Limits on Expert Testimony in Child Sexual Abuse Cases

by ***Alex Stalvey***

I have yet to meet a prosecutor or criminal defense attorney that "enjoys" trying a child sexual abuse case. The stakes for both sides are extremely high and child molestation is a topic that is uncomfortable to discuss in any setting. Apart from the subject matter, criminal sexual conduct trials involve unique legal issues that can also be challenging to address. One of these issues involves the State's use of a "forensic interviewer" as an expert at trial.

These cases often rest on the story of the child victim. Jurors, like all of us, are naturally sympathetic to child witnesses in any case. In cases involving sexual abuse, they see a young victim who has been forced to speak to a courtroom full of strangers about things that they would otherwise never talk about. On the other hand, jurors are also being asked to convict a defendant on one of the most serious crimes that we have in our system of justice. They are generally aware that their verdict will have a profound and life altering effect on the accused.

There are factors that are common to these cases which may leave a juror with some hesitation in believing the child's allegations. Pre-school or early elementary age children may not have reached a stage of mental development to fully grasp the importance of telling the truth about what may or may not have happened. Difficult family situations, typically involving custody disputes, create the potential of a child being improperly influenced or pressured into disclosing abuse. The way a child discloses the allegations also may cause a juror to question the truthfulness of the allegations. The child may have waited to disclose the abuse until well after it had occurred. The child may have been given the opportunity to tell someone they trusted and didn't do so. The child's story may have changed. Details involving the nature and extent of the abuse may be significantly different in subsequent interviews or may be inconsistent with the child's testimony at trial. Children often recant their story at some point during the process and may deny ever being abused by the Defendant. Physical evidence or eyewitness testimony corroborating the victim's story is rare. Usually, the prosecutor must rely on the jury having nothing more than a firm belief that the victim is telling the truth. In order to address the potential concerns of the jury in believing the child's allegations, the prosecutor will likely call an expert witness to offer an explanation as to why the jury should believe the victim. Like all witnesses, experts are not allowed to improperly vouch for the credibility of another witness. Recent appellate court cases provide us with some guidelines and limitations as what experts may testify to in child criminal sexual conduct cases.

The "forensic interviewer" who initially met with the child may be called as an expert by the State. They also may call a "blind expert" who has never met with the victim, but has experience treating victims of sexual abuse to testify. Once qualified as experts, these witnesses will testify to common characteristics in the disclosure of child sexual abuse cases.

Expert's Improper Bolstering of a Child Witness *(Jennings and McKerley)*

The assessment of witness credibility is within the exclusive province of the jury. *State v. Wright,* 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977). Rule 608(a) of the South Carolina Rules of Evidence provides that opinion evidence regarding credibility "may refer only to character for truthfulness or untruthfulness," and "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Even a witness permitted to give an opinion under Rule 608(a) must restrict

the opinion to "character for truthfulness," and may not testify whether the witness believes a specific statement or account given by another witness. *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

In *State vs. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012), an expert called by state had conducted a "forensic interview" with the child and testified that the purpose of the interview was to "form an opinion as to whether…something happened" and in forming this opinion, she explained, "does this child appear to be giving statements that are similar to, in my experience, in my training and what I have learned, similar to what other children with the same experience may have had". Id. at 466, 142. The expert further testified that she found interviews with the victim "to be compelling for sexual abuse". *Id.* at 466, 142.

In the *McKerley* opinion, the Court of Appeals found that the only relevance of the forensic interviewer's testimony regarding her findings in the case was to inform the jury that she believed the story told by the victim, despite the fact that the expert never testified directly that she believed the victim's statements. *Id.* at 467, 143.

The Court also found that the expert's testimony describing the role of a forensic interviewer demonstrated that she believed the victim was truthful. *McKerley*, 465, 142.

For these reasons, the Court held that the testimony was inadmissible as improper vouching for the victim. Id.

In support of their finding in *McKerley*, the Court cites the 2011 S.C. Supreme Court opinion in State v. Jennings in which the State introduced a written report of the forensic interviewer which stated, that the victims provided a "compelling disclosure" of abuse by the Defendant. *State v. Jennings*, 394 S.C. 473, 477, 716 S.E.2d 91, 93 (2011).

Justice Pleciones' opinion in Jennings (and directly quoted by the Court of Appeals in *McKerley*) states that "There is no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful." *Jennings*, 394 S.C. at 480. Justice Kittredge's concurring opinion further addresses this issue in describing statements included in the forensic interviewer's written report as "patently inadmissible evidence" *Jennings* at 483, 96 (2011).

Further Guidance on Improper Bolstering (*Kromah*).

In 2013, the S.C. Supreme Court revisited the issue of improper vouching by a forensic interviewer in State vs. *Kromah*. The *Kromah* case involved a Mother accused of inflicting great bodily injury on her three year old child at the time. The State offered as an expert Heather Smith, a therapist who had previously interviewed the child. Once qualified as an expert in "forensic interviewer of children", Smith was asked by the prosecutor what her conclusion was based on her interview with the child to which she replied, "Based on the interview that I conducted, as well as information provided by law enforcement and the child protective services worker, I made a decision that the child had given compelling – a compelling finding." *State v. Kromah*, 401 S.C. 340, 351, 737 S.E.2d 490, 496 (2013).

The Court held that it was improper for a forensic interviewer to testify as to his or her opinion about the credibility of a child victim. *Kromah*, 401 S.C. at 358-59, 737 S.E.2d at 500. In an effort to provide some guidelines as to allowable testimony from an expert in this situation, the Court gave the following specific examples of what forensic interviewers should avoid:

1. Stating the child was instructed to be truthful;

2. Offering a direct opinion on "the child's veracity or tendency to the tell the truth";

3. Indirectly vouching for the child, such as stating the interviewer has made a 'compelling finding' of abuse;

4. Indicating "the interviewer believes the child's allegations in the current matter"; or

5. Opining "the child's behavior indicating the child was telling the truth". 401 S.C. at 358-359, 737 S.E.2d at 500.

Proper testimony from a forensic interviewer would include:

6. The time, date and circumstances of the interview;

7. Any personal observations regarding the child's behavior or demeanor; or

8. A statement as to events that occurred within the personal knowledge of the interviewer. 401 S.C. at 360, 737 S.E.2d at 500.

"Blind Expert" and Child Sexual Abuse Dynamics (Brown)

In *State v. Brown*, the Defendant was accused of sexually abusing three children living with them in his girlfriend's mobile home. The victims delayed disclosing the abuse until several years had passed and their statements included discrepancies between what they initially told police and their testimony at trial. *State v. Brown*, 411 S.C. 332, 337, 768 S.E.2d 246, 248 (Ct. App. 2015), reh'g denied (Feb. 11, 2015), cert. denied (Aug. 6, 2015).

Due to the fact that she had nev-

er interviewed the victims and had no direct knowledge of the facts of the case other than what the prosecutor had provided, the expert was characterized as a "blind expert".

Coincidentally, Shauna Galloway-Williams, the same expert used by the State in *Jennings*, was the expert used in *Brown*. The trial court qualified Galloway-Williams as an expert in "child abuse dynamics and disclosure" and found her testimony was admissible because it assisted the jury in understanding the dynamics of child sexual abuse (finding that, "Galloway–Williams' specialized knowledge of the behavioral characteristics of child sex abuse victims was relevant and crucial in assisting the jury's understanding of why children might delay disclosing sexual abuse, as well as why their recollections may become clearer each time they discuss the instances of abuse") *Brown*, at 341-42, 251.

Galloway-Williams' opinion included the following:

> 1. Research indicates that between seventy and eighty percent of abused children delay disclosing the abuse into adulthood;
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> 2. Children delay disclosing abuse for a number of reasons, including: (1) fear of consequences to themselves, the perpetrator, or someone the child loves; (2) the child's age; (3) the child's relationship to the perpetrator; (4) a lack of vocabulary or language to describe what has happened to them; (5) threats by the perpetrator; (6) grooming by the perpetrator; and (7) the perpetrator's normalization of the abusive conduct;
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> 3. Most disclosures happen accidentally, and children generally reveal more details over time throughout the disclosure process;
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> 4. When children suffer chronic abuse, she stated it is more difficult for them to sort out the timing of individual incidents and the order in which they occurred;
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> 5. A close and trusting relationship with the perpetrator can have a very strong impact on whether a child feels like he or she can disclose the abuse; and
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> 6. Child abuse victims will sometimes tolerate sexual abuse to maintain a relationship, particularly if the perpetrator is someone they love and trust."

State v. Brown, 411 S.C. 332, 337-38, 768 S.E.2d 246, 249 (Ct. App. 2015), reh'g denied (Feb. 11, 2015), cert. denied (Aug. 6, 2015).

The Court determined that the opinion offered did not improperly bolster the victims' testimony at trial.

In distinguishing Brown from previous cases finding improper bolstering, the Court stated that Galloway-Williams, "(1) was not testifying as a forensic interviewer, (2) never interviewed the victims, (3) did not prepare a report for her testimony, (4) did not express an opinion or belief regarding the credibility of child sex abuse victims' allegations, and (5) did not express an opinion regarding the credibility of the minor victims in this case."

State v. Brown, 411 S.C. 332, 345, 768 S.E.2d 246, 252-53 (Ct. App. 2015), reh'g denied (Feb. 11, 2015), cert. denied (Aug. 6, 2015)

The Court further explained that unlike previous "forensic interviewers", the State's use of a "blind expert" expert in *Brown* was different. She had never interviewed any of the victims and had no knowledge of the facts of the case beyond her discussions with the Solicitor's office prior to trial. Galloway-Williams testimony was also distinguishable from the testimony of previous "forensic interviewers" because in those cases, it had been indicated in some manner that the expert believed the victim's allegations of abuse. The expert in *Brown* "never commented – directly or indirectly – about the credibility of the victims' allegations or testimony", nor did she make any of the prohibited statements specifically outlined by the Court in *Kromah*". *State v. Brown* 411 S.C. at 343-344, 768 S.E.2d. at 251.

In addressing Galloway-Williams' testimony that seventy and eighty percent of children delayed disclosing abuse, the Court found that it was not improper bolstering because there had been no statements as to "the applicability of that statistic to the victims" despite the Defendant's argument that the statistic corroborated some of the minor victims' reasons for delaying disclosure. *Brown* at 253.

What Can We Learn From the Above Cases

The State's argument in admitting this testimony will be that it is necessary to educate the jurors, however, a defense lawyer should always keep in mind that the sole purpose in calling these experts is to convince the jury that the victim is telling the truth.

The following has been clearly held as inadmissible bolstering:

1. Direct testimony or opinions by an expert who has interviewed the victim that they believe the allegations;

2. Indirect testimony by an expert who has interviewed the victim offered for the sole purpose of informing the jury that they believed the allegations ("compelling findings"); and

3. Examples of testimony that should be avoided by forensic interviewers as provided in Kromah;

In determining what will likely be found admissible testimony, consider whether the opinion is being offered by a "blind expert" and what was allowed in State vs. Brown involving "Child Sexual Abuse Dynamics".