

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHARLES M. DEVEAUX,

APPELLANT

APPELLATE CASE NO. 2011-202734

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The Supreme Court's Opinion in *State v. Kromah* Requires Reversal

After appellant filed his initial brief, the Supreme Court issued its opinion in *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). *Kromah* mandates reversal of appellant's conviction. In *Kromah*, just as in this case, a forensic interviewer was qualified as an expert witness. Discussing the qualification of the forensic interviewer in *Kromah*, the Supreme Court said, "[W]e state today that we can envision no circumstance where [a forensic interviewer's] qualification as an expert at trial would be appropriate." Id. at ___, 737 S.E.2d at 499 n.5. The Court further noted that the "label of expert should be jealously guarded by the court and never loosely bandied about." Id. at ___, 737 S.E.2d at 499. The Court could not have been more clear that qualification of a forensic interviewer as an expert is error.

As to appellant's first issue, the State asserts that this issue is not preserved for review apparently because trial counsel failed to utter the words "child abuse assessment" when he objected to the expert's qualification. This contention stretches the law of error preservation well past its breaking point. The State offered Olszewski "as an expert in the field of forensic interviewing and child abuse assessment." Tr. 425, ll. 10 – 12. After a rigorous voir dire that thoroughly discredited any scientific basis for the forensic interviewer's opinions, trial counsel objected to the qualification stating, "[W]e don't think this is a science that he can be an expert in, Judge." Tr. 427, ll. 3 – 4. The trial judge immediately overruled the objection. This issue is preserved.

The State also claims that issues related to Olszewski's improper vouching and bolstering the child's credibility are not preserved. Deveaux had already made an objection

to the entirety of Olszewski's testimony. Tr. 427, ll. 3 – 4. Deveaux objected three more times during Olszewski's direct testimony and each time he was overruled. Tr. 440, ll. 17 – 21; Tr. 442, ll. 3 – 6; Tr. 443, ll. 16 - 19. Deveaux's objections were specific and gave the trial judge ample opportunity to rule on this issue. Deveaux also moved for a mistrial immediately after Olszewski's testimony on these issues. Tr. 458, l. 13 – 459, l. 7. "The rationale behind the requirement of a contemporaneous objection is to enable trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition." State v. Byers, 392 S.C. 438, 445, 710 S.E.2d 55, 58 (2011). The trial judge fully understood the objection to the testimony and ruled. This issue is preserved.

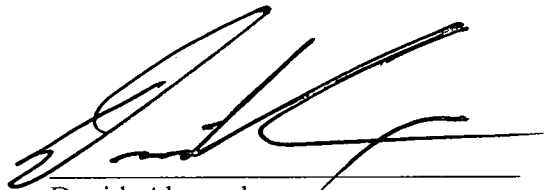
The State also claims that issues related to Investigator Martin are not preserved. When Investigator Martin testified outside of the limitations the time and place restrictions of Rule 801(d)(1)(D), trial counsel immediately objected even before the officer could finish his sentence. Tr. 320, ll. 11 – 14. A bench conference ensued. Tr. 320, l. 25 – 321, l. 1. The trial judge gave a curative instruction. At the next point when the jury was excused, Deveaux moved for a mistrial and noted that he had moved for a mistrial at the time of the testimony. Tr. 336, ll. 4 – 14. The preservation rule advocated by the State is overly formalistic and would deprive judges of the ability to effectively manage their courtrooms. Trial judges should have the latitude to conduct bench conferences to deal with objections without removing the jury for argument at every objection as long as the substance of the issues are placed on the record. See Cody P. v. Bank of America, 395 S.C. 611, 624, 720 S.E.2d 473, 480 (Ct. App. 2011). Otherwise, trials would be

needlessly prolonged and the management of courtrooms would be left to the whims of attorneys. This issue is preserved.

As for appellant's issue regarding section 16-3-657 of the South Carolina Code, the State incorrectly states that the trial judge failed to rule on this ground before the solicitor's opening statement. The trial judge denied this as "Motion No. 6" during pre-trial arguments. Tr. 185, ll. 3 – 4; Court's Ex. 9. The trial judge's remarks clearly indicate that he ruled on this issue prior to opening statements. Tr. 184, l. 14 – 185, l. 10. This issue is preserved.

The State's error preservation arguments are without merit. It is clear that the issues raised on appeal were met head on by the defendant and the State at trial and ruled upon by the trial judge. The Court should disregard these arguments, consider the issues raised by appellant, and reverse his conviction.

Respectfully submitted,

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

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of April, 2013.

STATE OF SOUTH CAROLINA
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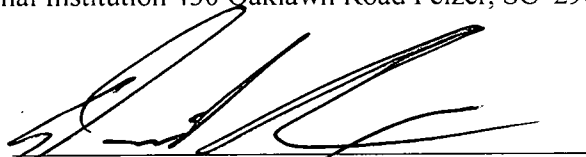
CHARLES M. DEVEAUX,

APPELLANT

APPELLATE CASE NO. 2011-202734

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant and Designation of Matter in the above referenced case has been served upon Julie Kate Keeney, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and also served upon Mr. Charles M. Deveaux, #348530 Perry Correctional Institution Perry Correctional Institution 430 Oaklawn Road Pelzer, SC 29669 this 24th day of April, 2013.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of April, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013

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