criminal sexual conduct charge. Slocumb sought to restrict the cross examination of his own defense expert when the State tried to cross-examine the expert on an inconsistent juvenile mental health assessment considered, but disregarded, by the expert. The Court found the earlier assessment, which addressed Slocumb's prior bad acts, would ordinarily be inadmissible as prejudicial. The Court cited Rule 705, SCRE, and reasoned a defendant who seeks to claim mental incapacity may open the door to otherwise inadmissible content within those records. *Slocumb*, at 632–33, 521 S.E.2d at 514.

Finally, Simpson can show no prejudice from the trial court's decision to allow Dr. Smith's testimony based on her underlying mental health records from other facilities. Simpson called three expert witnesses, Dr. Frierson, Dr. Mulbry, and Dr. Price, to testify about their opinions of her mental health after reviewing her records from Dr. Smith. The defense experts explained to the jury the portions of Dr. Smith's records they found relevant to their opinions. Simpson cannot show how Dr. Smith revealed information to the jury that was not previously revealed through the defense witnesses. Any error in allowing Dr. Smith's testimony about these records was harmless beyond a reasonable doubt. *See State v. Terry*, 339 S.C. 352, 360, 529 S.E.2d 274, 278 (2000)(when a defendant offers protected medical records as mitigation evidence, he cannot claim prejudice from the disclosure of the records pursuant to §44-22-100).

The State was entitled to Simpson's mental health records via the rules of discovery, common law, and statutory law. Any attempt by SLED to gain access to that information under an inapplicable state statute has no relevance to whether the State was entitled to call Dr. Smith

to testify in reply. Simpson's affirmative defense of insanity, based in large part of the treatment notes of Dr. Smith, created the necessity for the State to call Dr. Smith to explain. Simpson's attempts to distract the Court with SLED's actions, which were never developed on the record below, should not be confused as trial court error.

Lastly, Simpson's contention that Dr. Smith's testimony should not have been allowed because SLED violated Simpson's Fourth Amendment right is also without merit. The trial judge specifically declined to find the records obtained by SLED were a search or a seizure in violation of Simpson's Fourth Amendment rights. (App. p. 683, lines 18-24.) Based on the record, SLED sent the medical providers a form letter saying it was entitled to Simpson's mental health records. (App. pp. 660-331.) Whether the providers complied with that request, and whether the providers considered Simpson's release of her medical records before voluntarily submitting that information to SLED was not presented to the trial court.

Here, Simpson did not request, nor did the trial court conduct, a suppression hearing on the medical records. Instead, Simpson sought to suppress Dr. Smith's opinion on the basis of supposedly improperly obtained medical records. As discussed in the preceding section, the State was entitled to Simpson's medical records, and was entitled to call Dr. Smith as a reply witness. Simpson does not object to the disclosure of the information in her medical records to all expert witnesses, only the State's. Similarly, she does not object to the information in her medical records being presented to the jury. Consequently, Simpson's Fourth Amendment violation claim is neither supported by the record, nor an appropriate claim of exclusion to Dr. Smith's testimony.

In this case, the same information in the medical records was used in defense of Simpson's actions and to condemn it. The experts' interpretation of that information resulted in

vastly different conclusions, which the jury was free to give whatever weight it chose in determining Simpson's guilt. Despite her assertions the medical records were improperly obtained, Simpson did not and does not want this court to suppress the medical records, or the information contained therein. Instead, Simpson asks this Court to suppress only the expert testimony of Dr. Smith because he disagreed with Dr. Price and Dr. Frierson. The Fourth Amendment does not protect Simpson's interest in stacking the deck in her favor, nor does fruit of the poisonous tree doctrine allow for such a selective remedy.

III. Dr. Smith's qualification as an expert in psychiatry allowed him to opine on Simpson's criminal responsibility, even though he was not qualified as an expert in forensic psychiatry, because Dr. Smith had the requisite knowledge and skill to offer his opinion of Simpson's capacity to distinguish right from wrong.

In her claim Dr. Smith was not qualified to offer an opinion on her capacity to know right from wrong or conform her conduct, Simpson echoes a claim she made throughout her trial: A finding of incapacity requires the jury to "practice psychiatry," which she claims they are unqualified to do. (App. p. 185, lines 6-14.) Similarly, Simpson's objection to Dr. Smith's testimony focused solely on Dr. Smith's opinion concerning the ultimate issue at trial: did Simpson know right from wrong and could she control herself? Simpson mistakenly believes the determination of this question can be made only by experts qualified in forensics psychiatry. The Court of Appeals rejected this contention. (App. p. 11.)

In determining whether to admit expert testimony, the court must make three inquiries. First, the court must determine whether "the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." *Watson v. Ford Motor Co*, 389 S.C. 434, 446, 699 S.E.2d 169, 175. Second, the expert must have "acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter," although he "need

not be a specialist in the particular branch of the field." *Id.* Finally, the substance of the testimony must be reliable. *Id.* In the case before the court, neither the State nor the defense seriously disputed whether the subject matter of Simpson's psychiatric condition was beyond the ordinary knowledge of the jury. Simpson does not challenge the reliability of psychiatric treatment as a particularized discipline of medicine. Instead, Simpson argues Dr. Smith was not qualified to testify to Simpson's capacity to distinguish right from wrong or conform her conduct to the law. (App. p. 679, line 18 – p. 680, line 4.)

While an expert's qualification generally goes to weight of his testimony and not its admissibility, the trial court acts as a gatekeeper in vetting its reliability and deeming the testimony admissible. *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012). If the proffered testimony is scientific in nature, then the circuit court must determine its reliability per the factors set forth in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). The trial court correctly identified this standard, and specifically applied the *Council* factors to the testimony given at the pretrial hearing. (App. pp. 721-724.)

With respect to Dr. Smith's qualifications in particular, the qualification of an expert witness and the admissibility of the expert's testimony are matters largely within the trial court's discretion. *McMillan v. Durant*, 312 S.C. 200, 439 S.E.2d 829 (1993). A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); *State v.* White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). To present expert testimony, a party must show the witness possesses through either study or experience the knowledge or skill in a business, profession, or science making him or her better qualified than the jury to form an opinion on the particular

subject in question. *Hall v. Clarendon Outdoor Advertising, Inc.*, 311 S.C. 185, 428 S.E.2d 1 (Ct.App.1993).

Simpson claims Dr. Smith was not qualified to give an opinion on **forensic** psychiatry. However, in the case of psychiatry, the treating physician's opinion on the patient's mental health is critical to the everyday care of the patient; it is not solely for forensic purposes. "It has been said that a forensic interviewer's purpose is to prepare for trial." *State v. Kromah*, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013); *See State v. Blue*, 717 N.W.2d 558, 564 (N.D.2006) (observing "[t]he forensic interviewer's purpose was undoubtedly to prepare for trial" as "[f]orensic by definition means 'suitable to courts,' ") (quoting *Merriam–Webster's Collegiate Dictionary* 490 (11th ed.2005)); *Black's Law Dictionary* 721 (9th ed.2009) (stating "forensic" is derived from the Latin terms "forensis" (public) and "forum" (court) and defining "forensic" as " [u]sed in or suitable to courts of law or public debate"). In short, "forensic" refers to the expert's preparation and participation in litigation. The term has little to do with the quality of the underlying opinion.

In the case of an affirmative defense of insanity, the jury must decide whether the defendant knew right from wrong based on the testimony of both lay witnesses and expert psychiatrists or psychologists. Only the doctors are directly asked to give an opinion that conclusively establishes a defendant's guilt. Regardless of whether a doctor is qualified as a "forensic" psychiatrist, which appears to mean prepares for and participates in litigation, a psychiatrist is more than qualified to conclude Simpson possessed the mental capacity to know right from wrong, particularly within the framework of serving as Simpson's treating physician for three years. In fact, no other doctor was more qualified than Dr. Smith to opine as to Simpson's mental capacity.

Simpson cannot show the trial court abused its discretion in finding Dr. Smith qualified to opine on Simpson's state of mind. Moreover, questions going to an expert's knowledge of state of mind of the accused at the time of the crime are proper, and the expert's opinion as to state of mind is admissible. *See State v. Atkins*, 303 S.C. 214, 399 S.E.2d 760 (1990). Dr. Smith observed Simpson 34 times in a clinical setting, and was qualified to treat her mental condition with medications and monitor her progress while she took those medications. It was his professional responsibility to determine whether she knew right from wrong and could conform her conduct to the law. The fact that Dr. Smith was not as qualified as the other experts to prepare for and testify at trial does not render his opinion as her treating psychiatrist invalid. If the jury was entitled to hear from experts who based their opinions on Dr. Smith's treatment notes, then they were certainly entitled to hear an opinion directly from Dr. Smith. Lastly, Dr. Smith's opinion on whether Simpson knew right from wrong was the same question presented to the jury. As her treating physician, Dr. Smith need not be a forensic expert to make that determination. The Court of Appeals affirmed the trial court's ruling. There is no error to correct.

IV. The trial court properly sustained the State's objection to the defense witness' bolstering of his own testimony by claiming the State's expert "agreed with his opinion," when Dr. Smith's purported agreement was not used as a basis for Dr. Price's opinion of Simpson's sanity.

All of the defense's expert witnesses relied on Simpson's medical records during her treatment by Dr. Smith to form their opinions on Simpson's sanity. To his credit, Dr. Price was the only expert who sought out Dr. Smith to discuss Simpson's case before testifying at Simpson's trial. Although he discussed his opinion with Dr. Smith, logic requires Dr. Price to have formed an opinion on Simpson's mental capacity before Dr. Smith "agreed" with his conclusion. Accordingly, Dr. Smith's purported agreement provided no basis for Dr. Price's opinion. The only explanation for Dr. Price's testimony that Dr. Smith agreed with him was to

bolster his own credibility before the jury. In fact, Dr. Smith explained the limitations of his agreement when he testified in reply. Dr. Price's testimony was thus properly objectionable as not fitting with the hearsay exception for the basis of expert testimony, and the trial court committed no error.

Expert witness testimony is a widely-recognized exception to the rule against hearsay testimony. *See U.S. v Williams*, 447 F.2d 1285, 1290 (5th Cir 1971) ("The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion."); *State v. Hutto*, 325 S.C. 221, 481 S.E.2d 432, 436 (1997) ("An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience. Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, *to arrive at his opinion*, that opinion is regarded as evidence in its own right and not as hearsay in disguise." (emphasis added)).

The trial court allowed Dr. Price to testify to the numerous details about Simpson's prior treatment. Dr. Price discussed details such as the events that led to Simpson's prior emergency hospitalization. The contents of the records Dr. Price examined were properly within the hearsay exception enumerated above. However, when Dr. Price tried to suggest Dr. Smith supported his conclusions, Dr. Price's testimony crossed the line. As the record indicates, Dr. Price had already formed his opinion on Simpson's sanity when Dr. Smith purportedly agreed with him:

> Q Did you have an opportunity to review Dr. Smith's records and also have an interview with Dr. Smith about this patient?
>
> A I had time to meet with Dr. Smith, I have reviewed all of his records and had time to talk about Anna, his treatment, things that happened. And as part of reaching my opinion and actually, well, within that meeting, Dr. Smith agreed with my opinion.

MR. WILKINS: Objection, Your Honor. He's about to opine as to what another doctor has – diagnosis or –

THE COURT: Objection as to hearsay.

MR. MAULDIN: Well, the evaluator obviously talked to tons of people, that he is relating what they told him about the person being evaluated. I don't know how --

THE COURT: Is this something that was contained in the records?

THE WITNESS: It's what he told me directly, Your Honor.

MR. WILKINS: It's not in his medical records. It's what he told him.

THE COURT: All right. Objection sustained.

BY MR. MAULDIN:

Q Don't say what Dr. Smith told you unless it actually is contained in Dr. Smith's records. Okay?

(App. p. 585, line 5 – p. 586, line 5.)

Here, the State objected, appropriately, to Dr. Price's testimony that Dr. Smith agreed with his opinion, which necessarily indicates Price formed his opinion after reviewing Smith's notes, perhaps sometime during his discussion with Smith at the latest, but *before* Smith "agreed with [his] opinion." The Court of Appeals correctly found the statement by Dr. Price constituted improper bolstering. (App. p. 15.) Price's statement was an unnecessary attempt to augment his credibility before the jury and did not fit within the hearsay exception for expert testimony.

A witness is not permitted to vouch for the credibility of another witness by offering testimony that bolsters the testimony of another witness. *See State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App.2012). The prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain "the assessment of witness credibility ... within the exclusive province of the jury." *Id.* at 464, 725 S.E.2d at 141; *see also Maddox v. State*, 275 Ga.App. 869, 622 S.E.2d 80 (2005) ("improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference

to be drawn is not beyond the ken of the average juror."). The ultimate issue for the jury in this case was Simpson's sanity at the time she shot her family. Dr. Price's testimony another expert agreed with his assessment of her sanity served no other purpose than to convince the jury he was correct about the ultimate issue of fact for the jury.

Even if the statement had been admissible, Simpson cannot show she was prejudiced by the trial court's refusal to allow Simpson to question Dr. Price on Dr. Smith's opinion because she had the opportunity to question Dr. Smith about any agreement when he took the stand in reply. Further, when Dr. Smith testified, he discussed the meeting he had with Dr. Price, in which Price told Dr. Smith his findings. (App. p. 734, lines 16-21.) Dr. Smith said he told Dr. Price, "Well, based on upon what you were seeing at that time, I can see how you arrived at your decision." (App. p. 734, lines 22-24.) Dr. Smith went on to say he adamantly told Dr. Price Simpson presented entirely differently in the 34 visits he had with her, and there was "nothing similar in clinical presentation." (App. p. 735, lines 1-3.) Thus, Dr. Smith explained the underlying circumstances in which he agreed with Dr. Price's conclusion on the basis on what Dr. Price reviewed, but put that agreement within the framework of the larger conversation about Simpson. Thus, Simpson cannot show she was prejudiced by the trial court's refusal to allow Dr. Price to testify about Dr. Smith's opinion, unless she also concedes she sought to distort the context of the agreement before the jury.

CONCLUSION

The Court of Appeals did not err in reviewing the trial judge's application of the law to the facts of this case. The trial judge correctly ruled based upon the controlling legal principles in this State. For all of the foregoing reasons, it is respectfully submitted that the petition for writ

of certiorari be denied, and the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General

W. WALTER WILKINS, III
Solicitor, Thirteenth Circuit
305 East North Street
Greenville, SC 29601
(864) 467-8282

BY: _____
SUSANNAH R. COLE
SC Bar No. 68383

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-0265

ATTORNEY(S) FOR RESPONDENT

June 6, 2019
Columbia, South Carolina

RECEIVED
JUN 06 2019
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Pickens County
The Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SUZANNA BROWN SIMPSON,

PETITIONER

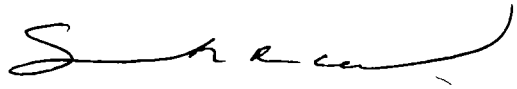
Appellate Case No. 2019-000500

CERTIFICATE OF SERVICE

I, Susannah R. Cole, certify that I have served the *Return to Petition for Writ of Certiorari* on Petitioner by depositing two (2) copies in the United States mail, postage prepaid, to her attorney of record, addressed as follows:

J. Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292

This 6th day of June, 2019.



Susannah R. Cole
Assistant Attorney General
S.C. Bar No. 68383