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SC Court of Appeals

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Greenville County

Robin B. Stilwell, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

v.

SHANNON EARL GARLAND,

APPELLANT

APPELLATE CASE NO. 2018-002085  
\_\_\_\_\_

INITIAL BRIEF OF APPELLANT  
\_\_\_\_\_

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## **STATEMENT OF ISSUE ON APPEAL**

Did the trial judge err in allowing the alleged victim's treating therapist testify as an expert in the treatment of children with trauma, including but not limited to sex abuse and child sex abuse dynamics where the state failed to demonstrate the therapist's personal reliability and the therapist's testimony served to improperly vouch for Minor's credibility?

## STATEMENT OF THE CASE

On March 20, 2018, a Greenville County grand jury indicted Appellant for exposure of private parts in a lewd and lascivious manner (2016-GS-23-10154), criminal sexual conduct with a minor in the first degree (2018-GS-23-1757). R. \*(indictments). Then, on October 23, 2018, a Greenville County grand jury indicted Appellant for criminal sexual conduct with a minor in the third degree (2018-GS-23-7848A). R. \*(indictment). The state, represented by Alexa Kluska and Kris Hodge, called the case to trial before the Honorable Robin B. Stilwell and a jury on November 13-15, 2018. Tr. 1. Charles Propst and J. Maxwell Gravlee represented Appellant. Tr. 1. The jury found Appellant guilty as charged. Tr. 411, l. 7 – Tr. 412, l. 3. Judge Stilwell sentenced Appellant to six months imprisonment for the exposure charge, to fifteen years imprisonment for criminal sexual conduct with a minor in the third degree, and to twenty-eight years imprisonment for criminal sexual conduct with a minor in the first degree. Tr. 419, l. 19 – Tr. 420, l. 9; R. \*(sentence sheets). He ordered the sentences to be served concurrently. Tr. 419, l. 19 – Tr. 420, l. 9; R. \*(sentence sheets).

On November 19, 2018, Appellant served a notice of appeal. This brief follows.

## STATEMENT OF FACTS

Erin and Brad Watford were married for a short period of time. Tr. 104, l. 22 – Tr. 105, l. 11. From their union, Minor was born. Tr. 104, ll. 7-21. When Erin and Brad divorced, Erin and Minor moved to Moonville, South Carolina, to live with Andy Starick, Erin's new boyfriend. Tr. 105, ll. 12-23. After approximately four years, Erin and Andy separated, and Minor went to live with her maternal grandmother, Wilma Smith. Tr. 106, ll. 11-23. Minor lived with Wilma for a little over a year before Erin returned to get her. Tr. 107, ll. 8-15.

Appellant and Erin were romantically involved for just over five years. Tr. 327, ll. 15-18. During that time, Erin's daughter, Minor, lived with them from time to time. Tr. 108, l. 22 – Tr. 109, l. 3; Tr. 327, ll. 21-25. Over the years, Appellant and Erin struggled financially, forcing them to live in various places, including homes of friends and motels. Tr. 109, l. 15 – Tr. 119, l. 6; Tr. 183, ll. 10-12; Tr. 328, ll. 4-11.

On Mother's Day of 2016, Minor visited with Erin and Appellant, who were staying at a motel. Tr. 330, ll. 6-13; Tr. 331, ll. 2-5; Tr. 342, ll. 3-6. Appellant took Minor to Bi-Lo on Mother's Day to buy a gift for Erin. Tr. 331, ll. 6-8. Shortly after Minor gave Erin the gift, Erin wanted to go to the hospital. Tr. 331, ll. 8-10. Erin was addicted to prescription medication, and she wanted to get more pills. Tr. 331, ll. 13-18; Tr. 333, ll. 11-15. While Erin was away, Appellant and Minor colored and watched television. Tr. 342, ll. 7-16.

Later, Minor told Erin that she wanted to live with Erin. Tr. 331, ll. 19-21. Erin responded that she was not financially able to care for Minor. Tr. 331, ll. 21-23. In an effort to get a reaction, Minor insisted that if she could not live with Erin, then she wanted to go live with her biological father. Tr. 331, ll. 23-24. However, Minor did not receive the expected reaction; instead, Erin simply told Minor to go live with her father. Tr. 332, ll. 1-5.

Shortly after Mother's Day weekend, Minor told individuals that Appellant sexually abused her at the motel. Tr. 122, ll. 16-25; Tr. 194, l. 10 – Tr. 201, l. 3. Appellant emphatically denied the allegations. Tr. 324, ll. 15-17; Tr. 335, ll. 1-7. In fact, Erin did not believe Minor's accusations. Tr. 124, ll. 3-9. Minor was very hurt by her mother's lack of attention. Tr. 124, ll. 10-13. Therefore, a few short months later, Minor made additional allegations of abuse against Appellant. Tr. 127, ll. 17-23; Tr. 185, l. 6 – Tr. 190, l. 5; Tr. 192, l. 20 – Tr. 193, l. 17. After Minor made the additional allegations of sexual abuse, Minor's biological father obtained custody of her. Tr. 130, l. 24 – Tr. 131, l. 3.

## STANDARD OF REVIEW

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting Douglas, 369 S.C. at 429-30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct.App.2001)).

## ARGUMENT

The trial judge erred in allowing the alleged victim's treating therapist testify as an expert in the treatment of children with trauma, including but not limited to sex abuse and child sex abuse dynamics where the state failed to demonstrate the therapist's personal reliability and the therapist's testimony served to improperly vouch for Minor's credibility.

### **Relevant facts**

While Minor's maternal grandmother, Wilma Smith, was testifying, she informed the jury that Minor met with Erica Van Wagner, a mental health counselor for Greenville Mental Health. Tr. 128, l. 11 – Tr. 129, l. 1. Wilma explained that after Minor alleged she was abused by Appellant, she began seeing Van Wagner. Tr. 128, l. 11 – Tr. 129, l. 10. When Minor subsequently made additional allegations of abuse against Appellant, Wilma immediately contacted Van Wagner to assist Minor. Tr. 128, l. 11 – Tr. 129, l. 1. Minor continued to receive counseling from Van Wagner. Tr. 130, l. 21 – Tr. 131, l. 3.

Michael Robertson, the chief investigating officer, told the jurors that a second allegation of sexual abuse was brought to his attention by Erica Van Wagner, Minor's therapist. Tr. 246, l. 24 – Tr. 247, l. 17. When Robertson received the information from Van Wagner, he referred Minor to the Julie Valentine Center for a second forensic interview. Tr. 247, ll. 18-25. Robertson explained that a second forensic interview may be necessary when "the child makes a disclosure and then goes and sees a therapist and other stuff comes out during therapy session." Tr. 248, ll. 1-5.

Finally, Dr. Mary Fran Croswell examined Minor related to her allegations of abuse. Tr. 234, ll. 6-8. Minor "had a normal exam." Tr. 237, ll. 10-13. Minor also tested negative for sexually transmitted infections. Tr. 238, ll. 4-9. Nevertheless, Dr. Croswell recommended that Minor "have no contact" with Appellant "and that contact with her mother should be supervised."

Tr. 238, ll. 14-16. She further recommended that Minor receive “trauma focused, cognitive behavioral therapy.” Tr. 238, ll. 19-20.<sup>1</sup>

Prior to the state calling Van Wagner as a witness, defense counsel objected to her testimony and requested a proffer to ensure she was qualified and that her testimony was reliable. Tr. 277, ll. 13-15. Defense counsel argued “the reliability of her testimony [was] suspect.” Tr. 287, ll. 3-6.

After the proffer, the state indicated Van Wagner would testify about child sex abuse dynamics and her treatment of Minor. Tr. 282, l. 21 – Tr. 283, l. 4. The state argued Van Wagner was “an important piece of the factual puzzle because [Minor] did make a disclosure to her.” Tr. 283, ll. 14-18. In response to defense counsel’s objection to the state calling Van Wagner in this dual capacity because her testimony would “implicitly vouch[]” for Minor, the judge ordered the state to decide whether to call Van Wagner as “a blind witness or a fact witness.” Tr. 289, ll. 15-17. Defense counsel explained Van Wagner would “be testifying and say that she doesn’t believe the child she treated,” which would be unethical “to continue treatment when you don’t think there’s an issue, or she does genuinely believe the child and she can’t provide objective and unbiased testimony here today.” Tr. 287, ll. 12-25.

The state opted to call Van Wagner to testify “as to child sex abuse dynamics,” but explained that “it was made clear” through Investigator Robertson, Minor, and Minor’s grandmother that Van Wagner “was involved in the disclosure process.” Tr. 290, ll. 2-8. Defense

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<sup>1</sup> Although trial counsel did not object to this testimony, the solicitor’s line of questioning and Dr. Croswell’s answers violated the South Carolina Supreme Court’s holding in State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015). In Chavis, the Court held it was error to allow an expert in child abuse assessment to testify regarding her recommendation that the victim “not be around [Appellant] for any reason.” Chavis, 412 S.C. at 108-109, 771 S.E.2d at 340. The Court held that the expert’s “recommendation that Appellant not be around Victim for any reason, can only be interpreted as [the expert] believing Victim’s claim that Appellant sexually abused her. This type of testimony is improper.” Id. at 109, 771 S.E.2d at 340. The reason for the error was that it improperly bolstered the complainant’s credibility. Id.

counsel agreed, noting the jury was well aware that Van Wagner was Minor's therapist. Tr. 290, ll. 10-11. Defense counsel objected to Van Wagner testifying at all because the jurors were "aware that she was a treating counselor here," and "by testifying as a blind expert here, necessarily saying these are the things [she] observed in her or observed in general," she would improperly bolster Minor. Tr. 290, ll. 18-25. Put simply, Van Wagner would not be treating her unless she actually believed that something was going on. Tr. 290, l. 25 – Tr. 291, l. 1. Despite the objection, the judge permitted Van Wagner to testify as on behalf of the state. Tr. 291, ll. 6-11.

Erica Van Wagner, who was qualified as "an expert in the treatment of children with trauma, including but not limited to sex abuse and child sex dynamics," told the jurors that she was a mental health therapist, specializing in treating victims of trauma. Tr. 292, ll. 12-16; Tr. 295, ll. 9-12. She had been treating children who had been sexually abused for over eighteen years. Tr. 293, ll. 4-6. Van Wagner used "a treatment called Trauma Focused Cognitive Behavioral Therapy, or TF-CBT for short, which is an evidence-based treatment." Tr. 294, ll. 5-9.

According to Van Wagner, it was "way more common for a child to be sexually abused by someone that they know or that they're familiar with as opposed to that happening by a stranger." Tr. 296, ll. 16-21. She also told the jurors about how a perpetrator may groom someone in order "to lower the inhibitions" of the person "and to establish that trust to kind of decrease their defense mechanisms." Tr. 297, ll. 6-12.

When discussing "disclosure," Van Wagner detailed the "five kind of known stages of disclosure" from *her* experience. Tr. 299, ll. 6-20. She explained that "[i]n [her] experience, it's not common that a child reports right away." Tr. 300, ll. 3-4. Van Wagner "had the experience where a client disclosed when she was 86 years old" rendering "her disclosure ... delayed by some 76 years." Tr. 300, ll. 5-8. Van Wager used "a standardized trauma screen" – "a standardized list of

questions about experiences that children have.” Tr. 305, ll. 20-24. If a child experienced any of the “potential traumas,” then Van Wagner would do “the symptom checklist to explore any symptoms that [were] related to that particular trauma.” Tr. 305, l. 25 – Tr. 306, l. 3. Van Wagner told the jurors that all children of sexual abuse do not all have the same symptoms based on *her* experience. Tr. 306, ll. 4-6.

She elaborated that the symptoms *she* saw in children who had been sexually abused included “fear,” “sadness,” “alterations in mood,” “flashbacks,” “intrusive thoughts,” “avoidance,” “irritability, anger, anger outbursts, trouble sleeping, maybe sleeping too much.” Tr. 306, ll. 7-21. She also remarked upon the “outward manifestations of those symptoms in an unhealthy way” that *she* saw in children, including “talking back or being disrespectful, walking out of class.” Tr. 306, l. 22 – Tr. 307, l. 8.

In her closing argument, where the entire case centered on credibility, the solicitor argued that Van Wagner’s “testimony was so important because everything she said was so on point with what we know [Minor] is dealing with.” Tr. 362, ll. 18-21. Thereafter, the solicitor painstakingly detailed Van Wagner’s testimony. She reminded the jurors that Van Wagner claimed “most of the time abuse happens within families” because of “easy” “access.” Tr. 362, ll. 21-25. Here, according to the solicitor, Appellant was around Minor “all the time.” Tr. 363, ll. 1-3. As the solicitor recalled, Van Wagner told the jurors about grooming, and that the jurors “heard that all of that took place in [Minor]’s case.” Tr. 363, ll. 4-18. Next, the solicitor echoed Van Wagner’s testimony about “delayed disclosures” and argued that Minor failed to disclose her alleged abuse because of threats from Appellant and “domestic violence between [Appellant] and her mother” that Minor witnessed. Tr. 363, l. 19 – Tr. 364, l. 5. According to the solicitor, “[Minor] had a piecemeal disclosure and that [was] right in light with what Erica Van Wagner told” them. Tr. 365, ll. 4-6.

Thereafter, the solicitor hit the jury with her best argument for why the jury should believe

Minor:

You heard that there are many symptoms that children -- victims of sexual abuse deal with. And I actually wrote them down because they are so telling in this case. Erica Van Wagner told that some common symptoms are irritability, trouble sleeping, sadness, moodiness, avoidance, talking back or disrespect. Throughout the course of this trial, whether it be from [Minor] herself, her grandma, Dr. Crosswell or even the Defense, every single one of those symptoms [Minor] has.

Tr. 365, ll. 7-16. Further, the solicitor reminded the jurors that Van Wagner told them “about non-offending caregivers.” Tr. 368, ll. 20-21. According to Van Wagner, “the reaction of a parent who’s not the one who’s conducting the abuse, oftentimes has a very big impact on how and when children disclose.” Tr. 368, ll. 22-24.

### **Discussion**

The South Carolina Rules of Evidence and case law govern the admission and scope of expert testimony. Pursuant to the Rule, “[i]f 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.” Rule 702, SCRE. In Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), the South Carolina Supreme Court specified the following three-prong test for expert testimony:

[E]xpert 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. 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. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.

Id. at 446, 699 S.E.2d 169, 175 (internal citations omitted) (emphasis added). “All expert testimony must satisfy the Rule 702, SCRE, criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration.” State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

In State v. Chavis, 412 S.C. 101, 106-107, 771 S.E.2d 336, 338-339 (2015), the Court held that State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) should apply in qualifying child abuse assessment experts because their testimony is non-scientific. The Court found that the trial court improperly qualified the child abuse assessment expert in Chavis because there was “simply no evidence that her conclusions or impressions taken from [the] interviews were accurate.” Chavis, 412 S.C. at 108, 771 S.E.2d at 339. Although the Court established “no formulaic approach for determining the foundational requirements of qualification and reliability in non-scientific evidence,” the Court explained “evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies.” Id.

The trial judge erred in qualifying Van Wagner as “an expert in the treatment of children with trauma, including but not limited to sex abuse and child sex dynamics” where the state presented no evidence of Van Wagner's individual reliability. Repeatedly, the solicitor asked and Van Wagner answered questions regarding sex abuse based upon her personal experiences. Yet, the state failed to present any evidence that Van Wagner's personal experiences produced reliable results or answers.

Additionally, the trial judge erred in permitting Van Wagner, who was Minor's treating therapist, to testify as an expert in child abuse dynamics. See State v. Anderson, 413 S.C. 212,

776 S.E.2d 76 (2015). In Anderson, the South Carolina Supreme stated that to “allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim’s credibility.” Id. at 218-19, 776 S.E.2d at 79. “The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert.” Id.

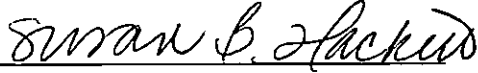
The forensic interviewer in Anderson “vouched for the minor when she testified only to those characteristics which she observed in the minor.” Id. The same thing happened in this case. In fact, the solicitor made this point clear in her closing when she reminded the jurors of Van Wagner’s testimony regarding the “symptoms” that “victims of sexual abuse deal with.” Tr. 365, ll. 7-16. According to the solicitor, “every single one of those symptoms [Minor] has.” Tr. 365, ll. 7-16.

Further, allowing the treating therapist to testify as an expert improperly vouched for Minor because a treating therapist must believe the patient. The solicitor admitted the jurors were aware that Van Wagner was Minor’s treating therapist because numerous witnesses had testified to that fact prior to Van Wagner even taking the stand. Van Wagner told the jurors how she used “a treatment called Trauma Focused Cognitive Behavioral Therapy, or TF-CBT for short, which is an evidence-based treatment.” Tr. 294, ll. 5-9. She also told the jurors about her use of “a standardized trauma screen” and “symptom checklist.” Tr. 305, l. 20 – Tr. 306, l. 3. Thus, Van Wagner made clear to the jurors that her treatment of Minor was “evidence-based” and involved the use of scientific screens and determinations. This testimony improperly vouched for Minor’s credibility. See State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (holding that an expert in child abuse assessment improperly vouched for the alleged victim by testifying that she recommended that the victim “not be around [Appellant] for any reason” because the testimony

could only be interpreted to mean the expert believed the alleged victim). “This type of bolstering, especially when made by a witness imbued with imprimatur of an expert witness, improperly invades the province of the jury.” Id. “The label of expert should be jealously guarded by the court and never loosely bandied about.” State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013). As the Court noted in Kromah, “although 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.” Id.

**CONCLUSION**

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

This 20<sup>th</sup> day of November, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Robin B. Stilwell, Circuit Court Judge

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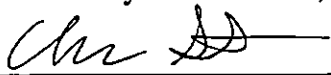
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blich, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Shannon Earl Garland, #287177, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 20<sup>th</sup> day of November, 2019.



Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 20<sup>th</sup> day of November, 2019.

 (L.S)

Notary Public for South Carolina  
My Commission Expires: September 30, 2029