

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

**ORIGINAL**

THE STATE,

RESPONDENT,

v.

**RECEIVED**

SFP 30 2019

ONTARIO STEFON PATRICK MAKINS,

**SC Court of Appeals**

APPELLANT

APPELLATE CASE NO 2016-002495

---

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

---

Opinion No. 5683

---

RETURN TO PETITION FOR REHEARING

---

Respondent's chief complaint appears to suggest that this Court's decision in this matter contravened State v. Barrett, 416 S.C. 124, 785 S.E.2d 387 (Ct. App. 2016) wherein this Court affirmed the trial court's qualification of a witness, Kendra Twitty, as an expert mental health professional "[u]nder the specific facts of [that] case." Id. at 130, 785 S.E.2d 390. Notably different from the testimony at Makins' trial, "Twitty's testimony did not vouch for Victim's veracity or improperly bolster her testimony." Id. at 131, 785 S.E.2d at 390. Unlike the case at bar, "Twitty did not limit her testimony to explaining the exact behavioral characteristics Victim exhibited." Id. at 133, 785 S.E.2d at 391. Rich, however, directly mirrored preceding testimony

by reaffirming changes in Minor's behavior and attributing them to symptoms of trauma associated with sexual abuse. Because Rich implied Minor was telling the truth with respect to her allegations of sexual abuse, this Court correctly held that the admission of her testimony was improper.

Following a question from the solicitor regarding "changes or any particular symptoms," Minor's mother testified that Minor was "acting out a lot," that Minor was wetting the bed, that Minor avoided going over to her sister's house where the alleged abuse took place, and that Minor was not sleeping well at night. R. 153, l. 16 – R. 155, l. 9.

At trial, Rich listed various symptoms of trauma, including the exact same ones Minor's mother mentioned: avoidance, hypervigilance, sleep difficulties, emotional and behavioral disturbances, somatic symptoms, and intrusive thoughts. R. 251, l. 4 – R. 252, l. 13. Regarding sexual abuse trauma in particular, Rich testified that the symptoms would be similar, including bedwetting, pulling out hair, avoidance, and fear. R. 252, l. 14 – R. 253, l. 1. As noted, many of these symptoms matched Minor's behavior as previously established at trial. A Venn diagram of the symptoms of trauma described by Rich and the symptoms noted by Minor and her family members would simply be a single circle.

As this Court correctly deduced, Briggs v. State precludes the admission of Rich's bolstering testimony: "[A] witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." 421 S.C. 316, 324, 806 S.E.2d 714, 717 (2017). This holding is not limited to forensic interviewers, nor does it pave the way for evidence of trauma which also bolsters the testimony of a minor witness to be admitted.

Rich testified that her job and duties at the time of Makins' trial entailed meeting with children and their parents to "do an evaluation and assessment of any difficulties they might

have.” R. 242, l. 10 - R. 243, l. 8. She specialized in “trauma-focused cognitive behavioral therapy, which is particularly related to childhood trauma.” R. 243, ll. 2 – 8. She defined trauma as “a very bad event where somebody feels like they might be hurt or killed or something very bad might happen to them.” R. 243, ll. 9 – 20. She indicated that trauma is “something that tragically shifts your life.” Id. Two of the examples of trauma she listed were physical and sexual abuse. R. 243, l. 21 – R. 244, l. 5.

Rich testified that she used an evidence-based model called “trauma-focused cognitive behavioral therapy” which “focuses on the trauma.” R. 244, ll. 6 – 12. Seemingly suggesting that the acts described by patients actually occurred, she opined that “the most important part of the trauma is to talk about what happened.” R. 244, l. 6 – R. 245, l. 5. The solicitor questioned Rich regarding her treatment models and protocols, asking whether they are “based on evidence-based studies.” R. 247, l. 22 – R. 248, l. 9. This question-and-answer combination was particularly egregious:

Q: And are your treatment models and protocols based on evidence-based studies?

A: Yes. So evidence-based means that what I’m providing for a client is based on scientific evidence, not just a kind of ‘feel good, oh, I think this might help.’ But it’s based on a model to say this is how you approach this. And that it has been studied to say that it produces results and there’s scientific evidence for that. And so the TFCBT is a scientific evidence based model that you use with children who have undergone a type of trauma.

Id.

Rich testified that she had provided therapy to approximately five hundred children during the course of her career at the time of trial. R. 248, ll. 22 – 25. Around one fourth of those children had experienced trauma “as a result of sexual abuse” according to Rich. R. 249,

ll. 1 – 5. Rich also stated that as part of her training regarding trauma, she participated in a year-long learning collaborative effort. R. 246, l. 11 – R. 247, l. 8. During those sessions, she was assigned “a client .. that has trauma.” Id. She indicated that she “provid[ed] the treatment ... [a]nd then there’s consultation calls with experts.” Id. In other words, she would not have treated Minor unless abuse had occurred.

Echoing the testimony of witnesses before her and seeming zeroing in on Minor’s case, Rich justified delayed disclosure of minors regarding alleged sexual abuse. R. 253, l. 24 – R. 256, l. 17. Immediately thereafter, the solicitor asked Rich if she provided therapy to Minor. R. 257, ll. 6 – 12. As Rich answered in the affirmative, defense counsel objected. Id.

Following the trial judge’s denial of defense counsel’s motion for a mistrial, the solicitor elicited from Rich the fact that she treated Minor and Minor disclosed sexual abuse in the context of a therapy session. R. 275, ll. 8 – 16.

Respondent attempts to distinguish Rich’s role from a forensic interviewer by suggesting that her role was not to collect facts, although her trial testimony revolved around alleged factual disclosures by Minor. Pet. for Reh’g 12. Such a contention overlooks the crux of Rich’s testimony and likely the reason she was called as a witness at trial: she provided treatment to Minor, who allegedly disclosed sexual abuse during a therapy session. R. 275, ll. 8 – 16. The picture Minor drew was made an exhibit at Makins’ trial. Thus, the claim that Rich’s role in this case was simply to provide therapy is easily disproven. A picture drawn during the therapy session was undoubtedly part of a fact-finding endeavor. Accordingly, the only purpose of Rich’s testimony was to improperly bolster Minor’s testimony.

Respondent further contends that this Court’s erred because the state should be allowed to present evidence of trauma under State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993)

overruled by State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). The solicitor noted pretrial that the state would avoid eliciting testimony from Rich regarding a diagnosis of “victim of childhood sexual trauma.” R. 48, l. 3 – R. 49, l. 12.

Reliance on Schumpert, *supra*, is disingenuous following the South Carolina Supreme Court’s opinion almost twenty years later in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). Such an assertion belies the point of Kromah: to prevent witnesses from bolstering the credibility of a minor witness. As this Court correctly noted, Rich’s testimony improperly indicated to the jury that she believed Minor’s allegations in the current matter. Violating the holdings of many recent opinions, including Kromah, Rich’s testimony indicated she was providing therapy to Minor and thereby directly implied Minor had suffered trauma. The two focal points of Rich’s testimony—trauma and therapy—were inextricably intertwined. Without the former, the latter was unnecessary. Rich’s testimony implied she was providing therapy to Minor because she believed Minor had suffered trauma. Rich’s remarks were correctly held to be improper by this Court.

This Court correctly held that “Rich’s opinion testimony addressing the various manifestations of child sexual abuse, followed immediately by her affirmative response that she treated Victim, implied she believed Victim was telling the truth with respect to her allegations of sexual abuse.” The state attempted to circumvent recent case law which sharply limits the use of forensic interviewers by presenting Minor’s therapist, who was presumably familiar with Minor’s expected testimony and specific allegations. Rich’s testimony perfectly aligned with prior testimony regarding symptoms of sexual abuse trauma such that the jury was led to the inescapable conclusion that Rich was only treating Minor because she had suffered abuse. The jury very likely interpreted Rich’s testimony as an overt indication that Minor’s behavior was

typical, her delayed disclosure acceptable, and her testimony believable. The state's petition for rehearing should be denied.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

TAYLOR D GILLIAM  
Appellate Defender

This 30th day of September, 2019.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

RECEIVED

SEP 30 2019

THE STATE,

RESPONDENT, SC Court of Appeals

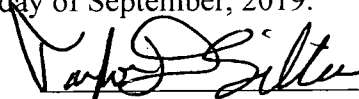
V.

ONTARIO STEFON PATRICK MAKINS,

APPELLANT

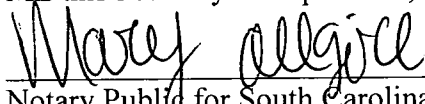
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Return to Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Ontario Stefon Patrick Makins, ##370725, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 30th day of September, 2019.



Taylor D Gilliam  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE  
ME this 30th day of September, 2019.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 12, 2027.