

RECEIVED
OCT 08 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Case No. 2011-GS-44-0413

The State of South Carolina,.....Respondent,

v.

Stephen Douglas Berry,.....Appellant.

FINAL BRIEF OF APPELLANT

League B. Creech
Peters, Murdaugh, Parker
Eltzroth & Detrick, P.A.
Post Office Box 457
Hampton, South Carolina 29924
Telephone: (803) 943-2111
Facsimile: (803) 943-3943

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on
Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	2
ARGUMENTS.....	4
I. THE TRIAL COURT ERRED IN ALLOWING THE VICTIM TO TESTIFY REGARDING ALLEGED OTHER ACTS WHICH EXCEEDED THE SCOPE OF THE INDICTMENT AND WHICH WERE NOT CRIMINAL IN NATURE.....	4
II. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS TWO INADMISSIBLE ASPECTS OF THE STATE'S EXPERT'S TESTIMONY.....	7
CONCLUSION.....	11

TABLE OF AUTHORITIES

CASES

<i>State v. Adams</i> , 322 S.C. 114, 470 S.E.2d 366 (1996).....	7
<i>State v. Clasby</i> , 385 S.C. 148, 682 S.E.2d 892 (2009).....	5
<i>State v. Commander</i> , 396 S.C. 254, 721 S.E.2d 413 (2011).....	8
<i>State v. Cope</i> , 405 S.C. 317, 748 S.E.2d 194 (2013).....	5
<i>State v. Douglas</i> , 380 S.C. 499, 671 S.E.2d 606 (2009).....	10
<i>State v. Ellis</i> , 345 S.C. 175, 547 S.E.2d 490 (2001).....	8
<i>State v. Hill</i> , 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011).....	7
<i>State v. King</i> , 334 S.C. 504, 514 S.E.2d 578 (1999).....	7
<i>State v. Kromah</i> , 401 S.C. 340, 737 S.E.2d 490 (2013).....	7,8,10
<i>State v. Lyle</i> , 125 S.C. 406, 118 S.E. 803 (1923).....	4,5,6,7
<i>State v. Richey</i> , 88 S.C. 239, 70 S.E. 729 (1911).....	6
<i>State v. Weaverling</i> , 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999).....	5,6
<i>State v. Whitener</i> , 228 S.C. 244, 89 S.E.2d 701 (1955).....	6

OTHER AUTHORITIES

<u>Rule 401, SC Rules of Evidence</u>	5
<u>Rule 403, SC Rules of Evidence</u>	7
<u>Rule 404(b), SC Rules of Evidence</u>	4,5,6

STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN ALLOWING THE VICTIM TO TESTIFY REGARDING ALLEGED OTHER ACTS WHICH EXCEEDED THE SCOPE OF THE INDICTMENT AND WHICH WERE NOT CRIMINAL IN NATURE?
- II. DID THE TRIAL COURT ERR IN FAILING TO SUPPRESS TWO INADMISSIBLE ASPECTS OF THE STATE'S EXPERT'S TESTIMONY?

STATEMENT OF THE CASE

In July of 2012, a Union County Grand Jury indicted Stephen Douglas Berry (Berry) for Criminal Sexual Conduct with a Minor, Second Degree, Indictment #2011-GS-44-0413. (R. pp. 1-2).

On July 17, 2012, Berry proceeded to jury trial before the Honorable Edward Miller. Attorney Melinda Butler represented Berry at trial. Assistant Solicitor John C. Anthony represented the State. The jury could not reach a unanimous verdict.

On February 5, 2013, Berry again proceeded to jury trial, this time before the Honorable John C. Hayes. Attorney Erik Delaney of the Union County Public Defender's office and Attorney Melissa Inzerillo of the York County Public Defender's office represented Berry at trial. John C. Anthony again represented the State.

The jury returned a guilty verdict and Judge Hayes sentenced Berry to fifteen (15) years. Berry timely served a Notice of Appeal on February 11, 2013. (R. pp. 4-5).

STATEMENT OF FACTS

The July 2012 indictment states as follows:

That in Union County, South Carolina, between on or about May 01, 2010 and on or about _____ 2010, Stephen Douglas Berry did commit the crime of Criminal Sexual Conduct with a Minor in the Second Degree, in that the Defendant, on one or more occasion, did commit a sexual battery upon the victim, a minor who was at least fourteen years of age but who was less than sixteen years of age, by digitally penetrating or engaging in sexual intercourse with the victim, and the Defendant was in a position of familial, custodial, or official authority to coerce the victim to submit or the Defendant was older than the victim, in violation of Section 16-03-655, Code of Laws of South Carolina (1976, as amended). (R. p. 2).

Before the trial started, Berry's counsel moved to limit the testimony regarding any alleged sexual acts to the dates contained in the indictment. (R. p. 10, lines 20-23).

The State sought to introduce testimony that the alleged acts continued to occur beyond the dates set forth in the indictment. (R. p. 11, lines 17-23). The judge decided to allow the parties to start the trial and, at the appropriate time, the State would be allowed to proffer testimony regarding acts occurring after _____ 2010. (R. p. 17, line 19 – p. 18, line 7).

The State's first witness at trial was the victim. The victim testified that she began attending New Life Baptist Church in 2009 and that Berry was the youth pastor there at that time. (R. p. 27, lines 13-16, 22-24). She testified that she became close friends with Berry's daughter, Jadea Berry (Jadea), who was the same age. (R. p. 30, line 22 – p. 31, line 3). Around May of 2010, Berry and his family moved to a house which was three houses down from the victim's house. (R. p. 35, lines 7-9). She testified that shortly following this move, Berry digitally penetrated her. (R. p. 38, lines 6-23). She went on to testify that this type of activity occurred with regularity thereafter. (R. p. 48, line 25 – p. 49, line 18). She testified that, on one occasion while she was still fifteen, she and Berry engaged in sexual intercourse. (R. p. 53, line 13; p. 56, line 8 – p. 57, line 12).

In _____ 2010, the victim turned sixteen years old. (R. p. 59, lines 16-18). During an *in camera* review, she testified that the sexual relationship between Berry and her continued after she turned sixteen in _____ 2010 until March of 2011. (R. p. 60, lines 3-8). Over the objection of Berry's counsel, the judge allowed the State to present this testimony to the jury. (R. p. 65, line 24 – p. 66, line 1; p. 66, lines 16-17).

During the trial, the State also called Kim Roseborough, a psychotherapist and social worker, as a witness. (R. p. 106, lines 14-25). The judge found Ms. Roseborough

qualified to testify as an expert in the field of child sexual abuse assessment and treatment. (R. p. 110, lines 9-14). In the course of her practice, Ms. Roseborough counseled the victim. (R. p. 111, lines 15-17). During Ms. Roseborough's testimony, Berry's counsel objected to any statements relating to Ms. Roseborough's opinion that the circumstances of the victim's disclosure were consistent with a disclosure of sexual abuse. (R. p. 116, lines 2-15). Following a lengthy discussion with counsel outside the jury's presence, the judge sustained the objection. (R. p. 119, line 8). Shortly thereafter, Berry's counsel again objected to similar testimony of Ms. Roseborough and the judge overruled the objection. (R. p. 132, lines 1-21). The judge also overruled an objection by Berry's counsel that Ms. Roseborough was not qualified to diagnose the victim with PTSD. (R. p. 140, lines 3-25).

ARGUMENTS

I. THE TRIAL COURT ERRED IN ALLOWING THE VICTIM TO TESTIFY REGARDING ALLEGED OTHER ACTS WHICH EXCEEDED THE SCOPE OF THE INDICTMENT AND WHICH WERE NOT CRIMINAL IN NATURE.

It is well settled under South Carolina law that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE; *State v. Lyle*, 125 S.C. 406, 415-16, 118 S.E. 803, 807 (1923) (noting the rule "universally recognized and firmly established in all English-speaking countries, that evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged").

Under Rule 404(b), SCRE, such evidence may be admissible to show "motive, identity, the existence of a common scheme or plan, the absence of mistake or accident,

or intent.” Prior to considering whether the evidence satisfies one of the above exceptions, “the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE.” *State v. Cope*, 405 S.C. 317, 748 S.E. 2d 194 (2013) (citing *State v. Clasby*, 385 S.C. 148, 682 S.E.2d 892 (2009)).

During the hearing on pre-trial motions, the judge correctly noted that the age of consent in South Carolina is sixteen and that any sexual acts occurring after the victim turned sixteen were not crimes. (R. p. 11, lines 12-16). The judge went on to state that he failed to “see how a continuing relationship is a commission of a crime and it may be reversible. *Lyle*: It’s kind of *Lyle* in reverse that this continued pattern of bad acts afterward the how [sic] she reached the age of consent.” (R. p. 12, lines 10-13).

In the present case, the issue is first whether the testimony pertaining to events beyond those set forth in the indictment was relevant. Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. This testimony cannot be relevant because, even if the allegations are true, any activity occurring after the victim reached the age of consent was not criminal.

Alternatively, even if the testimony in question were relevant, it is inadmissible because, even if the allegations are true, any activity occurring after the victim reached the age of consent was not criminal. Furthermore, even if the testimony in question were relevant, it is inadmissible because it does not relate to an exception set forth in Rule 404(b), SCRE. Relying on *State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999), *State v. Whitener*, 228 S.C. 244, 89 S.E.2d 701 (1955), and *State v. Richey*, 88

S.C. 239, 70 S.E. 729 (1911) the judge allowed the testimony “based on the exception to the admission of evidence prior or subsequent bad acts under the common scheme or plan exception.” (R. p. 83, lines 20-22).

These three cases are distinguishable from the case at bar because, as Berry’s counsel correctly argued at trial, this case is not one which concerns a common scheme or plan. (R. p. 16, lines 15-17). Therefore, even if the testimony passed the first prong of the test and was relevant, it certainly would not meet the second prong. The admission of the testimony was error. Berry’s counsel correctly submitted to the judge that in the *Weaverling* case:

there were common scheme of [sic] plan in terms of other witnesses, I believe some other siblings that were testifying to other abuse. We don’t have that in this case. Essentially we have one alleged victim that would testify to some acts falling outside of the terms of the indictment which would be the position of the defense that that is not the common scheme of [sic] plan and would not fall under that exception.

(R. p. 16, line 22 – p. 17, line 4).

In *Weaverling*, the issue was whether the trial court erred in admitting evidence of uncharged sexual misconduct allegedly committed by the defendant. *Id.* at 467, S.E.2d at 790. The *Weaverling* Court held that the evidence at issue fell within the *Lyle* exception. Here, unlike *Weaverling*, the testimony concerning acts after the victim reached the age of consent were not criminal acts, and therefore were unchargeable acts, not just “uncharged” acts.

Finally, even if the testimony in question were relevant *and* related to an exception set forth in Rule 404(b), SCRE, it is inadmissible because any probative value is substantially outweighed by the danger of unfair prejudice. According to South Carolina law, “even though the evidence is clear and convincing and falls within a *Lyle*

exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.” *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); Rule 403, SCRE; *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996). Certainly, in this case, it is unfairly prejudicial to allow testimony of events that do not even constitute criminal acts to bolster evidence of alleged criminal acts.

The judge erred in allowing the victim to testify to alleged non-criminal events occurring after the dates set forth in the indictment and Berry should be granted a new trial.

II. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS TWO INADMISSIBLE ASPECTS OF THE STATE’S EXPERT’S TESTIMONY.

While “experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others.” *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). Specifically, “it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter.” *Id.* at 358, 727 S.E.2d at 499 (citing *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011)).

In an effort to clarify what constitutes proper subject matter of a forensic interviewer’s testimony in cases involving children, the *Kromah* Court set forth examples of “the kinds of statements forensic interviewers should avoid at trial:”

that the child was told to be truthful; a direct opinion as to a child’s veracity or tendency to tell the truth; any statement that indirectly vouches for the child’s believability, such as stating the interviewer has made a ‘compelling finding’ of abuse; any statement to indicate to a jury that the interviewer believes the child’s allegations in the current matter; or an opinion that the child’s behavior indicated the child was telling the truth.

Id. at 360, 727 S.E.2d at 500. Expert witnesses also cannot give opinion testimony on matters exceeding the scope of their expertise. *State v. Commander*, 396 S.C. 254, 721 S.E.2d 413 (2011) (citing *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001)).

During this trial, the State called Kim Roseborough, a psychotherapist and social worker, as a witness. (R. p. 106, lines 14-25). The judge found Ms. Roseborough qualified to testify as an expert in the field of child sexual abuse assessment and treatment. (R. p. 110, lines 9-14). In the course of her practice, Ms. Roseborough counseled the victim. (R. p. 111, lines 15-17). During Ms. Roseborough's testimony, Berry's counsel objected to any statements relating to Ms. Roseborough's opinion that the circumstances of the victim's disclosure were consistent with a disclosure of sexual abuse. (R. p. 116, lines 2-15). Following a lengthy discussion with counsel outside the jury's presence, the judge sustained the objection. (R. p. 119, line 8).

Shortly thereafter, the following exchange took place:

BY SOLICITOR ANTHONY:

Q: All right. And moving on, are there any typical symptoms of trauma that are exhibited by people who have been – by children who have been sexually assaulted?

A: Yes.

Q: Okay. And what are those?

A: There are certain symptoms of trauma that must be present in order to diagnose someone with a traumatic response or post traumatic stress disorder, and those include certain things – there are certain categories and the way that it is written in the Diagnostic Statistical Manual, you have to have a certain number under each category. The first category is that there has to have been some type of traumatic event where someone was harmed or felt like that they were in danger in some way and that that caused them a significant amount of distress.

MS. INZERILLO: Your Honor, I'm going to object. May we approach at this point?

(SIDE BAR CONFERENCE OFF THE RECORD OUT OF THE HEARING OF THE JURY AT 11:39 A.M.)

BY SOLICITORY ANTHONY:

Q: Okay. Are there any specific trauma symptoms that children would tend to show following a sexual assault?

A: Yes.

Q: And what are those or some of those?

A: Some of those would be hyper-vigilance. A very exaggerated, startled response. There could be distressing intrusive thoughts about the event that occurred. These can sometimes cause really significant problems with concentration because they are having intrusive thoughts and they are not able to get the event out of their mind. A lot of people can have and one of the symptoms certainly is agitation, outbursts of anger. They also can have feelings of detachment that lead to very significant depression and anxiety and the symptoms that would go along with both of those; lack of sleep, problems with appetite. Those types of things.

Q: And in regards to any of your treatment of the victim, did you make observations and form opinions as to specific symptoms of trauma suffered by her?

A: Yes.

Q: And what were those?

A: Over time the victim became much more agitated and had a lot of feelings of guilt and separation and detachment from her family. She became increasingly more angry and had some ---

MS. INZERILLO: Your Honor, I'm going to object.

THE COURT: I overrule your objection. Go ahead.

A: Thank you. Had some very violent outbursts toward people in her family, her dad and her brothers. And she became more withdrawn. She had a lot of feelings of loneliness and detachment. She became so clinically depressed that I was concerned about her and referred her to a psychiatrist.

(R. p. 130, line 15 – p. 132, line 21)

Later, Berry's counsel was allowed to put her objection on the record. The basis of this objection was that "Ms. Roseborough was testifying to a diagnosis of PTSD and...there had been no testimony as to her qualification to make that diagnosis... I believe the testimony was that of a social worker but nothing in terms of a M.D., or anything like that that would qualify her..." (R. p. 140, lines 10-15). The judge "determined that you don't have to be an M.D., to diagnose post traumatic stress disorder; that her qualifications were broad enough to encompass that. And I did agree that it had not been mentioned to that point and we had some concern that we would be launching into that line of testimony without any predicate." (R. p. 140, lines 17-23).

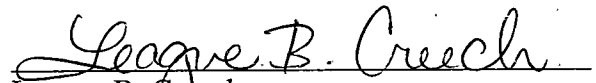
There can be no other conclusion than that this testimony prejudiced Berry. While "an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." *Kromah* at 357, 737 S.E.2d at 499. Furthermore, allowing Ms. Roseborough to testify that the victim developed PTSD due to the trauma of sexual abuse tells the jury that an expert finds the victim credible, which is precisely what the *Kromah* case forbids an expert to do. In this case, where no physical evidence exists linking the Defendant to the crime, the jury's decision comes down solely to the veracity of the victim. Ms. Roseborough was the only expert witness for the State. Qualification "as an expert clothes the witness with an air of authority that does not attach to 'ordinary' witnesses." *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (Pleicones, J., dissenting).

Berry should be granted a new trial given the prejudicial nature of Ms. Roseborough's expert testimony.

CONCLUSION

Based on the foregoing, Berry's conviction should be reversed and this case remanded to the Union County Court of General Sessions for a new trial.

Respectfully submitted,


League B. Creech

Peters, Murdaugh, Parker,
Eltzroth & Detrick, P.A.
Post Office Box 457
Hampton, South Carolina 29924
Telephone: (803) 943-2111
Facsimile: (803) 943-3943

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on
Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

ATTORNEYS FOR APPELLANT

October 8, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Case No. 2011-GS-44-0413

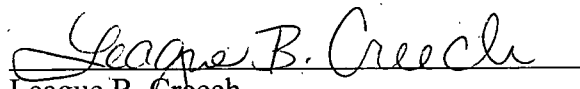
The State of South Carolina,.....Respondent,

v.

Stephen Douglas Berry,.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.


League B. Creech
Peters, Murdaugh, Parker,
Eltzroth & Detrick, P.A.
Post Office Box 457
Hampton, South Carolina 29924

October 8, 2014

ATTORNEYS FOR APPELLANT