STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

Respondent,

vs.

SHANNON EARL GARLAND,

Appellant.

Appellate Case No. 2018-002085

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

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

RESPONDENT'S STATEMENT OF THE ISSUE ON APPEAL

The therapist did not vouch for victim's credibility and did not testify she treated the victim or describe any of victim's behaviors. The therapist did not even mention Victim during her testimony. The trial court did not abuse its discretion in allowing the therapist to provide general background testimony about the behaviors of sexually abused children because the therapist treated sexually abused children for eighteen years and treated over 4,000 patients, so the therapist was qualified to testify to behaviors and symptoms she has observed in other children in her experience as a therapist, and her observations were reliable. She did not make any findings, conclusions, or diagnosis.

STATEMENT OF THE CASE

The Greenville County grand jury indicted Appellant Garland for criminal sexual conduct with a minor in the first degree (CSC first), exposure of private parts in a lewd and lascivious manner, and criminal sexual conduct in the third degree (CSC third). Garland was convicted of all charges following a jury trial on November 13-15, 2018. The Honorable Robin B. Stillwell sentenced Garland to twenty-eight years' imprisonment for CSC first, fifteen years' imprisonment for CSC third, and six months' imprisonment for the exposure charge, all concurrent sentences.

Garland appealed his conviction and sentence, and submitted a brief. The State's brief follows.

STATEMENT OF FACTS

At the time of trial, Victim was thirteen years' old and had lived with her biological father for two years. Before that, she lived with her grandmother (Grandmother) at times, and other times she lived with her mother (Mother) and Appellant Garland. While with Mother and Garland, she moved often, living in a trailer next to Grandmother's house, moving away to another trailer, and moving in with a person named Sylvia after they were evicted from that trailer. R. pp. 104-05.

Victim described Garland as nice at first. That changed because he started stepping on Victim, cursing her, or even throwing shoes at her. Garland also threw a rock at Mother and got on top of Mother and bruised her rib cage. Sometimes he babysat Victim, for instance when Mother went to the hospital. R. pp. 105-06.

Victim testified about when Garland took out his penis and showed it to Victim. Victim testified about another incident that occurred when the family lived in a trailer with Mother's friend, Sylvia, sometime before Christmas. Mother went to the Doctor, leaving Garland alone with Victim. In a detached garage by the trailer, Garland put his penis in Victim's mouth and he ejaculated. He told Victim to swallow. She testified the incident concluded when they heard someone, Sylvia, come in the driveway. R. pp. 111-12. While describing the incident at Sylvia's, Victim responded to the forensic interviewer's question of how it felt by explaining it felt weird because Garland was supposed to be like a dad to her. State's Exhibit No. 1 (13:00-13:20).

There were two forensic interviews. The first was on June 6, 2016. State's Exhibit No. 2. The second, following a new disclosure, was on February 7, 2017. State's Exhibit No. 1. Amber Hiott was the forensic interviewer both times. R. pp. 74-75. Victim's testimony at trial was

consistent with the content of the forensic interviews.

During the second forensic interview, Victim recounted the garage incident and described Garland telling her he would cum and she should swallow. Garland promised to pay for her to go skating. She described the ejaculation as white and silky, and it tasted salty. Garland told her not to tell anyone. She tried to not think about it afterwards because it was disgusting. State's Exhibit No. 1 (14:00-15:30).

At trial, Victim testified about an incident when Victim's family lived with someone named Tony, but were moving out because they were evicted. By a pool table in the house, Garland asked Victim to put his penis in her mouth and pulled his pants down. During the second forensic interview, Victim explained he put his penis in her mouth but he did not ejaculate. Instead, they stopped and he pulled his pants up because through the window they saw Mother outside returning to the house. R. pp. 115-16; State's Exhibit No. 1 (16:00-18:30).

Victim related another incident that occurred while she was in Fourth Grade. By that time, she was living with Grandmother, and Mother and Garland were living in a motel. Victim visited Mother and Garland at the motel on Mother's Day weekend. However, while she was visiting, Mother left to see a doctor and left her alone with Garland. The motel door was open but Garland told Victim to close it. While Victim was coloring on the bed, Garland watched porn on his smart phone. Garland exposed his penis and told Victim to sit in his lap. Victim told Garland to leave her alone and pushed him away with her feet. Garland attempted to pull her pajama pants down but she pulled them up. They were down to her mid-thigh before she pulled them up. Garland subsequently took his phone into the bathroom and stayed there for a substantial amount of time. R. pp. 116-23.

Subsequently, Victim told a friend of hers, who against her wishes, told a teacher. R. pp. 124-25. She discussed the motel incident during the first forensic interview. State's Exhibit No. 2 (8:40-13:45). This incident was also revisited during the second forensic interview. During this second interview: she described how Garland, while sitting in a chair with his pants down, opened his arms and called her. Victim remonstrated that Mother later rationalized maybe he just wanted a hug, but Victim rhetorically asked the interviewer why he would ask for a hug with his pants pulled down. State's Exhibit No. 1 (21:15-22:30).

On a separate occasion, Victim, Mother, and Garland were camping. While on a hike, Victim said she needed to go to the bathroom and Mother told her to go in the woods. Garland followed Victim and tried to put his penis inside her while she had her pants down, but the incident ended when people approached nearby stairs. R. pp. 126-28. Victim provided a consistent account of this incident to the forensic interviewer during the first forensic interview. State's Exhibit No. 2 (23:00-25:15).

Victim disclosed abuse to Grandmother after asking Grandmother what "rape" was. R. pp. 128-29. This led to the second forensic interview (See State's Exhibit No. 1). Victim told the jury that despite the aforementioned attempts, Garland never penetrated Victim with his penis. R. p. 130. Garland told Victim though that he wanted to stick his penis in her when she got older. R. p. 132.

Garland told Victim if she ever told anyone, Garland would hurt the family. Victim believed Garland because he hurt Mother before. R. p. 131. Victim admitted she did not tell anyone initially because she was scared something would happen to the family, specifically Mother and Grandmother. R. p. 131. During the first forensic interview, Victim disclosed several instances of

physical and verbal abuse by Garland. State's Exhibit No. 2 (41:00-46:00). During cross-examination, she admitted she was worried during one of her interviews that she might not see Mother anymore. Victim testified she disclosed the abuse because she did not want Garland to do what he did to her to anyone else. R. pp. 133-34; p. 147, lines 21-23.

On cross-examination, Victim admitted Mother did not believe her when she disclosed. She also admitted on cross-examination that she started seeing counselors. R. p. 146. On redirect, Victim testified Mother believes her now and they spend more time together. R. p. 148. Victim explained it made her upset that Mother did not believe her for a long time, but she understood because, "If I was a mom, I wouldn't want to think that happened to my child. So I was thinking about it like that." R. p. 149, lines 1-7; see State's Exhibit No. 2 (39:30-40:00) (Victim discussing a drawing she drew of her and Mother, Victim describes Mother saying she did not believe Victim "about all that stuff," Victim saying she loves Mother, and Mother replying "come see me.").

Grandmother testified Mother and Victim's biological father divorced early in Victim's life. Victim started living with Grandmother when Mother's epilepsy flared up. For a while, Mother was not in Victim's life much. However, Victim went back to Mother after about a year and around the time Victim began second grade, Mother started a relationship with Garland. Victim, Mother, and Garland lived in a mobile home on Grandmother's property for about a year and a half, until Garland was confronted about failing to pay for the utilities and the $100 a month rent they previously agreed upon. Garland, Mother, and Victim left because Garland did not want to get a job. R. pp. 35-39. Garland, Mother, and Victim rented a trailer from someone named Tony but were evicted. They then lived next door to that trailer for a time with someone named Sylvia. When Garland was

incarcerated, Mother moved in with a friend. Grandmother started picking up Victim from school and Victim started living with Grandmother again. R. pp. 38-42.

During the summer prior to fourth grade, Victim lived with Mother and Garland. When Grandmother discovered they were living in a motel, Grandmother took Victim back with her. R. pp. 44-45.

Grandmother testified Victim was on the A/B honor role in third grade and the beginning of fourth grade, but then Victim's grades started to drop during fourth grade. Victim started to have rage issues and could not sleep at night. She seemed to be mad all the time. At that point, Victim did not see her mother much. R. pp. 43-44.

Grandmother testified she took Victim to visit Mother and Garland at the motel on Mother's Day during fourth grade, and left her there for a few hours. A few days later after the visit, the school counselor summoned her to school and Grandmother learned Victim was sexually abused at the motel on Mother's Day. Grandmother subsequently took Victim to the Julie Valentine Center for an interview and started taking Victim to counseling. R. pp. 44-49.

Grandmother confirmed Mother did not believe Victim. Mother subsequently lost custody of Victim, and Victim's biological father gained custody of Victim when she was in fifth grade. R. pp. 50-51. Grandmother explained Victim "was very hurt that her mom didn't believe her." R. p. 50, lines 7-16.

Grandmother testified that in June 2017, Victim asked Grandmother what rape is. After explaining what rape is to Victim, Victim told Grandmother she was subjected to another kind of sexual abuse. She reported the sexual abuse occurred at the trailer on her property, the trailer they

moved to next, and the residence next door to that trailer. Grandmother did not report the abuse straight to law enforcement, but instead brought Victim to Erica Van Wagner, a mental health counselor. Even though Victim's biological father has custody of Victim, she stays with Grandmother. Victim's father felt Victim was better off growing up with a woman if Victim's mother was not going to be around. R. pp. 54-57. Victim never recanted the allegations to Grandmother. R. p. 58.

Sylvia Rojas testified Garland, Mother, and Victim lived next door to Sylvia, staying with Tony and his wife, but moved out because they could not pay the rent. Sylvia let them stay in her living room. She admitted she eventually became concerned about Victim's safety and noticed Victim seemed to know a lot about drugs, pills, and sex despite her young age. R. p. 100, p. 102.

Dr. Croswell testified she examined Victim and Victim reported sexual abuse. Dr. Croswell noted that it was a normal exam, but noted that considering the conduct described, a normal exam was not inconsistent with the report of sexual abuse. R. pp. 159-60.

Investigator Michael Robertson interviewed Garland in his car at Garland's construction work site. Garland confirmed he was alone with Victim when Mother went to the doctor while Victim was visiting them at a motel on Mother's Day. Garland denied abuse and suggested Victim made it up because she wanted to live with her biological father. R. pp. 166-67. Of course, at the time Victim did not live with Mother and Garland, she was only visiting them and at the time lived with Grandmother. Garland also confirmed the family went camping at Table Rock. R. p. 172.

A subsequent disclosure of abuse was reported to Michael Robertson from the therapist, Erica Van Wagner. Victim was referred to the Julie Valentine Center for the second forensic

interview at that time. R. pp. 168-69.

Erica Van Wagner testified as an expert in the treatment of children with trauma, including trauma from sex abuse, and child sex abuse dynamics. R. p. 203. She provided behavioral testimony and explained children who are abused are often abused by someone they know. Van Wagner described grooming and the role of a non-offending caregiver in the disclosure process. Van Wagner described piecemeal disclosure and testified as to common reasons for delayed disclosure of sexual abuse. She also testified about trauma from sexual abuse. R. pp. 204-14. On cross-examination, defense counsel inquired about other sources of trauma, including living with someone who has to go to jail. R. pp. 216-20. During her testimony, Van Wagner never referenced Victim. She did not offer any opinion, finding, or diagnosis concerning Victim. She did not testify as to any symptoms of trauma Victim might have experienced.

Garland testified in his own defense. He admitted during direct examination he has been in trouble with the law many times. He explained to the jury he has three children, one who is biological and two children "they" say were his. Garland was with Mother for about five years. He confirmed the various places he lived with Mother and confirmed Victim lived with them off and on, but often lived with Grandmother. Garland claimed they left Sylvia's after an argument with Mother. He testified she left while he was in the hospital getting a mental evaluation. They reunited a year later. R. pp. 227-31.

Garland confirmed Victim was staying with him and Mother at a motel and Mother left for the hospital because of her pill addiction. During the stay, Victim said she wanted to stay with Mother and then said she wanted to stay with her biological father when Mother said she was not

financially stable for Victim to stay with her. Garland testified he broke up with Mother on the second arrest because Mother became romantically involved with her friend's ex-husband. R. pp. 234-36. When Garland was impeached with his prior record, Garland confirmed, "Yes ma'am, I was a thief." R. p. 238, lines 17-20. He disputed, somewhat, testimony from other witnesses who indicated he failed to pay bills as required, which resulted in several moves. Garland claimed he paid the bills most of the time. R. pp. 240-41. Garland admitted he babysat Victim, then volunteered that they would color and "you know, wrestled around." R. p. 243, lines 6-12.

ARGUMENT

The therapist did not vouch for victim's credibility and did not testify she treated Victim or describe any of Victim's behaviors. The therapist did not even mention Victim during her testimony. The trial court did not abuse its discretion in allowing the therapist to provide general background testimony about the behaviors of sexually abused children because the therapist treated sexually abused children for eighteen years and treated over 4,000 patients, so the therapist was qualified to testify to behaviors and symptoms she has observed in other children in her experience as a therapist, and her observations were reliable. She did not make any findings, conclusions, or diagnosis.

Garland argues Erica Van Wagner, a therapist who treated Victim, was not qualified to testify as an expert witness on child sexual abuse dynamics and trauma resulting from sexual child abuse. Garland claims Van Wagner's experience was not reliable under Rule 702, SCRE, conflating separate elements of Rule 702, and further argues Van Wagner bolstered Victim's testimony even though she provided no testimony about treating Victim. The testimony Garland argues is bolstering actually is evidence that Van Wagner's experiences are reliable. Further, Van Wagner did not provide any findings or diagnosis about Victim, but merely provided background testimony about the common behaviors of sexually abused children in order to educate the jury. She never mentioned Victim during her testimony.

Van Wagner's qualifications

Erica Van Wagner testified she is a mental health therapist at Greenville Mental Health Center. She supervises the DSS program, working primarily with children involved with DSS services or who have some history of trauma. Wagner earned both a bachelor's degree and a master's degree in social work. She is a licensed independent social worker with a clinical practice

focus. She has worked with the Department of Mental Health since 2000. She has counseled approximately 4,000 children in her career. R. pp. 187-88.

Van Wagner often consults with other peers and attends training seminars in the field. She participates in a weekly treatment team with the psychiatrists. R. pp. 188-89. She testified she uses Trauma Focused Cognitive Behavioral Therapy to treat children who have suffered trauma. When asked if that is commonly used for children who have been sexually abused, she replied it was and it is evidence-based treatment empirically supported as an effective treatment for children experiencing trauma. R. p. 189, lines 9-13. When asked what she meant by empirically supported, Wagner explained, "That means that it's been researched and has studies that are done to show [it is] ethical." R. p. 189, lines 14-16. Van Wagner testified she reads the child welfare review and ASAP journals as references for her work. The journal articles are related to child abuse and neglect. R. pp. 189-90; p. 202, lines 18-24. Van Wagner has been qualified to testify seven other times. R. pp. 202-03.

Scope of the objection/reviewability

At trial, Garland labeled Van Wagner a forensic interviewer and claimed her blind expert testimony was not reliable because she was biased having previously treated Victim. R. pp. 194-95. Faced with the frivolous nature of that objection, Garland recasts the objection as a failure to show Garland's "experiences" were not reliable. These are not the same arguments and therefore, this claim is not preserved for review. State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

Additionally, Garland argues on appeal that Van Wagner's testimony about Trauma Focused Cognitive Behavioral Therapy and the use of a trauma screen and checklist was bolstering.

However, Garland did not object to this testimony at trial. "Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011).

Standard of Review and the Gatekeeper function of Rule 702, SCRE

Garland maintains the State failed to demonstrate Van Wagner's testimony was reliable and therefore, the testimony was inadmissible under Rule 702, SCRE. Under Rule 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, **experience**, training, or education, may testify thereto in the form of an opinion or otherwise.

(emphasis added).

Before admitting expert testimony, the trial judge must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011).

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

"A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). A trial court abuses its power of discretion when it commits an error of law or when there has been a

factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). The need for this standard is astutely explained by the United States Supreme Court as follows:

> [The abuse of discretion] standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.

Kumho Tire Company v. Carmichael, 526 U.S. 137, 152 (1999).

Competency to offer an expert opinion

Generally, courts allow experts to testify if they are more qualified in the field than a juror on the subject. Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) ("To be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony."). "There is no abuse of discretion as long as the witness has acquired by study or **practical experience** such knowledge of the subject matter of [her] testimony as would enable [her] to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." State v. Goode, 305 S.C. 176, 178, 406 S.E.2d 391, 393 (Ct. App. 1991) (emphasis added).

"[T]here are a variety of ways in which a person can become skilled or knowledgeable in a field that their opinion in a scientific, technical, or specialized area can assist the trier of fact in

determining a fact or in understanding the evidence." Fields v. J.Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008) ("[A] trial court's decision to refuse to qualify a person as an expert based solely on the failure to meet a licensing requirement arguably impairs the truth-seeking function of courts").

In the instant case, Van Wagner obviously gained the requisite expertise to provide expert testimony on the subject of sexually abused children and trauma. She treated four thousand patients over an eighteen year period, kept current with literature, and had training and education on the subject matter.

The therapist's experience establishes the reliability requirement of Rule 702 for general behavior testimony of sexually abused children.

Instead of confronting the abundance of evidence that Van Wagner was qualified to testify as an expert, Garland conflates the requirement of determining if an expert is qualified and the separate requirement of whether the field of expertise is reliable. The requirement of showing reliability only relates to the area of expertise, and not the reliability of an expert witness' testimony. State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012) ("To be clear, the reliability of a witness's testimony is not a prerequisite to determining whether or not the witness is an expert."). Further, the trial court must take care in its undertaking of the gatekeeper function without infringing on the jury's duty as a factfinder, the gatekeeper role merely requires the trial court "decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law." Watson, 389 S.C. at 445, 699 S.E.2d at 174.

In Graves v. CAS Medical Systems, 401 S.C. 63, 735 S.E.2d 650 (2012), our Supreme Court found the circuit court erred by not allowing a doctor to be qualified as an expert on Sudden Infant

Death Syndrome (SIDS) even though the doctor testified she did not consider herself an expert on SIDS. Id. at 78, 735 S.E.2d at 657. The Court noted "an expert need not be a specialist in the particular branch of the field." Id. The doctor had thirty years' experience as a neonatologist and stayed current on SIDS literature. The doctor routinely encountered SIDS in her practice. The Court found the circuit court abused its discretion in excluding the testimony because the doctor applied her knowledge to every day experiences when she relied on the knowledge she gained from her experience and training to determine the child would have lived but for the malfunction of a monitoring device. Id. at 78, 735 S.E.2d at 657-58.

In contrast, the Supreme Court found no error in the trial court's ruling finding three experts were not qualified to offer an opinion that the equipment malfunctioned. They purported to apply the best inference methodology (deductive reasoning based on elimination of other likely causes) to reach that conclusion that the equipment failed due to software malfunction. However, their conclusion was not reliable because they did not assess a viable alternate explanation that existed to explain why the monitoring equipment failed to alert. Therefore, their methodology was flawed. Id. at 75-78, 735 S.E.2d at 656-57. In the present case, Van Wagner did not apply any methodology to reach a conclusion about the present case, but merely related observations generally about abused children based on knowledge gained from her experience.

In Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988), Prior contended the circuit court erred in qualifying two social workers as experts to testify on a victim's mental condition. However, the Court of Appeals observed: "A witness may be competent to testify as an expert although the witness acquired his or her knowledge through **practical experience** and not by

scientific study, training, or research." Id. at 530, 369 S.E.2d at 849 (emphasis added). The Court of Appeals found each social worker was qualified based on her education, post-graduate training, and clinical experience with victims of sexual assault, as well as her opportunities to observe the victim. Id. at 531, 369 S.E.2d at 849.

As shown above, an expert witness may gain their expertise through experience. Experience is defined by Merriam-Webster in relevant part as follows:

> 1a: direct observation of or participation in events as a basis of knowledge
>
> b: the fact or state of having been affected by or gained knowledge through direct observation or participation
>
> 3: something personally encountered, undergone, or lived through
>
> 5: the act or process of directly perceiving events or reality

Merriam-Webster, at merriam-webster.com/dictionary/experience (visited May 21, 2020).

In the instant case, Garland complains the State failed to show "Van Wagner's personal experiences produced reliable results or answers." This argument is nonsensical. The "result" or "answer" is the experience itself. Van Wagner merely related situations she personally encountered while treating sexually abused children over the course of eighteen years. For instance, when a victim she is counseling demonstrates or reports fear, avoidance, or irritability – all symptoms of trauma an abused child may suffer – this observation is an experience, and so long as Van Wagner was lucid at the time of her counseling, her report of the experience – or accumulation of experiences during eighteen years in the field – is reliable.

Garland relies on State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015). In Chavis, a forensic

interviewer testified about a particular interviewing methodology, the RATAC method, but was unable to provide an error rate for her interviews and the Supreme Court determined her methodology was not adequately peer reviewed. In the instant case, Van Wagner was not executing any methodology or procedure, or even making any findings, diagnosis, or conclusions. Instead, the nature of the expert testimony falls under what a Texas court aptly described as "educator expert" evidence. Coble v. State, 330 S.W.3d 253 (Tx. Crim. App. 2010) (finding expert testimony about the prison classification system and prison violence admissible despite not relating to appellant personally, but was "educator-expert" evidence).

When Van Wagner relates her experiences while treating sexually abused children, Van Wagner is not executing a methodology or drawing a conclusion about this particular case. Instead, her testimony about her experiences is probative to educate the jury on the phenomenon of child abuse and resulting trauma and to show Victim's behavior is not uncommon for sexually abused children. This proper testimony is presented without Van Wagner ever expressing or even implying an opinion or belief that Victim was actually abused. Generally, "[e]xpert testimony that abused children often delay reporting the abuse . . . informs the jury that the victim's failure to disclose in a timely fashion does not necessarily exonerate the defendant without suggesting that the particular child witness in the case was or was not abused." Commonwealth v. Bougas, 795 N.E.2d 1230, 1236 (Mass. App. Ct. 2003); State v. Carpenter, 556 S.E.2d 316, 321 (N.C. Ct. App. 2001) (finding expert testimony on delayed disclosure is "clearly instructive and helpful to the jury in understanding the evidence since the nature of the sexual abuse of children places lay jurors at a disadvantage").

A law review article confirms the reliability of expert testimony on subjects such as delayed

disclosure:

> Psychological research demonstrates that delayed reporting is common among sexually abused children. Frequently when children finally disclose, they give slightly different versions of the abuse to different interviewers. Finally, although there is debate about how many sexually abused children recant, it is undisputed that some children recant and some recant their recantation. **Thus, from a psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such testimony is not worrisome.**

John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y, 45-46 (2010) (footnotes omitted) (emphasis added). This article was cited favorably by this Court in State v. Brown, 411 S.C. 332, 343, 768 S.E.2d 246, 251 (Ct. App. 2015) *abrogated on other grounds by* State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018).

Further, expert testimony concerning trauma resulting from sexual abuse, such as the testimony provided by Van Wagner in the instant case, is admissible to prove the sexual abuse occurred. "[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect." State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993) *overruled on other grounds by* State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). "Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior." State v. White, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004) (finding testimony is admissible in prosecutions where the victim of sexual abuse is an adult).

Because Van Wagner did not offer a conclusion or opinion about the facts of the instant case,

her testimony was merely educator expert testimony, and was reliable because it was based on her experiences as a counselor, not some methodology applied to the facts of the instant case. The trial court did not err.

Anderson is inapplicable

Even though Van Wagner did not testify about Victim at all – she did not even testify she treated Victim – Garland claims she vouched for Victim's credibility. Garland claims "allowing the treating therapist to testify as an expert improperly vouched for [Victim] because a treating therapist must believe the patient." Br. of App. p. 12. Garland cites no authority for the claim that a therapist is required to believe the patient. Further, Van Wagner never testified Victim disclosed abuse to her.

Garland relies on State v. Anderson, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015). In Anderson, the person who conducted a forensic interview of the child victim was qualified "as a forensic interviewer in child abuse assessment" without the trial court holding a hearing to determine if the forensic interviewer possessed the requisite experience in child abuse assessment. This Court found it was error for the trial court to deny an in camera hearing to determine if the forensic interviewer possessed the requisite expertise. This Court also noted the forensic interviewer's behavioral expert testimony vouched for the Victim's credibility because she testified "only to those characteristics **which she observed** in the minor." Id. at 219, 776 S.E.2d at 79 (emphasis added). In the instant case, Van Wagner did not testify about any characteristics she observed in Victim – she did not mention Victim during her testimony. Therefore, she could not bolster Victim's testimony like the forensic interviewer did in Anderson.

In the present case, Van Wagner discussed a broader range of symptoms than those

symptoms other witnesses testified Victim suffered. For instance, there was no evidence Victim suffered flashbacks, intrusive thoughts, exhibited fear or avoidance symptoms, or misbehaved or was disrespectful, which were symptoms or behaviors Van Wagner discussed. R. pp. 214-15.

The Supreme Court made the following suggestion in Anderson:

> **The better practice**, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that he expert will vouch for the alleged victim's credibility.

Id. at 218-19, 776 S.E.2d at 79 (emphasis added). Even though suggesting the better practice of an independent expert, rather than a forensic interviewer, to provide expert behavioral testimony, the Supreme Court did not outright ban the practice, as it noted in Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017). The Supreme Court observed:

> Since Anderson, the Court of Appeals has on at least two occasions affirmed a trial court's qualification of a forensic interviewer as an expert to testify as to the behavior of child sex abuse victims. See State v. Barrett, 416 S.C. 124, 130, 785 S.E.2d 387, 390 (Ct. App. 2016) *cert granted* (Mar. 24, 2017) (finding "no error" in qualifying a forensic interviewer as an expert to testify "regarding general behavioral characteristics" of child sex abuse victims); State v. White, 416 S.C. 135, 138, 784 S.E.2d 695, 696 (Ct. App. 2016) (finding "the trial court acted within its discretion" when it qualified "the forensic interviewer as an expert in the dynamics of child abuse").

Id. at 332-33, 806 S.E.2d at 722.

Of course, Van Wagner was not performing a forensic interview, she was a therapist providing treatment. So Anderson is wholly inapplicable. Likewise, the Supreme Court in Anderson recognized one "purpose of [a forensic] interview is to allow law enforcement to determine whether a criminal investigation is warranted." Anderson, 413 S.C. at 221, 776 S.E.2d at

80. Briggs cited Anderson and State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) when noting the dual purpose of forensic interviews was to collect facts for court and serve an investigatory purpose for law enforcement. Briggs, 421 S.C. at 327-28, 806 S.E.2d 719-20. In the instant case, Van Wagner's purpose of meeting with Victim was to provide therapy, not to investigate on behalf of law enforcement.

Testimony about the use of therapy methods to patients generally is evidence that the therapist's experiences were reliable.

Garland also complains about testimony offered during voir dire that Van Wagner uses an evidence-based treatment model. However, as previously mentioned, Van Wagner did not testify she applied this therapy model to Victim nor did she testify as to any aspect of therapy she provided Victim. Further, Garland wants it both ways. She claims Van Wagner failed to show her "experiences" were reliable, however, the fact Van Wagner used an evidence-based model for therapy would be evidence showing her experiences while providing therapy to over 4,000 children were reliable. The testimony was merely offered to show Van Wagner was qualified to provide the expert behavioral testimony that the Supreme Court in Anderson confirmed was admissible. Since she did not relate the testimony to Victim, no bolstering occurred.

Van Wagner also testified she used a trauma screen or checklist while treating children, which Garland also complains is bolstering. Again, Van Wagner did not testify she used such a checklist with Victim or that Victim reported any symptoms of trauma to her. R. pp. 213-14. Instead, Van Wagner explained the symptom checklist is utilized "to explore any symptoms that are related to that particular trauma." R. p. 214. So the testimony about the checklist shows how she has identified symptoms with other patients in her past experience.

Van Wagner testified that victims do not all have the same symptoms. She then testified as follows:

> So, some of the symptoms would be fear or sadness. It impacts someone on an emotional level. There [are] alterations in mood. There can be what we call re-experience symptoms, which would be things like flashbacks, where, you know, pictures or images pop into your head. There can be intrusive thoughts, which is you know, again, just kind of thoughts that intrude when you're trying not to think about it. There are avoidance symptoms, so trying not to think about it, trying not to remember, not being able to remember an important aspect of what happened. . . . [A]nd then what we call hyperarousal symptoms, irritability, anger, anger outbursts, trouble sleeping, maybe sleeping too much.

R. p. 214, lines 9-24.

Van Wagner continued as follows:

> Yes. So, we talk about internalizing symptoms, and those might be depression or anxiety or negative beliefs in thinking. They're problems that people experience on the inside. But then there's also [these] externalized things like talking back or being disrespectful, walking out of class, more behavioral things that are kind of observable. So, typically, if someone is experiencing negative or alterations in their mood, then it impacts their behavior as well.

R. p. 214, line 22 – p. 215, line 8.

Garland references and paraphrases these two passages of Van Wagner's testimony in her brief, interjecting "she" and "her" in italics, and complains the State failed to show Van Wagner's experiences were reliable under Rule 702. Br. of App. p. 9. However, Van Wagner's testimony concerning the standardized trauma screen and the symptom checklist, in conjunction with her previous testimony about the use of an evidence-based model, demonstrates that her experiences with sexually abused children, as discussed in the two passages above, is the result of reliable

methodology, assuming an expert witness ever has to show that the methodology of their experiences is reliable. Because Van Wagner never relates discussion of the evidence-based therapy, the standardized trauma screen, or the symptom checklist to Victim, the testimony is not bolstering.

Garland recites facts from State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), in which a forensic interviewer testified she recommended the victim should not be around Chavis for any reason. However, that fact pattern is not present in any manner in the instant case because Van Wagner did not testify about Victim at all and did not testify as to any recommendations she may have provided to Victim and her family.

Instead, State v. Barrett, 416 S.C. 124, 785 S.E.2d 387 (Ct. App. 2016) is on point with this case. In Barrett, the appellant objected to the person performing the forensic interview also providing expert testimony on the behaviors of sexually abused children. Before the jury, the witness described her interview with the child. She then testified about her education and experience. Over the appellant's objection, she testified as an expert in mental health, "specifically in the area of child sex abuse characteristics." Id. at 127, 785 S.E.2d at 388. This Court noted unlike Anderson, the expert was not qualified as an expert in forensic interviewing and did not comment directly or indirectly on the child's credibility, concluding she did not bolster the child's credibility. Id. at 130, 785 S.E.2d at 389.

Van Wagner provided examples of symptoms of trauma: a few of those examples were symptoms other witnesses testified Victim actually did suffer from – Grandmother provided testimony that Victim suffered irritability and sleep difficulty, Victim's grades in school dropped – but there were also examples of symptoms or behaviors Victim was not reported to have exhibited or

experienced, such as suffering flashbacks, acting out in school, or exhibiting avoidance behaviors. The corroboration of general expert testimony with fact testimony elicited from other witnesses is not bolstering. See State v. Brown, 411 S.C. 332, 345, 768 S.E.2d 246, 253 (Ct. App. 2015) (finding the expert's testimony, which merely provided broad testimony about the behaviors of sexually abused children, did not bolster the victims' testimony even though the expert's testimony did corroborate some of the reasons for the victims' delayed disclosure); State v. Jones, 417 S.C. 319, 790 S.E.2d 17 (Ct. App. 2016) (finding expert witness never commented on the credibility of victim or her mother but merely offered reasons why children might delay disclosing instances of sexual abuse and why a non-offending caregiver may have an unusual reaction when learning about the abuse. The testimony assisted the jury's understanding of the complex dynamics of sexual abuse cases) *aff'd as modified by* State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018). Because Van Wagner provided no testimony about Victim, her testimony was not bolstering.

The trial court did not abuse its discretion in allowing Van Wagner to testify. There is no controversy about the reliability of the general information she conveyed to the jury and she was well-qualified to deliver the information. Further, she did not bolster Victim's testimony. Additionally, any conceivable error would be harmless beyond a reasonable doubt as the jury undoubtedly focused on the two forensic interviews which were consistent with Victim's testimony and constituted powerful evidence of Garland's guilt. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). Therefore, the conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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July 23, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

Respondent,

vs.

SHANNON EARL GARLAND,

Appellant.

Appellate Case No. 2018-002085

CERTFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

Respectfully submitted,

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THE STATE,

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PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Final Brief of Respondent on Appellant by email to the address listed in AIS and with a copy of the same to follow in the United States mail, postage prepaid, addressed to his attorney of record; Susan B. Hackett, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.
This 23 day of July, 2020.

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Good Morning,

Attached please find a copy of the Final Brief of Respondent in the State V. Shannon E. Garland. Please confirm receipt. This document will be submitted to the Court of Appeals through our AIS system. As written in the proof of service, in addition to this email a hard copy of this document will be deposited in today's mail.

Thank You.

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