RECEIVED
Jul 02 2020
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

PETITIONER,

V.

ONTARIO STEFON PATRICK MAKINS,

RESPONDENT

APPELLATE CASE NO 2020-000024

BRIEF OF RESPONDENT

TAYLOR D. GILLIAM
Appellate Defender

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

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUES PRESENTED

Petitioner's Statement of Issue on Appeal

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

Respondent's Statement of Issue on Appeal

Whether the Court of Appeals correctly held that the circuit court erred in allowing an expert witness who treated Minor 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, where the testimony improperly implied she believed Minor was telling the truth?

STATEMENT

Ontario Makins was indicted by a Greenville County grand jury on August 23, 2016 for lewd act, criminal sexual conduct with a minor in the third degree, and criminal sexual conduct with a minor in the first degree. App. 8 ll. 3 – 25; App. 374. He proceeded to trial before the Honorable Robin Stilwell and a jury on December 5, 2016. App. 5. 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 in the third degree charge and not guilty of the lewd act and criminal sexual conduct in the first degree charges. App. 368 ll. 6 – 16. Judge Stilwell sentenced Makins to ten years' incarceration. App. 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.

Petitioner filed its Petition for Writ of Certiorari on January 7, 2020. The undersigned filed a Return on February 18, 2020. Petitioner filed a Reply on February 26, 2020. Certiorari was granted on April 24, 2020. The state filed its Brief of Petitioner on May 1, 2020. This Brief of Respondent follows.

STANDARD OF REVIEW

"A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." State v. Chavis, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015) (citing State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006)). "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." Id. (citing State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006).

ARGUMENT

The Court of Appeals correctly held that the circuit court erred in allowing an expert witness who treated Minor 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, where the testimony improperly implied she believed Minor was telling the truth.

Petitioner's suggestion that Kristen Rich's testimony was proper might have been more persuasive had this case been on appeal thirty years ago or perhaps even at the turn of the millennium. As it stands, however, the state's argument succumbs to the weight of case law from this Court which has repeatedly disallowed testimony which implies that an expert witness believes a minor. Although the state, both at trial and on appeal, has sought to distance itself from the inescapable conclusion that Rich's testimony was designed to convince the jury that Minor was telling the truth, one sentence from closing arguments completely undermines that position. After harping on Rich's expert qualifications and listing symptoms she associated with trauma, the solicitor revealed the true purpose of Rich's testimony—to bolster Minor's credibility: "Ladies and gentlemen, those are the exact same symptoms that Minor's mother described to you that her child has experienced." App. 309 ll. 4 – 7. In doing so, the state revealed its intent, contrary to previous assertions to the trial judge, to have an expert witness suggest to the jury that Minor was telling the truth.

Relevant facts

There was no physical evidence corroborating Minor's allegations. 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 provided treatment to Minor in the

context of a therapy session. App. 249 ll. 1-14; App. 275 ll. 8 – 16. Rich testified before the jury that part of her duties included providing an assessment of a minor and then giving a diagnosis and treatment plan. App. 242 ll. 10 – 20.

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. App. 47 l. 11 – App. 49 1. 7. 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. App. 45 l. 23 – App. 46 l. 22.

Rich was qualified as an expert in child the treatment of child trauma and child sexual abuse dynamics and testified before the jury as to the common symptoms children allegedly exhibit when they have experienced trauma. App. 251 l. 4 – App. 253 l. 20. Rich stated that children who have experienced trauma frequently act out and misbehave. Id. In particular, she listed symptoms of trauma and sexual abuse trauma, including avoidance, hyper-vigilance, sleep difficulties, behavior disturbances, and bedwetting. App. 251 l. 4 – App. 253 l. 1. Curiously, and perhaps as intended, Minor's mother testified that Minor experienced avoidance, trouble sleeping, hyper-vigilance, bedwetting, and behavior disturbances. App. 153 l. 16 – App. 155 l. 9. Minor's mother's testimony preceded Rich's.

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." App. 242 l. 10 - App. 243 l. 8. She specialized in "trauma-focused cognitive behavioral therapy, which is particularly related to childhood trauma." App. 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." App. 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. App. 243 l. 21 – App. 244 l. 5.

Rich testified that she used an evidence-based model called "trauma-focused cognitive behavioral therapy" which "focuses on the trauma." App. 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." App. 244 l. 6 – App. 245 l. 5. The solicitor questioned Rich regarding her treatment models and protocols, asking whether they are "based on evidence-based studies." App. 247 l. 22 – App. 248 l. 9.

Rich testified that she had provided therapy to approximately five hundred children during the course of her career at the time of trial. App. 248 ll. 22 – 25. Around one fourth of those children had experienced trauma "as a result of sexual abuse" according to Rich. App. 249 ll. 1 – 5. Rich also stated that as part of her training regarding trauma, she participated in a year-long learning collaborative effort. App. 246 l. 11 – App. 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.

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." App. 252 ll. 17-25.

Echoing the testimony of witnesses before her and seeming zeroing in on Minor's case, Rich justified delayed disclosure of minors regarding alleged sexual abuse. App. 253 l. 24 – App. 256 l. 17. Rich then held forth how 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." App. 254 1. 2 – App. 255 1. 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.

Immediately thereafter, the solicitor asked Rich if she provided therapy to Minor. App. 257 ll. 6 – 12. As Rich answered in the affirmative, defense counsel objected. Id. 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:

> Well, once 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.

App. 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." App. 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.

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, "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." App. 267 ll. 9-16.

Ultimately, the court ruled that Rich's testimony was not objectionable because Rich had not testified beyond what a "blind expert" would have testified too. App. 269 ll. 19-22. Notably, the trial court also ruled that if Rich "testifies about the disclosure, then obviously she represents to the jury that she has a relationship, a professional relationship with this child. But if she doesn't talk about the diagnosis and all of those other things, then I don't think you get to the point of vouching." App. 269 l. 23 – App. 270 l. 4.

After the jury returned, Rich testified that Minor disclosed the sexual abuse to her during a counseling treatment session. App. 275 l. 8 – App. 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." App. 279 ll. 7-13.

Following Rich's testimony, the state rested. App. 287 l. 25 – App. 288 l. 1. Defense counsel renewed the mistrial motion "based on the witness vouching [for] the credibility of Minor." App. 288 l. 24 – App. 289 l. 3. The trial judge refused to grant a mistrial. App. 289 ll. 18 – 20.

During closing arguments, the solicitor overlooked the trial judge's cautionary remarks and brazenly linked Minor's mother's testimony regarding symptoms to Rich's list of symptoms associated with trauma. App. 90 ll. 13 – 20; App. 308 l. 16 – App. 309 l. 7. Perhaps even more egregiously, the solicitor then outright stated to the jury that "[t]he other witness[es] in this case can talk to you about how she has disclosed to them, how **that corroborates it**. App. 312 ll. 6 – 14 (emphasis added).

Following closing argument by defense counsel, the trial judge charged the jury on the law. App. 338 – 354. Contained within the jury instructions was the following language: "Also understand that no witness, even an expert witness can vouch for the credibility of

another witness' testimony." App. 344 ll. 11 – 13. Far from a curative instruction, this statement fell within the litany of other jury charges.

The jury deliberated for almost three hours before it submitted a note to the trial judge. App. 355 l. 18 – App. 356 l. 22. The note read: "We have not come up with a verdict. Are we allowed to leave for the night and restart our discussion tomorrow?" Id. The bailiff inquired further, and the jury indicated that it may require up to four more hours to deliberate. Id. The trial judge let the jury go home for the evening. Id. After the jury was dismissed, the trial judge put on the record that the anti-vouching instruction followed a conversation in chambers. App. 359 ll. 8 – 25. Defense counsel noted that the instruction did not resolve his mistrial motion. App. 360 ll. 5 – 9.

The following day, the jury submitted four additional notes to the trial judge: a request for a DVD player, a question regarding a timeline "of the sequence of events" for review, a question about the lewd act charge date, and a request for "a brief recap on the difference between the first degree and the third degree." App. 362 l. 18 – App. 366 l. 21. After deliberating for over five more hours, the jury reached its verdict. App. 366 l. 22 – App. 368 l. 16. The trial judge sentenced Makins to ten years' incarceration. App. 370 ll. 3 – 8.

Discussion

This Court has 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 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 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. This Court 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 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, according to the expert, was typical, expected, and complied with the behavior of the majority of other victims of sexual abuse. Moreover, the jurors would be inclined to 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 witnessed 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. App. 251 l. 6 – App. 257 l. 8. Rich's testimony regarding both the typical process of delayed disclosure and her firsthand 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).

Respondent 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). Reliance on Schumpert, is disingenuous following the South Carolina Supreme Court's opinion almost twenty years later in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) as well as other recent opinions. Such an assertion belies the point of Kromah and its progeny: to prevent witnesses from bolstering the credibility of a another witness. As the Court of Appeals correctly noted, Rich's testimony improperly indicated to the jury that the 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.

Further, Schumpert predated the South Carolina Rules of Evidence, which became effective on September 3, 1995. Rule 1103(b), SCRE. Petitioner suggests that this Court "affirm[ed] Schumpert's continuing validity in State v. Anderson," even though Anderson predated Stukes which overruled Schumpert on other grounds. Brief of Petitioner 6. Schumpert has only been cited once in a published opinion since Stukes. In State v. Jones, the Court of Appeals referred to State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999) which quoted Schumpert. 417 S.C. 319, 790 S.E.2d 17 (Ct. App. 2016), aff'd as modified, 423 S.C. 631, 817 S.E.2d 268 (2018). Schumpert and Weaverling are cases from a different era which have outlived their usefulness. The landscape in this area of the law has shifted in recent years, and the viability of those two cases is questionable. Unwavering dependence on Schumpert, coupled with a disregard of the numerous recent opinions, fails to recognize the restrictions that have been judicially created in the last three decades; a plain Schumpert application would seem to suggest that this Court is only required to conduct a balancing test under Rule 403, SCRE, when additional limitations have been put in place to prevent improper testimony such as Rich's.

The Court of Appeals 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." Rich's testimony perfectly aligned with prior testimony regarding symptoms of sexual abuse trauma such that the jury was led to the intended 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.

Recent opinions at both appellate courts reflect a trend of disallowing testimony similar to Rich's. In Chappell v. State, the Court of Appeals held that trial counsel was ineffective for failing to object when the state's expert witness gave improper bolstering testimony. 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019) (rehearing denied) (petition for certiorari pending). Although the expert forensic interviewer in that case neither treated the minor nor saw the video of the interview, she testified "Children don't often lie about sexual abuse incidents." Id.at 73-4, 837 S.E.2d at 499. Chappell cited numerous cases, many of which have been discussed above, all revolving around improper bolstering by a witness who interviewed or treated the complaining witness. Id. at 75-6, 837 S.E.2d at 500. Chappell also referred to State v. Cartwright for the notion that an independent's expert testimony was not improper bolstering because she testified in general terms and "never interviewed the victims and never stated she believed the victims were telling the truth." Id. at 77, 837 S.E.2d at 501 (citing Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018)). The Court of Appeals noted that the expert's statement "not only had the effect of improper bolstering the victim's credibility; it also improperly invaded the province of the jury to determine the only issue in this case: whether Chappell sexually abused the victim." Id. at 78, 837 S.E.2d at 501.

In Cartwright, the defendant was charged with multiple counts of criminal sexual conduct. 425 S.C. 85, 819 S.E.2d at 748. At trial, the state relied on the testimony of Dr. Alicia

Benedetto, a clinical psychologist and an expert in "child sexual abuse dynamics." Id. at 88, 819 S.E.2d at 759. Having not spoken to any witnesses or victims in the case, she served as a "blind expert." Id. Much like Rich, Dr. Benedetto testified that "children routinely delay reporting." Id.; App. 253 l. 24 – App. 256 l. 17. Regarding expertise and bolstering, this Court held that her testimony did not improperly bolster the victim's credibility:

> Rather, her testimony served the purpose of explaining the behaviors common to sexually abused children. Here, **she never interviewed the victims** and never stated she believed the victims were telling the truth. Dr. Benedetto simply described, in general terms, the reasons why children recant. … Thus, although Dr. Benedetto's testimony corroborated some of the minor victim's general behavior, she properly testified in broad terms based on her expert qualifications.

Id. at 96, 819 S.E.2d 764. (emphasis added). Unlike Dr. Benedetto, Rich interviewed Minor and provided therapy. App. 275 ll. 8 – 16. Thus, the authorization upon which Petitioner seeks to rely is inapplicable.

Briggs v. State is another example of a PCR case wherein trial counsel failed to object to improper bolstering. 421 S.C. 316, 806 S.E.2d 713 (2017). This Court in Briggs remarked upon the numerous recent cases discussing "the permissible limits of a forensic interviewer's testimony in the context of the prohibition against improper bolstering." Id. at 322, 806 S.E.2d at 716. In particular, this Court relied on State v. Smith for "the central point of the prohibition against improper bolstering: a witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." Id. at 323, 806 S.E.2d at 717 (citing Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010)). Based upon Kromah and Anderson, supra, the expert's testimony in Briggs, at least in part, "clearly conveyed to the jury that she believed the victim." Id. at 327, 806 S.E.2d at 719. Much like Rich, the expert in Briggs "invaded the province of the jury and testified she had already made [the] determination" that Minor was telling the truth. Id. at 328, 806 S.E.2d at 720.

Much like Cartwright in that it dealt with a blind expert, the Court of Appeals held in State v. Brown that an expert who did not interview the minor was allowed to testify in broad terms as long as there was no vouching or bolstering. 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) abrogated by State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018). Unlike the experts in Cartwright and Brown, Rich testified that she treated Minor and crossed the line into vouching. A suggestion that Rich testified only in broad terms, when she advised the jury that she treated Minor, is indefensible. As the Court of Appeals correctly concluded, this testimony was violative of the standards set forth in State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004) and State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), among others. Rich's testimony invaded the province of the jury and suggested that she would not have been treating Minor had she not believed her.

The trial judge in Mr. Makins' case was apprehensive of this result. On numerous occasions, the trial judge expressed doubt as to the methods the state sought to use:

> 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.
>
> So I don't have an issue with the qualification. I think the qualification is fairly airtight. It's - - the question is, what opinion will be offered and how close are we going to get to her saying, 'I talked to her. I diagnosed her as being a victim of childhood sexual trauma and all of her answers were consistent with my diagnosis for childhood sexual trauma.

App. 48 ll. 8 – App. 49 l. 7. Soon thereafter, the trial judge cut to the heart of the issue and pointedly remarked: "The distinction here is that she is actually an attending expert. That's the one distinction that I've drawn." App. 50, ll. 4 – 11.

The trial judge's concern persisted throughout trial, even going as far as to suggest that the state prepare testimony of a blind expert instead of an expert witness who attended to the child. App. 55, ll. 13 – 17. Quite presciently, the trial judge remarked to the solicitor: "Again, if you get a conviction in this case, this is where you're going to lose it on appeal, okay?" App. 56, ll. 5 – 7. The trial judge repeatedly continued to warn the state:

> So I still have the same concern about the expert witness vouching for the testimony of the minor victim.
>
> I don't know what this expert witness is going to say. I don't have an issue with her qualification as an expert witness. I don't think - - and I haven't heard the testimony yet - - I don't think I have any issue with her saying that she talked to her, and that she exhibits symptoms of post-traumatic stress disorder.
>
> Beyond that, **I'm concerned that if she starts matching up her testimony with her symptoms, we are essentially establishing a circumstance where she is vouching for the credibility of the witness**. If that happens, I don't think I have any choice but to declare a mistrial and I don't want to get there.
>
> You can put her … on the stand to testify as a fact witness without any vouching for the credibility. And then use a blind witness if you want to. Or you can use a blind witness. But don't get to the point where she's vouching for the credibility, okay?
>
> …
>
> Because I think **when you start talking about symptoms, that is [when] you're matching the expert opinion to her specific testimony, to her disclosures. I think that's where you start getting into the vouching part**.

App. 90 l. 1 – App. 91 l. 23. (emphasis added). The state failed to "walk that tight rope" envisioned by the trial judge. App. 53 ll. 2 – 3. As a result, the Court of Appeals correctly reversed Makins' conviction by relying on the unambiguous law set forth by this Court.

The error committed by the trial court was not harmless beyond a reasonable doubt. In State v. Jennings, this Court held that improper vouching was not harmless in a case with no physical evidence. 394 S.C. 473, 480, 716 S.E.2d 91, 94-95 (2011). In Jennings, "[t]he only evidence presented by the State was the children's accounts of what occurred and other hearsay evidence of the children's accounts." Id. "Because the children's credibility was the most critical determination" in that case, the admission of written reports was nor harmless. Id. Similarly, State v. Stukes, a case that "hinged on credibility," was not "amenable to a harmless error analysis." 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016).

This Court also recently held that failure to give a requested charge in an "almost exclusively circumstantial" case was not harmless error. See State v. Herndon, Op. No. 27986 (S.C. Sup. Ct. filed July 1, 2020) (Shearouse Adv. Sh. No. 26 at 11) n. 6 ("Fundamental to a jury's role as fact-finder is making credibility determinations, which lie in the sole province of the jury.").

The Court of Appeals correctly held that the error in this case was not harmless beyond a reasonable doubt. State v. Makins, 428 S.C. 440, 449-50, 835 S.E.2d at 537. The Court of Appeals issued an opinion which accurately and thoroughly discussed the applicable case law. Counsel for Mr. Makins timely moved for a mistrial and renewed his motion when the time came. He noted his dissatisfaction with the jury instruction. This matter was preserved and correctly decided by the Court of Appeals.

Rich's role as a therapist made it more likely that the jury believed Minor's allegations. 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. 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 this Court affirm the Court of Appeals decision. In the event this Court reverses the Court of Appeals, Respondent requests that the matter be remanded to the Court of Appeals for consideration of the issues not addressed in State v. Makins, 428 S.C. 440, 835 S.E.2d 532 (Ct. App. 2019).

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR RESPONDENT

This 2nd day of July, 2020.