

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

RECEIVED

FEB 18 2020

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ONTARIO STEFON PATRICK MAKINS,

APPELLANT

APPELLATE CASE NO 2020-000024

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner's Statement of Issue on Appeal

Whether the Court of Appeals erred by finding the therapist indirectly bolstered Victim's testimony merely by stating she treated Victim. The therapist was allowed to testify to the circumstances of treatment and also provide expert treatment on trauma resulting from sexual abuse pursuant to Shumpert; and the therapist never indicated directly or indirectly that she believed Victim?

STATEMENT OF THE CASE

Ontario Makins was indicted by a Greenville County grand jury on August 23, 2016 for lewd act and criminal sexual conduct with a minor in the third degree. R. 347. He proceeded to trial before the Honorable Robin Stilwell and a jury on December 5, 2016. R. 1. Tom Quinn represented Makins; Kate Patterson and Chris Hodge prosecuted the case.

After a four-day trial, the jury found Makins guilty of the criminal sexual conduct charge and not guilty of the lewd act charge. R. 368, ll. 6 – 16. Judge Stilwell sentenced Makins to ten years' incarceration. R. 370, ll. 3 – 8. Makins pursued a direct appeal, and the Court of Appeals heard argument on November 7, 2018. Makins' conviction was reversed when the Court of Appeals held that an expert witness called by the state at trial improperly implied she believed the minor child. State v. Makins, 428 S.C. 440, 835 S.E.2d 532 (Ct. App. 2019); App. 451. The state filed a Petition for Rehearing and Petition for Rehearing En Banc on or about September 19, 2019. App. 460. Counsel for Respondent filed a Return on or about September 30, 2019. App. 477. The state filed a Reply on October 7, 2019. App. 484. Rehearing was denied on December 16, 2019. App. 488.

The state filed its Petition for Writ of Certiorari on January 7, 2020. This Return follows.

ARGUMENT

Relevant facts

On March 20, 2015, following a presentation by Jenna Toney from the Julie Valentine Center to a second grade class at Mitchell Road Elementary School, Minor alleged that Makins molested her. R. 109, ll. 4 – 11. Minor initially contended that Makins supposedly touched her “private parts” on several occasions but expressly denied any other abuse. R. 235, l. 15 – R. 237, l. 11. After meeting with Kristen Rich of the South Carolina Department of Mental Health, Minor suggested Makins asked her to perform oral sex on him. R. 275, l. 8 – R. 279, l. 20. There was no physical evidence presented at trial.

Makins voluntarily met with the police after the allegations were leveled. R. 210, l. 5 – R. 211, l. 17. He adamantly denied any sexual abuse. Id. Unlike a forensic interview conducted with Minor, Makins’ statements were not recorded based upon a dubious claim from law enforcement that the recording system was not turned on. R. 210, l. 5 – R. 211, l. 21.

At trial, the state sought to have therapist Kristin Rich testify as both an expert in the treatment of child trauma and child sexual abuse dynamics and as the therapist that diagnosed Minor with post-traumatic stress syndrome. R. 249, ll. 1-14. Further, the state sought to have Rich testify that Minor, a year and half after her first allegation of sexual abuse by Makins, disclosed to her during a counseling session that Makins had forced her to repeatedly perform oral sex on him when she was between the ages of six and eight. R. 91, l. 7 – 92, l. 25.

Rich was a clinical counselor and a therapist, employed in the Piedmont office of the Department of Mental health. R. 240, ll. 9 – 20. She described her job duties as including meeting with children and their parents in order to perform an evaluation and assessment, to

include diagnosis and treatment. R. 242, l. 10 – R. 243, l. 8. She defined trauma in front of the jury:

So trauma is a very bad event where somebody feels like they might be hurt or killed or something very bad might happen to them. And generally, it's shocking in nature where somebody feels helpless or terrorized or horrified, and if that occurs to them. So something out of the ordinary that's bad. It's worse than falling down and skinning your knee. It's something that tragically shifts your life.

R. 243, ll. 9 – 20. Rich then offered examples of trauma, including sexual abuse. R. 243, l. 21 – R. 244, l. 5. When asked about her therapy model, she specifically described an “evidence-based model” that she used “for children with trauma.” R. 244, ll. 6 – 12. She estimated that she had provided therapy to approximately five hundred children at the time of trial, with roughly one quarter of those children having experienced trauma as a result of sexual abuse. R. 248, l. 22 – R. 249, l. 5.

Defense counsel objected to having Rich testify as both an expert witness and a fact witness. Counsel argued that Rich's testimony would improperly bolster Minor's testimony. R. 47, l. 11 – 49, l. 7. The trial court acknowledged defense counsel's concern was valid:

This is my concern about this witness and why I'm somewhat circumspect. We have a long line of cases which discuss expert witnesses buttressing the credibility of minor witnesses. And although I think that most of what she talked about in a vacuum is okay, my concern is that she begins to talk about the specific treatment and discussions with this child and without saying 'that makes her believable', she is suggesting that that makes her believable.

And I want to make sure that what we're not doing is an end run around forensic interviewers being qualified as expert witnesses and thereby buttressing the credibility of witnesses.

R. 48, ll. 8-23. The state assured the trial court that it would limit Rich's testimony and not ask her if she determined the source of Minor's PTSD. R. 45, l. 23 – 46, l. 22.

Rich was qualified as an expert in child the treatment of child trauma and child sexual abuse dynamics; she testified before the jury as to the common symptoms children exhibit when

they have experienced trauma. R. 251, l. 4 – 253, l. 20. Rich stated that child who have experienced trauma frequently act out and misbehave. Id.

Rich also explained that children who have experienced trauma because of sexual abuse will frequently avoid talking about the abuse or avoid trying to visit where the abuse occurred. She posited that child sexual abuse "is strongly correlated with ... bedwetting, pulling out hair, wanting to avoid particular situations, being frightened in certain situations. Sometimes children who have been abused by a particular type of perpetrator, they want to avoid that. .. some children want to avoid men." R. 252, ll. 17-25.

Rich then suggested children typically do not immediately disclose the abuse and how it was perfectly normal for children's stories surrounding the abuse to change over time. "Disclosure is really not an event, it's a process." R. 254, l. 2 – 255, l. 18. Almost every single factor that Rich enumerated regarding characteristics and behaviors of children who have suffered trauma because of sexual abuse, matched Minor's behavior, specifically those enumerated by Minor's mother in response to a question by the solicitor. R. 153, l. 16 – R. 154, l. 15.

The state outright asked Rich about her treatment of Minor, immediately prompting an objection from counsel. R. 257, ll. 6 – 12. Defense counsel immediately moved for a mistrial arguing that the State had just vouched for Minor's credibility in direct violation of the court's pre-trial ruling:

Defense counsel stated that Rich had stated she worked with children who had sustained trauma and that she was treating Minor for trauma. "[O]nce Ms. Rich says 'I only work with people who have been traumatized, who have suffered ...' - I believe that her description was "a very bad event, one that they can feel that they can be hurt or killed, that was shocking and would leave them horrified", she is saying that, 'Every child I work with or every person I work with has suffered some trauma. That's why I provide counseling to them, is they are my clientele.

By definition then, she is saying [Minor] suffered a trauma. In this case, the trauma was from sexual abuse.

R. 260, ll. 3-16.

Counsel further averred that it was obvious the State was attempting to vouch for Minor's credibility by "saying in essence 'if she didn't suffer trauma, I wouldn't be working with her.' "

R. 260, ll. 18-25. Furthermore, once the state had Rich testify to Minor's disclosure, Rich would expressly stating that she had found Minor's disclosure credible.

In response, the state posited that "Ms. Rich's testimony thus far has been completely contained to blind expert testimony" seemingly overlooking the testimony regarding treatment of Minor which prompted the objection. R. 261, ll. 7 – 14. The assistant solicitor claimed "we're not going to have her get into the specifics." R. 263, ll. 16 – 23. Moments later, the assistant solicitor, when asked by the trial judge, admitted that she intended to ask Rich whether she provided therapy to Minor as well as whether Minor disclosed alleged sexual abuse. R. 265, l. 10 – R. 266, l. 7.

When the state sought to distinguish Rich, a therapist, from forensic interviewers, the trial judge pointedly remarked that a concern still exists:

Well, you know, we collectively as professionals are less concerned about what case law says and more concerned about what it means.

And what we're talking about is an expert witness, adult vouching for the veracity of a minor victim. And I'm not certain how we distinguish the therapist from a forensic interviewer. I know how we do it semantically. I'm not certain how we do it substantively. So we need to be very careful with that.

R. 267, ll. 5 – 16.

The trial court declined to grant a mistrial, but noted the clear parallel between Rich's testimony and the – now impermissible – testimony of purported forensic interviewers. R. 270, l. 24 – R. 271, l. 2. The trial judge stated that "essentially at this point she has testified as a

blind witness for all intents and purposes.” R. 269, ll. 18 – 22. However, if Rich talked about the diagnosis, she ran the risk of vouching, according to the trial judge. R. 269, l. 23 – R. 270, l. 4.

After the jury returned, Rich testified that Minor disclosed the sexual abuse to her during a counseling treatment session. R. 275, l. 8 – 279, l. 20. Rich recalled that the disclosure, "wasn't until the second session that she would say it because part of the therapy is to be able to say the things that you're scared of." R. 279, ll. 7-13.

While deliberating, the jury sent the trial judge a note which stated: “We have not come up with a verdict. Are we allowed to leave for the night and restart our discussion tomorrow?” R. 411, ll. 2 – 5. The following day, the jury sent four additional notes to the judge. R. 361, ll. 6 – 13. In response, the trial judge provided the jury with a DVD player for viewing a DVD that was admitted into evidence showing the forensic interview and recharged them regarding criminal sexual conduct with a minor in the first degree and third degree. R. 361, l. 16 – R. 362, l. 4.

After that occurred, the jury deliberated for another five hours before reaching a verdict. R. 366, l. 22 – R. 367, l. 8. As noted above, the jury found Makins not guilty on the lewd act charge and guilty on the criminal sexual conduct in the third degree charge. R. 368, ll. 6 – 16. The trial judge sentenced Makins to ten years’ incarceration. R. 370, ll. 3 – 8.

Appeal

Makins’ third issue on appeal was:

The trial court abused its discretion by allowing a witness to testify as both an expert witness in child sexual abuse trauma and as a fact witness regarding Minor’s allegations of sexual abuse as the expert’s testimony improperly bolstered Minor’s credibility in a sexual abuse case against Appellant where Minor’s credibility was the critical determination in the case.

App. 390.

The Court of Appeals correctly held that the circuit court erred in allowing Rich to indirectly bolster Minor's testimony by permitting her to testify as both an expert in child sexual abuse trauma and as a fact witness regarding Minor's allegations of sexual abuse. App. 453. Because the Court of Appeals' holding was correct and supported by South Carolina jurisprudence, this Court should deny the petition for writ of certiorari.

Discussion

There is no doubt the *only* purpose of Rich's testimony was to improperly bolster Minor's testimony. This point can be gleaned from the assistant solicitor's own words during closing argument:

Ladies and gentlemen, the last witness you heard from Kristin Rich, who the Judge qualified as an expert. She told you that she has been treating children and trauma victims since 2011. She's treated over five hundred children, including between a hundred and twenty and a hundred and fifty for sexual abuse. Kristin talked to you about trauma, what trauma means and the symptoms that children who have experienced trauma often experience: bedwetting, nightmares, avoidance, trouble sleeping, guilt, shame and acting out.

Ladies and gentlemen, **those are the exact same symptoms that Minor's mother described to you that her child has experienced.**

R. 308, l. 16 – R. 309, l. 7. (emphasis added). Additionally, the assistant solicitor contended that when Minor disclosed to Rich, “[t]he other witness in this case,” essentially “that corroborates it.” R. 312, ll. 6 – 19.

The South Carolina Court of Appeals has held that it is improper for a witness to bolster the testimony of other witnesses. State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012); see also Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (finding a "forensic interviewer's...opinion testimony improperly bolstered the Victim's credibility").

In McKerley, the trial court allowed a witness to testify as an expert in "forensic interviewing and child abuse assessment." 397 S.C at 463, 725 S.E.2d at 141. The expert had interviewed the alleged victim twice and concluded that both interviews were compelling for sexual abuse. She also determined that the victim's statements were consistent with other information she had on the case. Id. at 466, 725 S.E.2d at 142. Our Court of Appeals determined that there was no other way to interpret the language used in the expert's testimony other than to mean she believed the victim was being truthful. It further held, "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 finding harmful error. Id. at 467, 725 S.E.2d at 143.

This Court has also held that it is improper "for an expert to comment on the veracity of a child's accusations of sexual abuse." State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); see State v. Dawkins, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper); see also State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000) (finding 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 Dawkins, this Court held that it was improper for the prosecution to ask an expert witness who had treated the alleged victim whether her symptoms were genuine. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989). In that case, the solicitor asked Dr. Banks, a psychiatrist who had treated the alleged victim, "Based on your examination and your observations of Pamela, are you of the impression that her symptoms are genuine?", and the

response was in the affirmative. Id. at 393, 377 S.E.2d at 302. Rather than ruling on Dawkins' subsequent motion for a mistrial, the trial judge gave a curative instruction. Id. This Court stated that "[a]lthough it was improper for the prosecutor to pose the question, it was not of such magnitude to effect the outcome of the trial." Id. at 394, 377 S.E.2d at 302.

In State v. Jennings, this Court reversed two convictions of committing a lewd act upon a minor following the trial court's erroneous admission of a forensic interviewer's written reports which improperly vouched for the minor children's credibility. 394 S.C. 473, 716 S.E.2d 91 (2011). The written reports were created by forensic interviewer Shauna Galloway-Williams and contained sections called "Regarding Allegations of Abuse" and "Conclusion of Interview" that bolstered the minors' credibility and averred that the children provided "a compelling disclosure of abuse." Id. at 476-7, 716 S.E.2d at 93. This Court held that the reports allowed the forensic interviewer to improperly vouch for the children's veracity:

In each report, the forensic interviewer stated that during the interviews, each child had "provide[d] a compelling disclosure of abuse by [appellant]." The forensic interviewer further concluded that each of the children provided details consistent with the background information received from their mother, the police report, and the other children. **There is no other way to interpret the language used in the reports other than to mean the forensic interviewed believed the children were being truthful.** We therefore find the trial court erred in allowing the State to introduce the reports.

Id. at 480, 716 S.E.2d at 94. (emphasis added). This Court held that conclusions in the reports improperly vouched for the children's veracity and, thus, the trial court abused its 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 State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), this Court set forth general guidelines regarding prohibited testimony. In Kromah, the defendant was convicted of infliction

of great bodily injury upon a child and unlawful neglect of a child. Id. at 343-4, 737 S.E.2d at 492. The state relied on testimony from Heather Smith, a forensic interviewer; the minor child did not testify. Id. at 348, 737 S.E.2d at 494. This Court held that the issue was preserved for review, addressed it on the merits, but concluded it was harmless beyond a reasonable doubt.

Smith interviewed the minor child at the Assessment and Resource Center, a non-profit child abuse evaluation and treatment center. Id. at 350, 737 S.E.2d at 495. Smith's testimony at trial was that the minor child had given a compelling finding for child abuse. Id. at 351, 737 S.E.2d at 496. This Court held the admission of portions of her testimony was error:

[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others. It is undeniable that the primary purpose for calling a "forensic interviewer" as a witness is to lend credibility to the victim's allegations. When this witness is qualified as an expert the impermissible harm is compounded.

Id. at 358, 737 S.E.2d at 499-500.

This Court further noted that "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 attack more significance to the testimony of experts." Id. at 357, 737 S.E.2d at 499.

Two non-exclusive lists were offered as general guidelines, one containing examples of inadmissible testimony, the other entailing permissible statements. In the former category were five prohibited categories: 1) that the child was told to be truthful; 2) a direct opinion as to a child's veracity or tendency to tell the truth; 3) any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a "compelling finding" of abuse; 4) any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or 5) an opinion that the child's behavior indicated the child was telling the truth. Id. at 360, 737 S.E.2d at 500. By contrast, the following types of statements were described as

proper testimony: 1) the time, date, and circumstances of the interview; 2) any personal observations regarding the child's behavior or demeanor; or 3) a statement as to events that occurred within the personal knowledge of the interviewer. Id. Rich's testimony in the matter at hand violated at least two of the prohibited statements.

In State v. Anderson, this Court reversed a criminal sexual conduct with a minor conviction after one of the state's witnesses impermissibly bolstered the testimony of the minor. 413 S.C. 212, 776 S.E.2d 76 (2015). Initially, Anderson is similar to the matter at hand: in that case, there was no physical evidence, and the appellant denied the accusations. In Anderson, the state sought to offer Witness Smith as an expert in "child abuse assessment." Id. at 218, 776 S.E.2d at 79. The trial judge "declined to hold a hearing on the existence of this expertise, much less whether Smith possesses the necessary qualifications" which led to reversal. Id. Notably, Anderson reinforced the holding that "[t]he better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert." Id. Especially relevant to Makins' case is the following holding:

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. Here, Witness Smith vouched for the minor when she testified only to those characteristics which she observed in the minor.

Id. at 218-9, 776 S.E.2d at 79 (internal citations and footnote omitted). This Court in Anderson Court pointed out how the error prejudiced the appellant:

This case turned solely on the credibility of the minor and of Appellant. The minor testified to abuse by Appellant over a course of three to four years, while Appellant denied any improper conduct. There was no physical evidence of sexual abuse. We note that the solicitor and Witness Smith (a very experienced witness) repeatedly pushed the boundaries of the parties' common understanding of the permissible limits of Smith's trial testimony.

Id. at 79, 776 S.E.2d at 219.

It is clear from the record that the state in this case attempted to circumvent recent case law sharply limiting the use of forensic interviewers by presenting a Minor's therapist, who was presumably familiar Minor' expected testimony and specific allegations. The State used Rich's direct knowledge of the specifics of the case to *indirectly comment on Minors' credibility* and provide greater weight to their testimony.

Rich's testimony was very likely interpreted by the jury to express that they should believe Minor because Minor's behavior was typical, expected, and complied with the behavior of the majority of other victims of sexual abuse. Moreover, that jurors should believe Minor because she disclosed sexual abuse to an expert in "the treatment of child trauma and child sexual abuse dynamics." The expert, Rich, found Minor's disclosure credible enough to inform law enforcement

For example, Rich testified that the vast majority are children are delayed in disclosing abuse just like Minor in this case. Her testimony strongly implied that because she witness Minor act in the same manner as other victims of sexual abuse Minor must be telling the truth.

Not only was Rich's testimony used to bolster Minor's testimony, it was also highly prejudicial to Appellant and cumulative. Under Rule 403, SCRE, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ... or needless presentation of cumulative evidence."

Why Minor delayed disclosing was an issue of dispute. Initially, Minor claimed Appellant threatened her life and her family. Minor later admitted that this was a lie and that she did not disclose earlier because she did not realize Appellant was a child molester. Rich testified that either reason was consistent with the actions of a child who was traumatized by sexual abuse. R. 251, l. 6 – 257, l. 8. Rich's testimony regarding both the typical process of delayed

disclosure and her first hand observations of Minor's disclosure process was used solely by the State to reinforce and reiterate the reasoning for Minor's actions and behavior. See Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) ("Improper corroboration testimony that is *merely cumulative to the victim's testimony*, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.") (emphasis in original).

Rich's testimony was also prejudicial to Appellant because there was no physical evidence presented in the case and the sole issue was the credibility of Minor. Because the Minor's credibility was the most critical determination in this case and Rich's testimony was used solely to bolster Minor's credibility, Appellant was clearly prejudiced and was correctly 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.").

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.

As the Court of Appeals 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 seemingly 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. App. 471. 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.

Petitioner 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, 1. 3 – R. 49, 1. 12.

Reliance on Schumpert, supra, is disingenuous following this 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 the Court of Appeals 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 the Court of Appeals.

The present opinion 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.” App. 458. As in Anderson, it is clear from the record that the state in this case similarly sought to push the boundaries of the permissible limits of Rich’s testimony. Ignoring warnings from the trial judge, the state nonetheless presented Minor’s therapist—an individual who had treated her trauma—who was undoubtedly familiar with Minor’s 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.

Various types of therapists in South Carolina are statutorily regulated. The “practice of physical therapy” is defined as:

[T]he evaluation and treatment of human beings to detect, assess, prevent, correct, alleviate, and limit physical disability, bodily malfunction, and pain from injury, disease, and any other bodily or mental condition and includes the administration, interpretation, documentation, and evaluation of physical therapy tests and measurements of bodily functions and structures; the establishment, administration, evaluation, and modification of a physical therapy treatment plan which includes the use of physical, chemical, or mechanical agents, activities, instruction, and devices for prevention and therapeutic purposes; and the provision of consultation and educational and other advisory services for the purpose of preventing or reducing the incidence and severity of physical disability, bodily malfunction, and pain.

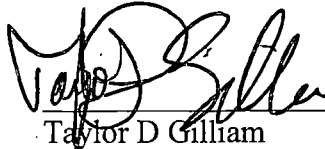
S.C. Code Ann. § 40-45-20. The practice of speech-language pathology means “the rendering of or the offering to render any speech-language pathology services to an individual, group, organization, or the public.” S.C. Code Ann. § 40-67-20.

The jury was probably familiar with the likes of speech therapists, physical therapists, and occupational therapists. Those professionals are tasked with treating individuals who require

assistance. Therefore, the jury likely believed therapists like Rich only treat individuals who appear to need it. As correctly deduced by the Court of Appeals, Rich's testimony implied she believed Minor was telling the truth with respect to her allegations of sexual abuse. Further, the solicitor leveraged the overlap during closing argument, increasing the prejudice to Makins. The trial judge's jury instruction, buried within the court's charge following closing arguments was insufficient to cure the error. R. 344, l. 11 – R. 345, l. 4. The Court of Appeals, finding the error preserved, correctly held that the admission of Rich's testimony was error, and that error was not harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that the petition for writ of certiorari be denied.

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

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of February, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

RECEIVED
FEB 18 2020
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ONTARIO STEFON PATRICK MAKINS,

APPELLANT

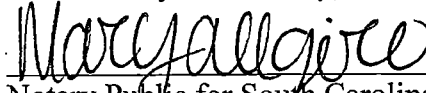
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari and a copy of the Appendix in the above referenced 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 5th day of February, 2020.



Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR RESPONDENT
this 18th day of February, 2020.

 (L.S)
Notary Public for South Carolina

My Commission Expires: May 12, 2027.