NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 0940

STATE OF LOUISIANA

VERSUS

RYAN PATRICK GREEN

Judgment Rendered: November 3, 2006

* * * * * * * *

Appealed from the
32nd Judicial District Court
In and for the Parish of Terrebonne, Louisiana
Case No. 437,767

The Honorable George J. Larke, Jr., Judge Presiding

* * * * * * * *

Joseph L. Waitz, Jr.
District Attorney
Ellen Daigle Doskey
Assistant District Attorney
Houma, Louisiana

Counsel for Appellee
State of Louisiana

Katherine M. Franks
Slidell, Louisiana

Counsel for Defendant/Appellant
Ryan Patrick Green

* * * * * * * *

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Welch, J. concurs with reasons.

GAIDRY, J.

The defendant, Ryan Patrick Green, was charged by grand jury indictment with one count of aggravated rape (count I), a violation of La. R.S. 14:42; and one count of attempted aggravated rape (count II), a violation of La. R.S. 14:27 and 14:42. The victim named in count I was E.P.[1] The victim named in count II was M.M. The defendant pled not guilty on both counts. The State elected not to seek the death penalty. Following a jury trial, the defendant was found guilty as charged on both counts by unanimous verdicts. He moved for a new trial and a post-verdict judgment of acquittal, but the motions were denied On count I, he was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. On count II, he was sentenced to thirty years at hard labor without benefit of probation, parole, or suspension of sentence to run concurrently with the sentence imposed on count I. He moved for reconsideration of sentence, but the motion was denied. The defendant now appeals, designating two assignments of error. We affirm the convictions and sentences.

ASSIGNMENTS OF ERROR

1. Reversible error occurred when the State presented the testimony of its psychotherapist (Dana W. Davis), who was permitted to testify as an expert over defense objection regarding delayed disclosure by child sex abuse victims and give her personal opinion that children do not lie about sexual abuse, which was an ultimate issue in this case. The trial court failed to fulfill its gatekeeping function when it permitted such testimony to be offered

---

[1] The victims are referenced herein only by their initials. See La. R.S. 46:1844(W).

without a scientific basis, resulting in prejudice to the defendant and denying him due process.

2. Defense counsel was ineffective in failing to object to the testimony of Dana Davis in its entirety.

FACTS

In May of 2004, E.P. and M.M. advised their stepmother, C.P., of inappropriate conduct committed by the defendant towards them at least four years earlier. E.P. had been living with his biological father and C.P. for approximately two years. C.P. questioned E.P. and M.M. after she found her six-year old son and his friend touching each other's "privates." The six-year old child told C.P. that E.P. had showed him the conduct.

C.P. asked E.P. if anyone had ever done anything sexually to him. E.P. emotionally "broke down." He cried and was very upset. Approximately one and one-half hours later, he stated "Ryan Green had stuck his private in [E.P.'s] butt." E.P. also stated the defendant tried to force him to do the same thing to the defendant, made him play with the defendant's "private" while they watched television, and had forced him to "suck on [the defendant's] bird," which caused him to gag.

C.P. asked M.M if the defendant had done anything to him. M.M. stated that while he was playing with a friend at a neighbor's house, the defendant called him back to his mother's house. When M.M. went back to his mother's house, the defendant pulled him into the bedroom, pulled his pants down, and tried to "force sex" on him, but he bit the defendant on the shoulder and ran away.

E.P. testified at trial on November 16, 2005. His date of birth was 11/23/89. Approximately five years earlier, he had lived with his biological mother and the defendant. The sexual conduct by the defendant against him

began with the defendant grabbing E.P.'s "private." On one of these occasions, after E.P. and the defendant had watched a movie that his mother had rented, the defendant asked him, "Are you going to be ready tonight?" E.P. did not respond and went into his mother's bedroom to sleep. He did not go to his own bed because the bed was covered with his things as he was in the process of moving to his father's home. E.P. was awakened by the defendant pulling the bed covers off of him. The defendant also pulled down E.P.'s jogging shorts. E.P. indicated the defendant "came on top [of] me like a dog." The defendant put his "private" into E.P.'s "butt[,]" and went up and down about five times. The defendant then got up from the bed, grabbed E.P. by the waist, and made him do something similar to the defendant by putting E.P. behind the defendant and "shaking" E.P. to the defendant. The defendant then grabbed E.P. by the arm and the head and forced E.P.'s mouth onto the defendant's "private." The attack ended after E.P. began gagging. The defendant threatened to kill E.P. if he told anyone what had happened.

M.M. also testified at trial. His date of birth was 9/7/91. He was eight or nine years old when he left his biological mother's house to live with his father. M.M. indicated the incident involving him occurred around noon while the defendant was living with his mother. He was at "a neighbor's" house when the defendant came to the house, grabbed him by the arm, and dragged him to his mother's house. The defendant took M.M. to his room and threw him onto his bed. The defendant then pulled down M.M.'s shorts and underwear, grabbed M.M. by the shoulders, and tried to "pull [M.M.'s] butt to [the defendant's] private." The defendant also tried to make M.M. do to the defendant the same thing the defendant tried to do to M.M. M.M. bit the defendant on the shoulder, pulled up his shorts, and ran away. The defendant stated, "You damn bitch[,]" and "If you tell anybody, I'll strangle you."

A.R., the biological mother of E.P. and M.M., also testified at trial. A.R. remembered seeing a wound on the defendant's arm while he, E.P., and M.M. were living with her. She asked the defendant about the mark, but did not recall his explanation for the wound.

The defendant also testified at trial. He moved in with A.R. in 2000. He conceded there were occasions when he was alone in the residence with E.P. and M.M. He denied groping E.P. or raping him. He also denied attempting to perform a sex act on M.M. He also denied suffering an injury to his shoulder or arm while he lived with A.R.

IMPROPER EXPERT TESTIMONY; INEFFECTIVE ASSISTANCE OF COUNSEL

In assignment of error number 1, the defendant argues the testimony of Dana Davis exceeded the permissible bounds of expert testimony in violation of the rules of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), *State v. Foret*, 628 So.2d 1116 (La. 1993), and *State v. Chauvin*, 2002-1188 (La. 5/20/03), 846 So.2d 697. In assignment of error number 2, the defendant argues, should this court find the objections of the defense to Davis's testimony insufficient to preserve the error, then counsel's failure to object to the entirety of Davis's testimony was prejudicial error warranting a finding of ineffective assistance of counsel.

Foret involved an appeal from a conviction for attempted molestation of a juvenile when the offender does not have control or supervision over the juvenile. *Foret*, 628 So.2d at 1117. At trial, the State presented testimony from Dr. William Janzen, Ph.D., an expert in the field of psychology with expertise in child sexual abuse. *Foret*, 628 So.2d at 1118. The defendant objected to Janzen being permitted to testify, arguing Janzen's report had not been produced for the defense until the morning of trial, the State had

possession of the report for a week prior to trial, and the defense had insufficient time to prepare an effective cross-examination of Janzen. *Foret*, 628 So.2d at 1118-19. Janzen testified that he interviewed the victim on three separate occasions and concluded, in his expert opinion, she was telling the truth about being the victim of sexual abuse. *Foret*, 628 So.2d at 1119. He went into specific details of the allegations made by the victim and, with the court's permission, named the defendant as the person whom the victim identified as her abuser. *Foret*, 628 So.2d at 1119. He discussed the "progressive" dynamic, the "secrecy" dynamic, the "jealousy" dynamic, and the "recantation" dynamic. *Foret*, 628 So.2d at 1119. The State asked, "Doctor, after the interviews you had with [the victim], the testing and the conversations and so on that you had with her, is it your opinion that she was sexually abused?" *Foret*, 628 So.2d at 1119-20. The defendant objected, claiming that the State was asking the expert to comment upon "the fact and (sic) issue here," but the objection was overruled. *Foret*, 628 So.2d at 1120. Janzen then answered, "[t]he details that she gave me are consistent with the dynamics of sexual abuse and so my conclusion would, therefore, be that she has been sexually abused and should be in counseling to help her cope with that." *Foret*, 628 So.2d at 1120. Subsequently, Janzen noted, given the details related to him by the victim and considering the various dynamics of sexual abuse, his only conclusion was that the victim had been sexually abused. *Foret*, 628 So.2d at 1120.

The court in *Foret*, citing *Daubert*, recognized that the trial court was obligated to act in a gatekeeping function to ensure that any and all scientific

testimony or evidence admitted is not only relevant, but reliable.[2] *Foret*, 628 So.2d at 1122. The gatekeeping function could be satisfied by an evidentiary hearing to determine whether or not the technique, if not inherently reliable, had been subjected to peer review and/or publication, the known or potential rate of error, the existence of standards controlling the technique's operation, the technique's refutability or testability, and whether or not the technique enjoyed general acceptance in the scientific community. *Foret*, 628 So.2d at 1122 & 1123 n. 8. Additionally, the court in *Foret* recognized that the scientific testimony was also subject to exclusion if its probative value was outweighed by its potential for unfair prejudice. *Foret*, 628 So.2d at 1122.

The court in *Foret* held that Child Sexual Abuse Accommodation Syndrome-based (CSAAS-based) testimony was of "highly questionable scientific validity," and failed to unequivocally pass the *Daubert* threshold test of scientific reliability. *Foret*, 628 So.2d at 1127. The court further held the use of CSAAS-based testimony for the purpose of bolstering a witness's credibility created a risk of prejudice that outweighed the evidence's questionable probative value, and thus, such opinion testimony as a determinant of a victim's/witness's credibility was not admissible. *Foret*, 628 So.2d at 1129. The court recognized, however, the testimony could be admissible for "very limited purposes," and a proper presentation of the testimony would focus on explaining to a jury why superficially bizarre reactions such as delayed reporting take place. Furthermore, the opinion testimony should demonstrate or explain in general terms the behavioral characteristics of child abuse victims in disclosing alleged incidents, without

---

[2] Subsequent to *Daubert*, the United States Supreme Court held the gatekeeping duty imposed upon trial courts in *Daubert* with regard to scientific testimony applied to all expert testimony. *Kumho Tire Company, Ltd. v. Carmichael,* 526 U.S. 137, 147, 119 S.Ct. 1167, 1174, 143 L.Ed.2d 238 (1999).

giving testimony that directly concerns the particular victim's credibility. *Foret*, 628 So.2d at 1129-30.

In regard to Janzen's testimony, the court in *Foret* concluded that he had testified as to his expert opinion on the victim's credibility, and did not limit his testimony to general information about possible psychiatric explanations for the delay in reporting. *Foret*, 628 So.2d at 1130. Additionally, the court found that because the State's case was based largely upon the testimony of the victim, and the inadmissible expert testimony served to unduly bolster this testimony, the error was not harmless and warranted reversal of the conviction. *Foret*, 628 So.2d at 1130-31.

Chauvin involved an appeal of a conviction for indecent behavior with juveniles. *Chauvin*, 2002-1188 at p. 1, 846 So.2d at 698. At trial, over the objection of the defense, the State presented the expert testimony of a licensed clinical social worker who testified she had seen one of the victims as a patient at a facility where counseling is provided for victims of sexual assault and domestic violence. *Chauvin*, 2002-1188 at p. 3, 846 So.2d at 699. Based upon objective and subjective symptomatology, the patient was diagnosed as suffering from Post Traumatic Stress Disorder (PTSD). *Id.* At trial, the State asked the social worker whether the clinical findings, both subjective and objective, that she observed in regard to the victim, were those consistent with a child who had been sexually abused. *Chauvin*, 2002-1188 at p. 4, 846 So.2d at 700. The social worker replied, "Yes, the symptoms were that of post-traumatic stress." *Id.* The State then asked whether there was any way that the social worker could predict, based on her experience and education, how a child might react to sexual abuse. *Id.* The social worker replied, "I mean just by the criteria of post-traumatic stress you don't know exactly what symptoms they might have, but there's a general knowledge that they could have this,

they could have this, they could have this." *Id.*

The supreme court held that the testimony of the social worker violated the rules of *Daubert* and *Foret*, concluding:

> Under these circumstances, we find that the State introduced the expert testimony regarding [the victim's] diagnosis of PTSD for the purpose of substantively proving that sexual abuse occurred. There is no indication that the State attempted to limit this evidence to explain delayed reporting, which could be construed as apparently inconsistent with having been sexually abused. There is no showing that PTSD evidence is reliable and accurate as substantive proof of sexual abuse and therefore, it is inadmissible for this purpose. We hold that this evidence, like CSAAS-based evidence, should be admissible only for the limited purpose of explaining, in general terms, certain reactions of a child to abuse that would be used to attack the victim/witness's credibility. *Foret*, 628 So.2d at 1131. The trial court in its discretion can determine, on a case by case basis, if a particularized hearing is necessary (*Daubert* hearing) to test the reliability of expert testimony on PTSD when it is being offered for the limited purposes discussed above.

Chauvin, 2002-1188 at pp. 17-18, 846 So.2d at 708-09.

In the instant case, the State offered Dana W. Davis, a clinical psychotherapist, as an expert witness in the field of clinical social work and psychotherapy. Davis indicated she was also a certified critical incident stress debriefer (CISD) and a certified bereavement facilitator. A CISD is someone with intensive training in dealing with people who have been victims of or witnesses to events that were extremely traumatic, including natural disasters, line-of-duty deaths, and things such as rapes, hostage takings, and murders. The defense objected, "for the record as far as [Davis's] expertise." The trial court accepted Davis as an expert in the field of clinical social work and psychotherapy.

The State asked Davis to explain to the jury "some of the dynamics behind or surrounding child abuse in a general sort of way, without commenting necessarily on this given case." Davis explained why a victim might have "delayed disclosure" of abuse. She also stated that it was her

experience, in her more than twenty years of practice, that disclosure was more often delayed than not. When the State asked whether delayed disclosure was any indication in any way that the event did not occur, the defense objected as follows:

> [Defense]: I object, Your Honor.
>
> There's absolutely no factual basis upon which she can answer that. What are we talking about? When are we talking about? What child are we talking about? She can't answer that question.
>
> [Court]: Be a little more specific in your questioning, Mr. Barnes.
>
> Objection sustained.
>
> [State]: Your Honor, my concern – and I want to make sure that I don't step on thin legal ice here. My concern is it's my understanding that I cannot ask about her opinions in a given case. And I'm trying not to ask about her opinions in this case or in any other case.

On cross-examination, the defense asked Davis, "I take it that you're not here today to tell us that children sometimes don't lie about events, correct?" Davis replied, "Children, like all people, lie. Children tend to lie about those things that they're afraid they'll be in trouble for." On redirect examination, the following exchange occurred:

> [State]: Ma'am, have there been any studies about children lying on serious things such as child abuse?
>
> [Davis]: There have been. There's lots of research in that area. And depending on who was doing the research and who's sponsoring the research, that can vary significantly. But my experience of literature from sources with which I am comfortable has been that children do not lie about things this dramatic that are likely to bring them unwanted attention. They generally do it because the situation has become intolerable or another concern has come up that has made them decide that they have to tell, regardless of what the outcome is going to be for them.

On re-cross-examination, the defense asked Davis whether she was stating that there was literature, which she did not agree with, that indicated the

contrary of her testimony. The following exchange took place:

> [Davis]: The literature to which I refer and I disagree with is literature that has been generated by a group of people who have been accused of pedophilia who are trying to make a case for the fact that children make these things up and therefore they cannot be guilty. Lobby isn't the right word; but there's a support-type network for people who have been accused of that that's not based in any psychological or legal or legitimate to my way of thinking as a therapist organization, self-generated information. So therefore it's suspect.
>
> [Defense]: Let me make sure I'm clear.
>
> [Davis]: Sure.
>
> [Defense]: Even though you don't believe it as far as the basis for this literature-
>
> [Davis]: Correct.
>
> [Defense]: - the literature does exist that is to the contrary of what you just suggested insofar as children lying about molestation done to them?
>
> [Davis]: It is not scientific research literature; it's self-generated from people who have special interests.

Upon further examination, over defense objection, the State asked Davis, "Is it your opinion that based upon all the scientific studies, the reliable studies that your profession has to rely on, that those studies show that in general that children do not lie when dealing with things as serious as things like child abuse?" Davis replied, "In general, children do not lie about sexual abuse because . . . it is going to create more difficulties and trouble for them than possibly bring them any benefit."

Davis's testimony was within the limits of *Daubert*, *Foret*, and *Chauvin*. Her testimony assisted the trier of fact in understanding the delayed disclosure of the victims. Davis did not give an opinion on the particular victims' credibility.

These assignments of error are without merit.[3]

PROTECTIVE ORDER

La. R.S. 15:440.6 requires that a videotape of a child's statement admitted under La. R.S. 15:440.5 be preserved under a protective order of the court to protect the privacy of the child. The trial court failed to issue such an order in this case. Accordingly, this matter is remanded to the trial court for the sole purpose of issuing a protective order to protect the privacy of the victims in this case.

DECREE

Defendant's convictions and sentences are affirmed, and this matter is remanded to the trial court for the issuance of a protective order in accordance with La. R.S. 15:440.6.

CONVICTIONS AND SENTENCES AFFIRMED; REMANDED FOR ISSUANCE OF PROTECTIVE ORDER.

---

[3] Our resolution of assignment of error number 1, renders assignment of error number 2 moot.

STATE OF LOUISIANA **NUMBER 2006 KA 0940**

FIRST CIRCUIT

VERSUS

COURT OF APPEAL

RYAN PATRICK GREEN **STATE OF LOUISIANA**

WELCH, J., CONCURRING.

Although I agree with affirming the defendant's convictions and sentences and remanding for the issuance of a protective order, I respectfully concur since I believe the testimony of Dana Davis, the clinical psychotherapist, violated the principles set forth in **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), 846 So.2d 697; **State v. Foret**, 628 S.2d 1116 (La. 1993); and **State v. Chauvin**, 2002-1188 (La. 5/20/03), 846 So.2d 697; however, based upon the entire record, I conclude the error was harmless. **State v. Johnson**, 94-1379 (La. 11/27/95), 664 So.2d 94.