STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FREDRICK HARRISON TOWE,

APPELLANT

APPELLATE CASE NO. 2018-002258

ANDERS BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by qualifying a state witness as an expert in child abuse counseling and allowing the witness to testify about delayed disclosure, recantation, and the nonoffending caregiver when the subject matter of her testimony was well within the realm of lay knowledge, improperly bolstered the complainant's credibility, and was unfairly prejudicial to Appellant?

STATEMENT OF THE CASE

A Pickens County Grand Jury indicted Appellant on November 20, 2018 for second degree criminal sexual conduct with a minor and incest. R. 306-309. His case was called to trial on December 17, 2018 before the Honorable Edward W. Miller, and a jury. R. 1. Assistant Solicitor Megan Owen represented the state, and John Dejong represented Appellant. R. 1. On December 18, 2018, the jury found Appellant guilty as indicted. R. 300, ll. 10-18. He was sentenced to ten years imprisonment on each offense to be served concurrently. R. 304, ll. 12-13.

This appeal follows.

STANDARD OF REVIEW

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the trial court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The trial 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, 847-848 (2006) (internal citations omitted). An abuse of discretion occurs when the trial 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 429-430, 632 S.E.2d at 848) (internal quotation marks omitted). "A trial 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)). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

ARGUMENT

The trial judge abused his discretion by qualifying a state witness as an expert in child abuse counseling and allowing the witness to testify about delayed disclosure, recantation, and the nonoffending caregiver when the subject matter of her testimony was well within the realm of lay knowledge, improperly bolstered the complainant's credibility, and was unfairly prejudicial to Appellant.

Relevant Facts

Tammy Truman, Minor's mother, began dating Appellant in January 1999. Truman, Minor, and Minor's younger brother moved in with Appellant in late February or early March 1999. The family moved out at the end of April 1999 to give Appellant an opportunity to work on his marriage with his then wife with whom he was separated. R. 46, l. 1- 47, l. 9; R. 152, l. 19 – 153, l. 4; R. 235, l. 1 – 236, l. 17. However, after Appellant's marriage ended, Truman, Minor, and her brother moved back in with Appellant in November 1999 when Minor was fourteen years old. R. 45, ll. 20-23; R. 47, ll. 6-19; R. R. 153, ll. 5-12. Truman and Appellant ultimately married on February 9, 2001. R. 60, ll. 10-12; R. 244, l. 25 – 245, l. 5.

Minor, who was thirty-three years old at the time of trial, claimed that Appellant forced her to have oral and vaginal sex with him beginning in September 2000 when she was fifteen years old. R. 56, l. 7 – 58, l. 1. She testified Appellant came "into [her] room on a daily basis for months and . . . just continued to do whatever he was in the mood for that day." Minor claimed this abuse continued until the summer of 2002 when she moved out of the house at the age of seventeen. R. 60, ll. 13-15; 63, ll. 2-10.

Minor first disclosed these allegations in January 2003. She told her then boyfriend who convinced her to tell her older brother and her mother. R. 63, ll. 11-24; R. 158, l. 20 – 159, l. 2.

She ultimately filed a police report with the Clemson Police Department on January 26, 2003, the same day she told her mother and brother. R. 64, ll. 20-25; R. 160, ll. 2-5; R. 228, ll. 3-16.

Tammy Truman, Minor's mother, immediately confronted Appellant about the allegations. Truman claimed Appellant "confessed everything to [her]." She testified, "He told me that sex between him and my daughter had happened and he convinced me that it was all her fault, that she is the one who started it, and . . . I believed him at the time." R. 161, ll. 3-21. According to Truman, Appellant "gave [her] twenty minutes" to meet Minor and tell Minor she "was standing by his [Appellant's] side" or Appellant was going to retain a lawyer and drag Minor "through the mud." R. 161, l. 22 – 163, l. 1.

After Truman told Minor she did not believe Minor and that she was "standing by" Appellant, Minor called the Clemson Police Department and said she did not wish to proceed with the charges. R. 66, ll. 5-9; R. 228, ll. 3-22. The case was "cleared" on February 3, 2003. R. 228, ll. 17-18. Minor again reported the allegations to law enforcement in 2016 after her mother and Appellant had divorced in 2014 or 2015. R. 67, ll. 5-20; App. 245, ll. 7-10.

Appellant, who testified in his defense at trial, vehemently denied that he ever had oral or vaginal sex with Minor. R. 233, l. 23 – 234, l. 5.

The state called Shauna Galloway Williams to testify as an expert in child abuse counseling. Before she testified, Appellant objected to Williams' qualification as an expert pursuant to Rule 702, SCRE, arguing the subject matter of her testimony was within the realm of lay knowledge, her testimony would not help the jury understand the evidence or determine a fact in issue, and her testimony would improperly bolster Minor's credibility. R. 192, l. 24 – 193, l. 24.

The state argued Williams' expert testimony was admissible pursuant to State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) and State v. Jones, 417 S.C. 319, 790 S.E.2d 17 (2016). R. 194, ll. 2-6. The solicitor asserted that the appellate courts have upheld expert testimony in child abuse dynamics and concluded it "is not something a lay person would know" and that it would assist the trier of fact in "determining believability, credibility, and understanding those dynamics that go into child abuse." R. 195, ll. 12-17.

The trial judge overruled the objection and qualified Williams as an expert in "child abuse counseling." R. 196, ll. 3-4; R. 201, ll. 13-19. However, he cautioned the state to keep Williams' testimony "brief" asserting "there is a tipping point and this is close, very close." R. 195, ll. 22-25.

Williams is the executive director of the Julie Valentine Center, a child abuse and sexual assault recovery center. R. 197, ll. 20-22. Prior to serving as the executive director, Williams was a forensic interviewer and clinical director at the center. R. 197, l. 23 – 198, l. 1. She has also worked at the Department of Mental Health as an outpatient "child and neglect therapist." R. 198, ll. 2-3.

Williams has a bachelor's degree in psychology from Winthrop University and a master's degree in counseling from Clemson University. R. 198, ll. 4-7. Her post-graduate training focused on child maltreatment and sexual assault. This is the area in which she specializes. R. 198, ll. 16-19. Williams is an adjunct professor at USC Upstate and a faculty member for South Carolina Child First, a group that trains forensic interviews. R. 199, ll. 11-19. Finally, she is licensed as a professional counselor in the State of South Carolina. R. 198, ll. 8-11.

Williams defined delayed disclosure for the jury and explained why someone might delay in disclosing allegations of sexual abuse. R. 202, l. 1 – 204, l. 25. She asserted, "One of the most

common reasons that someone would delay disclosure is fear, fear of what the consequences might be to themselves, fear of the consequences to the person that may have done this to them, fear of the consequences to their family, fear of not being believed." R. 203, ll. 5-10. She further maintained that individuals delay disclosure because they may have been threatened or they may feel embarrassed or ashamed. R. 203, ll. 17-24.

Williams also defined recantation and explained why someone may recant allegations of sexual abuse. R. 207, ll. 5-22. She maintained, "And the recantation can be influenced by some of those same things that influence why a child might delay a disclosure, that fear, threats. And, in particular, if some of those fears and threats are realized after the child has made the disclosure, they become at a much higher risk for recantation later on." R. 207, ll. 17-22.

Lastly, Williams described the nonoffending caregiver and how he or she may respond to a child's allegations of abuse. R. 205, l. 1 – 207, l. 4. A nonoffending caregiver is "a caregiver of a child who has been abused that is not the abusing parent." R. 205, ll. 3-6. Williams maintained that "the initial response of many non-offending caregivers . . . is a sense of disbelief. Some caregivers move beyond that disbelief and become protective caregivers and respond appropriate[ly] to their children, and some caregivers remain non-protective and non-believing." R. 205, ll. 11-16. She asserted that "[w]hen a child has already delayed disclosure or is sort of tentative about disclosing and realizes that individuals don't believe them, that may cause them to fall back on those fears that they had about telling in the first place. They may change their statements." R. 205, ll. 17-23.

Discussion

The trial judge abused his discretion by qualifying Shauna Galloway Williams as an expert in child abuse counseling and allowing her to testify about delayed disclosure, recantation,

and the nonoffending caregiver because of the subject matter of her testimony was well within the realm of lay knowledge, improperly bolstered Minor's credibility, and was unfairly prejudicial to Appellant.[1]

Rule 702, SCRE, which governs the admission of expert testimony, provides:

> If 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.

(emphasis added).

In Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), our 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 (emphasis added) (internal citations omitted).

In this case, the trial judge abused his discretion by qualifying Williams as an expert in child abuse counseling because the subject matter of her testimony was well within the realm of

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[1] *Contra* State v. Brown, 411 S.C. at 344, 768 S.E.2d at 252, *abrogated on other grounds by* State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (expert's testimony on child abuse dynamics and disclosures did not improperly bolster the minor complainants' testimony where expert had no knowledge of case and did not comment on the credibility of the allegations); State v. Jones, 423 S.C. at 636, 817 S.E.2d at 270-271 (holding "behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized.")

lay knowledge and did not assist the jury in understanding the evidence or determining a fact in issue as required by Rule 702, SCRE. Minor told the jury why she delayed disclosing the allegations and why she recanted the allegations after she first disclosed in 2003. Moreover, Tammy Truman, Minor's mother, explained to the jury why she initially did not believe Minor and why she responded in the way she did when Minor first disclosed the allegations in 2003. The jury did not need expert testimony to understand this evidence.

The only purpose of Williams' testimony was to improperly bolster Minor's credibility in violation of this state's long standing precedent. "[E]ven though 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, 358, 737 S.E.2d 490, 499 (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 358-59, 717 S.E.2d at 500. In Kromah, and State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011), our Supreme Court held the trial judge abused his discretion when evidence was admitted that a forensic interviewer believed the complainant had made a "compelling" allegation of abuse.

The prohibition against improper bolstering means that "a witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." Briggs v. State, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017). In this case, although Williams had not interviewed Minor, her testimony indirectly bolstered Minor's credibility. *Cf.* State v. Anderson, 413 S.C. 212, 219, 776 S.E.2d 76, 79 (2015) (witness qualified as expert in child abuse assessment improperly vouched for the minor complainant's credibility when she testified only to those characteristics which she observed in the minor).

In State v. McKerley, 397 S.C. 461, 463, 725 S.E.2d 139, 141 (Ct. App. 2012), the trial judge allowed a witness to testify as an expert in "forensic interviewing and child abuse assessment." The "expert" had interviewed the complainant twice and concluded that both interviews were compelling for sexual abuse. She also determined that the complainant's statements were consistent with other information she knew about the case. Id. at 466, 725 S.E.2d at 142. This Court held there was no other way to interpret the language used in the expert's testimony other than to mean she believed the complainant was being truthful. The Court further determined, "In light of [the expert's] extensive inadmissible testimony bolstering the credibility of the victim . . . we cannot say the erroneous admission of [the expert's] testimony did not contribute to the jury's decision," therefore concluding the error was not harmless. Id. at 467, 725 S.E.2d at 143.

Our Supreme Court has also held that it is improper "for an expert to comment on the veracity of a child's accusations of sexual abuse." Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011); See State v. Dawkins, 297 S.C. 386, 393-394, 377 S.E.2d 298, 302 (1989) (holding therapist indicating he believed complainant's allegations were genuine was improper); State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000) (holding therapist's testimony children were being truthful in ninety five percent of instances in which sexual abuse was alleged was improper vouching for child).

In Jennings, the "expert" forensic interviewer interviewed the three minor complainants and wrote a separate report for each child, which were admitted into evidence. She concluded in her reports that each child provided a compelling disclosure of abuse by the defendant and that the children provided details that were consistent with the background information received from their mother, the police report, and the other children. Jennings, 394 S.C. at 476-481, 716 S.E.2d

at 92-95. Our Supreme Court held the conclusions in the reports improperly vouched for the children's veracity and thus the trial judge had abused his discretion by admitting the reports into evidence. It further held the error was not harmless because there was no physical evidence presented at trial and, therefore, the children's credibility was the sole issue in the case. Id. at 94-95, 716 S.E.2d at 480.

In this case, while Williams did not interview Minor, the state still used her testimony to indirectly comment on Minor's credibility and provide greater weight to her testimony. See R. 279, l. 18 – 280, l. 24. Williams' testimony was very likely interpreted by the jury to express that they should believe Minor because her behavior is typical, expected, and complies with the behavior of the majority of other victims of sexual abuse. Her testimony strongly implied that because Minor acted in a similar manner as other victims of sexual abuse she must be telling the truth. Therefore, qualifying Williams as an expert and allowing her to testify was error for "[t]he assessment of witness credibility is within the exclusive province of the jury." McKerley, 397 S.C. at 464, 725 S.E.2d at 141 (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)).

The admission of Williams' testimony also violated Rule 403, SCRE, which provides in relevant part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." While the probative value of Williams' testimony was low, the danger of unfair prejudice was great since the presentation of Minor's alleged sexual abuse and her mother's response tracked closely with the expert's testimony. These parallels impermissibly allowed the jury to substitute its opinion of the credibility of the expert for the credibility of Minor.

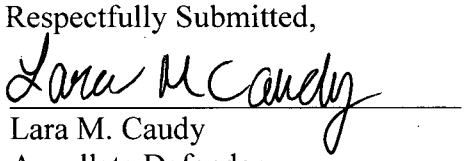
Moreover, there was no physical or forensic evidence of sexual abuse presented. The sole issue in this case was the credibility of Minor. Because Minor's credibility was the "most critical determination of this case" and Williams' testimony improperly bolstered her credibility, Petitioner was clearly prejudiced and should be granted a new trial. See Jennings, 394 S.C. at 480, 716 S.E.2d at 94-95 ("Because the children's credibility was the most critical determination of this case, we find the admissibility of the [forensic interviewer's] written reports was not harmless.").

Respectfully, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of December, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FREDRICK HARRISON TOWE,

APPELLANT.

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Fredrick Harrison Towe states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before, which was held on December 17-18, 2018 before the Honorable Edward W. Miller, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Fredrick Harrison Towe.

Respectfully Submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of December, 2019.

STATE OF SOUTH CAROLINA

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Complete Trial Transcript Dated December 17-18, 2018;
(2) True-Billed Indictments;
(3) Sentence Sheets.

I certify that this designation contains no matter which is irrelevant to this appeal.

December 12, 2019

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 12, 2019.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
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STATE OF SOUTH CAROLINA

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case have been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Fredrick Harrison Towe, #378638, at Allendale Correctional Institution, PO Box 1151, Highway 47, Fairfax, SC 29827, this 12th day of December, 2019.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of December, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: October 22, 2024.