

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Fairfield County

Honorable R. Keith Kelly, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

WILLIE EDWARD BYRD III

APPELLANT

APPELLATE CASE NO 2019-000484

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred where it allowed the testimony of a blind expert in child sex abuse dynamics and delayed disclosures, where the expert testified that delayed disclosure was common, that sexual abuse could cause confusion over sexual orientation, and that chronic abuse can negatively affect memory; where the minor alleged he delayed disclosure for four years, claimed he was bisexual, and claimed he was only able to specifically recall two instances of abuse out of roughly two hundred, since expert opinion may not improperly bolster the credibility of a witness; and, assuming arguendo that the evidence was not bolstering, it should have been excluded under Rule 403, SCRE?

STATEMENT OF THE CASE

On August 21, 2018, a Fairfield County Grand Jury indicted appellant for two counts of criminal sexual conduct with a minor in the second degree. R. 262 – 263; R. 254, ll. 12-21. Appellant was tried before the Honorable R. Keith Kelly and a jury, from March 18 – 20, 2019. R. 1. Bob Fitzsimmons represented appellant and Lisa Hall represented the state. R. 1.

The jury found appellant guilty of one count of criminal sexual conduct with a minor in the second degree, and it found him not guilty of the second count of criminal sexual conduct with a minor in the second degree. R. 254, ll. 3-21. The court sentenced appellant to a twenty-year term of imprisonment. R. 260, ll. 10-14; R. 264.

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 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)). 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).

The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); *see also State v. Dial*, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." (citation omitted)).

ARGUMENT

The trial court erred where it allowed the testimony of a blind expert in child sex abuse dynamics and delayed disclosures, where the expert testified that delayed disclosure was common, that sexual abuse could cause confusion over sexual orientation, and that chronic abuse can negatively affect memory; where the minor alleged he delayed disclosure for four years, claimed he was bisexual, and claimed he was only able to specifically recall two instances of abuse out of roughly two hundred, since expert opinion may not improperly bolster the credibility of a witness; and, assuming arguendo that the evidence was not bolstering, it should have been excluded under Rule 403, SCRE.

Because the expert's testimony mirrored the presentation of the minor's claim of sexual abuse, the expert's opinion improperly bolstered the minor's credibility. Although the expert was a "blind" expert, her testimony about how sexual abuse victims present tracked perfectly with the minor's presentation. Counsel correctly argued the expert testimony here should have been excluded as improper bolstering, and that the evidence's unfairly prejudicial nature outweighed its probative value.

Relevant facts

After the alleged victim (minor)¹ was caught filming another boy without the boy's knowledge while the boy masturbated in the school bathroom, school officials recommended the minor be expelled. R. 78, l. 13 – 80, l. 8. However, before the minor left school grounds, he visited his band teacher to explain why he would be unable to continue as a "drum major." R. 71, ll. 3-14. During the course of his conversation with the band teacher, the minor alleged he acted out sexually because he had been sexually abused by appellant, his uncle. R. 71, l. 24 – 72, l. 21.

¹ The alleged victim is referred to as "minor" herein, and as "minor 1" in the Record on Appeal.

The minor did not disclose the alleged abuse until he was in trouble for filming the other boy.

At trial, the minor claimed he had been sexually abused by appellant “once or twice a week” for four years, or “approximately 200 times.” R. 82, ll. 1-12. However, the minor only gave details as to two specific instances of sexual abuse—one of anal penetration and one of oral penetration. R. 63, ll. 2-15; R. 66, l. 15 – 67, l. 9. During direct examination, the minor stated that he was bisexual. R. 70, ll. 1-3.

The state proffered the testimony of Alicia Benedetto, a program manager at the Children’s Advocacy Center in Columbia. R. 143, ll. 9-12. Benedetto offered her testimony as a “blind” expert—she did not evaluate the minor, and she had no knowledge of the case at hand. R. 147, ll. 10-23. Benedetto said that “statistically speaking more than two-thirds of children delay disclosure.” R. 153, ll. 3-5. Benedetto offered that a child who had been “chronically” abused might have difficulty recounting “accurate detail.” R. 162, ll. 19-25. Benedetto added that sexual abuse generally causes “confusion about sexuality.” R. 163, ll. 16-19.

The state moved to qualify Benedetto as an expert in child abuse dynamics and delayed disclosure. R. 148, ll. 3-5. Defense counsel argued the testimony should be excluded because of its tendency to “improperly bolster” the minor’s credibility. R. 169, ll. 1-5. Counsel continued, “I believe that it is also unfairly prejudicial to my client, and that its prejudicial nature outweighs any probative value.” R. 169, ll. 5-8.

The court found the expert was qualified as “a clinical psychologist in child sex abuse cases with an emphasis on dynamics and delayed disclosures.” R. 155, ll. 13-15. The court found the expert testimony was necessary to assist the jury “because the subject matter falls outside the realm of ordinary lay knowledge . . . our courts have said the unique and often perplexing

behavior exhibited by child sexual abuse victims does not fall within the ordinary knowledge of a juror.” R. 167, ll. 4-8. The court also found the witness was reliable. R. 168, ll. 16-20.

The court noted that it had considered *Kromah*,² *Brown*,³ and *Jones*,⁴ and cited Rule 702, SCRE. R. 169, ll. 19-20; R. 170, ll. 2-11. The court found the testimony would assist a trier of fact. R. 170, ll. 11-14. The court also ruled the testimony was not overly prejudicial as the expert did not know the details of the case and would be testifying only to general characteristics. R. 171, ll. 13-19.

The expert’s testimony before the jury mirrored her in camera testimony.

Discussion

Here, the expert’s testimony about sex abuse dynamics and delayed disclosures improperly bolstered the minor’s testimony and should have been excluded.⁵ *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).

“[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. at 358, 737 S.E.2d at 499.

² *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013).

³ *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015).

⁴ *State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018).

⁵ *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 victim’s 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 270-71 (the law on delayed disclosure is settled in South Carolina: “behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized.”)

“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 in *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011), the South Carolina Supreme Court found error where evidence was admitted that a forensic interviewer believed the complainant had made a “compelling” allegation of abuse.

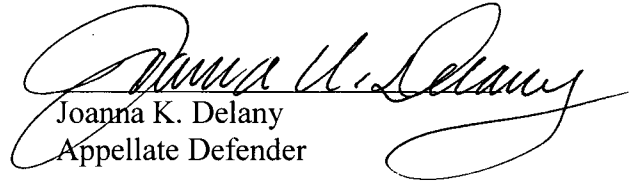
The prohibition against improper bolstering means that “a witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim.” *Briggs v. State*, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017). Here, although the expert had not interviewed the minor, her testimony indirectly bolstered the minor’s credibility.

The admission of this evidence also violated Rule 403, SCRE, which provides that “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” While the probative value of the evidence was low, the danger of unfair prejudice was great, since the presentation of the minor’s alleged sexual abuse tracked so 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 the minor, which confused the issues and unfairly prejudiced appellant.

The improper expert testimony here was not harmless, as the minor’s credibility was the heart of the state’s case. There was no physical evidence the minor had been sexually abused or that he had been sexually abused by appellant. Appellant did not confess. *See State v. Jennings*, 394 S.C. at 479, 716 S.E.2d at 94 (improper corroboration testimony was not harmless where “trial hinged on the children’s credibility”).

CONCLUSION

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


Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of November, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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V.

WILLIE EDWARD BYRD III

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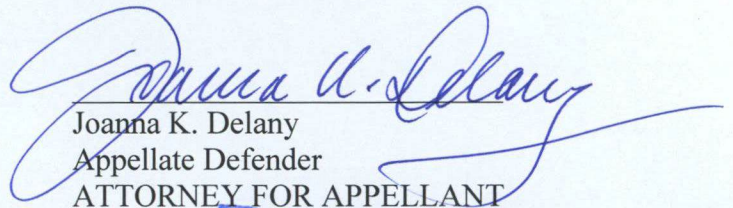
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Willie Edward Byrd states:

1. She is 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 Judge R. Keith Kelly, which was held on March 18 - 20, 2019, 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 Willie Edward Byrd.

Respectfully Submitted,


Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

This 19th day of November, 2019.

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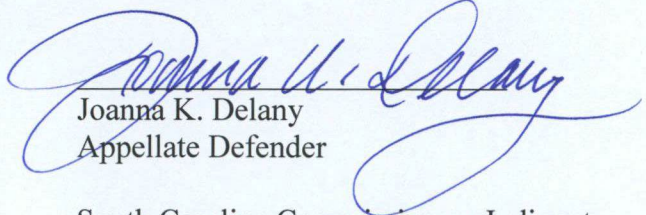
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SC Court of Appeals

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."

November 19, 2019.



Joanna K. Delany
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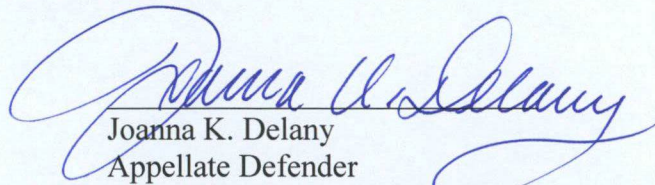
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WILLIE EDWARD BYRD III

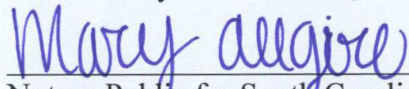
APPELLANT

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 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 Anders Brief of Appellant and Designation of Matter have been served on Willie Edward Byrd, 197193, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 19th day of November, 2019.


Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of November, 2019.

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

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SC Court of Appeals