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Jun 15 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County
Honorable Thomas W. Cooper, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

vs.

ROBERT WAYNE EAVES,

Appellant.

Appellate Case No. 2019-001683

BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

The forensic interview bore the particularized guarantees of trustworthiness, it was not suggestive, and Victim's statements in the forensic interview were her own recollections, so the trial court did not err in allowing the prosecution to introduce the video-recorded forensic interview into evidence.

STATEMENT OF THE CASE

The jury found Appellant Eaves guilty as charged of Criminal Sexual Conduct with a Minor in the Third Degree following trial on September 9-11, 2019, before the Honorable Thomas W. Cooper, Jr. Judge Cooper sentenced Appellant to five years' imprisonment.

Appellant appealed and opposing counsel submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967), and a motion to be relieved. Opposing counsel raised the question of whether the trial court erred in admitting the forensic interview because it was bolstering in his Anders brief. This Court denied the motion to be relieved and framed the issue to be raised by opposing counsel as to whether the trial court erred in admitting the forensic interview.

Prior to trial, Appellant's trial counsel objected to the trial court allowing the forensic interview to be admitted because trial counsel contended the forensic interviewer asked leading questions. R. pp. 55-56.

STATEMENT OF FACTS

Appellant Eaves sexually assaulted B.C. (Victim) and spooked by something, quickly left Victim's grandmother's trailer. Victim's story is corroborated by his pants – Appellant left in such a hurry, he left his clothes behind.

Victim lived in Columbia with her biological father (Father), but was spending the summer with her biological mother (Samantha Russo, hereinafter Mother) and Grandmother (Stephanie Ospitale, hereinafter Grandmother) in Walterboro. After receiving a phone call from Rob Russo, the mother's husband, Father spoke with Victim. Father called the Richland County Sheriff's Department who directed him to call the Colleton County Sheriff's Office. R. pp. 77-80.

Victim was thirteen years' old at the time of trial. She confirmed she was staying with her mother and grandmother during the summer. Appellant was a family friend she saw maybe once or twice a week. Appellant visited with Mother and Grandmother in the evening, and brought a case of beer with him. Victim went to sleep in Grandmother's bed. R. pp. 93-96; pp. 102-04. Her brother and Grandmother were also in the bed when Victim woke up to Appellant rubbing her leg. Appellant pulled off Victim's pants and underwear, rubbed by her private parts, and then tried to flip Victim over, but she would not let him. He then pulled off her shirt and rubbed his beard on her chest area, using his mouth. R. pp. 97-98; pp. 102-04.

Victim testified she did not know whether perhaps Appellant heard a noise, but all of a sudden he looked around the room and quickly left. Through the window, Victim saw Appellant run through the yard to his truck and drive away. R. p. 99.

Victim waited until the next morning for Mother, Grandmother, and Russo to all be together,

and then told them what happened. R. p. 108. Victim decided not to tell Father right away because Mother and Grandmother “said I would have to be on the news, and I would have to repeat myself, and I would have to like go to court and testify.” R. p. 108, lines 22-25. She testified what they said scared her. R. p. 109, lines 1-2.

D.C., Victim’s brother, was ten years old at the time of trial. D.C. testified he woke up that night and saw Appellant get in bed, before D.C. fell back asleep. R. p. 121.

Grandmother explained Appellant was best friends with Grandmother’s recently deceased, long-time boyfriend Whaley Bazzle. R. p. 135. She confirmed both Victim and D.C. slept with her in her bed. She testified that one morning in the summer Victim told them the night before, Appellant took his penis out and was rubbing it. R. p. 137. That morning, Grandmother found Appellant’s clothes neatly folded in the bathroom. Appellant never spent the night in the trailer before and when he was too drunk to drive home, he typically would sleep in the car. R. p. 139. After Victim disclosed the abuse, Grandmother called Appellant, who denied the abuse. She then went to his house and knocked on the door. She heard him inside but he would not answer. She left his clothes at the house and left. R. pp. 139-40.

Mother testified Appellant was drunk that night and fell out of his car, so they left him in a chair outside. R. pp. 171-72. The next day, Victim told them about the abuse. R. p. 172. They decided to do nothing, but they never hung out with Appellant again. R. pp. 174, 176.

However, apparently Mother slept with Appellant once some time ago and Russo found out about that after Appellant’s assault on Victim. Russo and Mother argued later that summer and a gun was brought into this dispute. This led to Russo calling Father and telling Father about Victim’s

disclosure. At trial, Mother denied she fired the gun, but admitted she was charged with domestic violence and additionally, Father filed a protective order against her. R. pp. 179-81. Previously, Victim testified Russo was good for Mother; he kept Mother from doing anything really bad. R. p. 112.

Detective Kelly Padgett was the investigator on the case. After interviewing Mother, Grandmother, and reviewing the results of the medical exam and the recording of the forensic interview, Detective Kelly went to the magistrate who issued an arrest warrant for Appellant. R. pp. 186-88.

STANDARD OF REVIEW

“In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous.” State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). “The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion.” Id. “An abuse of discretion occurs when a trial court’s decision is unsupported by the evidence or controlled by an error of law.” Id.

The present case concerns the admissibility of evidence – the recorded forensic interview. The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). A court’s ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 79, 606 S.E.2d 215, 218–19 (Ct. App. 2004).

Appellant does not explain the standard of review for this case. Instead, Appellant cites State v. Kromah, 401 S.C. 340, 350, 737 S.E.2d 490, 495-96 (2013) which provides substantive law and dicta on the proper testimony a forensic interviewer may provide to the jury. The instant case, on the other hand, deals with the admissibility of a recorded forensic interview under S.C. Code Ann. § 17-23-175. Accordingly, Kromah has no applicability in the present case.

ARGUMENT

The forensic interview bore the particularized guarantees of trustworthiness, it was not suggestive, and Victim's statements in the forensic interview were her own recollections, so the trial court did not err in allowing the prosecution to introduce the video-recorded forensic interview into evidence.

Appellant contends the trial court erred in allowing the State to introduce State's Exhibit 1, the forensic interview, because Appellant contends, the interviewer asked leading questions.¹ To the extent any questions might be typified in the legal sense as leading questions, the mature, eleven year-old Victim's answers were clearly her own, the interview was hardly suggestive, and the "leading" questions were merely clarifying questions and often resulted in Victim providing elaboration beyond what would be the arguably suggested answer.

Court's pre-trial ruling.

Prior to trial, Appellant's counsel moved to exclude the forensic interview (State's Exhibit 1)

¹ During the interview, following casual conversation obviously designed to make Victim comfortable, the forensic interviewer points to the camera and advises Victim the interview is recorded. She advises Victim that it is important to only talk about things that are real and true. She asks Victim to promise to tell the truth. She asks Victim to tell the interviewer to tell her if the interviewer says something wrong. State's Exhibit 1 (5:45 – 7:00). Appellant makes passing reference to this portion of the interview and notes this part is often redacted from the interviews introduced at trial. However, Appellant never objected or requested this part of the interview be redacted. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724-25 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. . . It prevents a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.") (Citations omitted). "[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750, 759 (1997). Further, Kromah and its recommendations concerned a forensic interviewer's trial testimony, not the content of the forensic

arguing it does not suitable for admission under S.C. Code Ann. § 17-23-175 because counsel contended the forensic interviewer asked leading questions. At the conclusion of the proffer and arguments, the trial court made the following ruling:

All right. I have had the chance, before today's hearing, . . . to look at . . . the video, and to listen to it. Ms. Elfering's response to the leading question question wasn't that she was not introducing any new matter into the discussion. That she was paraphrasing is probably not the best way to put it, quite frankly. The best way to put it is to repeat exactly what the witness says, didn't you tell me this. Now, that's not a leading question.

The question that you asked Ms. Elfering, as a matter of fact: isn't it true that you told me a few minutes ago thus and such. Well, if, a few mintues ago, she told you thus and such, then that's not a leading question. The question does not suggest the answer. She's already given the answer before. And so, it – in that case, it's not that your'e testifying; it's that she simply said, yes, I told you that before. And Ms. Elfering, of course said that that's, in large measure, what she's done throughout the interview.

I don't find that . . . she has changed the answers in any material way in paraphrasing or rephrasing. . . . the best practice, quite frankly, would be not to put anybody's words except the child's words back to play them.

The jury will be able to decide whether or not Ms. Elfering's responses and questions change the answer of the child. And I think they'll find that it did not, at least I did. I found that it did not. It did not [change] her answers. In some cases, she was asking for clarification. Now that's usually . . . natural in any question.

I don't find that the way the questions were asked overall violates the provisions of the statute against leading questions. I think that the questions initially were completely open-ended; tell me what happened; and then, for clarity, some follow-up questions were done. That's . . . a part of any investigation when you're trying to get the truth of a matter.

I don't' find leading in Ms. Elfering's testimony. In fact, I find that the child's testimony was elicited intact and retained intact. I note your objection in that regard, but I find that that does not [violate] the terms of the statute.

interview itself.

R. p. 56, line 19 – p. 58, line 6.

Section 17-23-175 allows for admission of recorded forensic interviews that under the totality of circumstances provide particularized guarantees of trustworthiness.

S.C. Code Ann. § 17-23-175 provides in relevant part:

(A) In a general sessions court proceeding or a delinquency proceeding in family court, an out-of-court statement of a child is admissible if:

- (1) the statement was given in response to questioning conducted during an investigative interview of the child;
- (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
- (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
- (4) the court finds, in a hearing conducted outside the presence of the jury, **that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.**

(B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, but is not limited to, the following factors:

- (1) whether the statement was elicited by leading questions;
- (2) whether the interviewer has been trained in conducting investigative interviews of children;
- (3) whether the statement represents a detailed account of the alleged offense;
- (4) whether the statement has internal coherence; and
- (5) sworn testimony of any participant which may be determined as necessary by the court.

S.C. Code Ann. § 17-23-175. The last paragraph on the statute concludes: “After considering these factors and additional factors the court deems important, the court will make a determination as to whether the statement is admissible pursuant to the provisions of this section.” *Id.* “In CSC cases involving minors, the Legislature has made specific allowances for such hearsay statements of child victims under proper circumstances.” *State v. Whitner*, 399 S.C. 547, 558, 732 S.E.2d 861, 867

(2012).

Forensic interviewing arose as both a valuable investigative tool and as a safeguard against accusations created by the interviewer from suggestive and coercive interviewing. In State v. Michaels, 642 A.2d 1372, 1377 (N.J. 1994), the Supreme Court of New Jersey reviewed a case that evidenced a series of improper techniques that were, unlike this case, alarming. The court noted:

That an investigatory interview of a young child can be coercive or suggestive and thus shape the child's responses is generally accepted. **If a child's recollection of events has been molded by an interrogation**, that influence undermines the reliability of the child's responses as an accurate recollection of actual events.

. . . We note that a fairly wide consensus exists among experts, scholars, and practitioners concerning improper interrogation techniques. They argue that among the factors that can undermine the neutrality of an interview and create undue suggestiveness are a lack of investigatory independence, the pursuit by the interviewer of a preconceived notion of what has happened to the child, the use of leading questions, and a lack of control for outside influences on the child's statements, such as previous conversations with parents or peers. . . .

The use of incessantly repeated questions also adds a manipulative element to an interview. When a child is asked a question and gives an answer, and the question is immediately asked again, the child's normal reaction is to assume that the first answer was wrong or displeasing to the adult questioner. . . .

Id. at 1377 (emphasis added). Vilification of the accused by the interviewer was another factor that could produce questionable answers. Id.

The New Jersey Supreme Court cited with authority articles promoting "interview guidelines [that] require that an interviewer remain 'open, neutral and objective.'" Id. at 1378. Citing these articles, the court wrote: "[A]n interviewer should avoid asking leading questions; . . . an interviewer should never threaten a child or try to force a reluctant child to talk; . . . and an

interviewer should refrain from telling a child what others, especially other children, have reported.”

Id. The interviewer should also refrain from speaking negatively about the accused and investigators should avoid multiple interviews with various interviewers. Id.

The New Jersey Supreme Court noted in that case, in which the alleged victims were pre-school aged: “the interrogations undertaken in the course of this case utilized most, if not all, of the practices that are disfavored or condemned by experts, law enforcement authorities and government agencies.” Id. at 1379. Expounding on that point: “[T]he overwhelming majority of the interviews and interrogations did not arise from the spontaneous recollections that are generally considered to be most reliable. . . . Few, if any, of the children volunteered information that directly implicated defendant. Further, none of the child victims related incidents of actual sexual abuse to their interviewers using ‘free recall’” Id.

The dual purpose of forensic interviews was to collect facts for court and serve an investigatory purpose for law enforcement. Briggs v. State, 421 S.C. 316, 327-28, 806 S.E.2d 713, 719-20 (2017). This function is important to the public interest as evidenced by the legislature’s provision for child advocacy centers for the purpose of coordinating multi-agency response to child abuse and the provision of “(1) a neutral, child-friendly facility for forensic interviews; . . .” S.C. Code § 63-11-310 (A).

In the context of trial testimony, “A leading question is one which suggests to the witness the desired answer.” State v. Tyner, 273 S.C. 646, 653, 258 S.E.2d 559, 563 (1979). “Leading questions should not be used on direct examination **except** as may be necessary to develop the witness’ testimony.” Rule 611(c), SCRE. Further, under Rule 611(a), SCRE, the trial court is allowed to

control the mode of interrogation of a witness to “(1) make the interrogation and presentation effective for the ascertainment of the truth.”

In the context of a forensic interview, the purpose of avoiding leading questions is to avoid inducing false facts from the child witness and ensure that the child’s recollections are the child’s own. Certainly, the younger the child, like the pre-school children in Michael, the more a leading question may create this risk.

Not a suggestive interview.

However, in the present case, one has to dig to find these “leading” questions posed to the eleven year-old – nothing in the interview is suggestive. Victim discloses the abuse after the forensic interviewer asks her to explain in her own words what happened. Victim then explains with much detail, the sexual assault perpetrated by Appellant that night in an extended narrative without questioning. State’s Exhibit 1 (9:00-12:20).

In the interview, Victim describes consistently with her trial testimony that Appellant wore only underwear when she awoke to Appellant rubbing her legs. He pulled her pants down, rubbed her private part, and pulled up her shirt. She did not know if Appellant licked her breasts, but her breasts were wet – presumably with his slobber. Appellant left and Victim tried unsuccessfully to wake up Grandmother. She told everyone the next day, but Grandmother would not believe her. Victim wanted to call the police, but Grandmother called an off-duty policeman she knew. According to Grandmother, the policeman described the difficulties of the legal process Victim would go through. Victim did not want to have to keep repeating the description of her assault and Mother said not to tell Father or Victim’s stepmother. However, Mother and Grandmother called

Appellant and told him not to come on the property. State's Exhibit 1 (9:00-12:20). No leading questions were asked to elicit this long narrative.

Later clarifying questions that perhaps qualify as the "leading" questions Appellant complains about are followed with explanations clearly not suggested by the interviewer. For instance, the question, "Did you say something about calling Wayne?" was answered affirmatively with Victim explaining that Rob was the person who called Wayne. State's Exhibit 1 (circa 22:15-22:45). Another clarifying question asked was the forensic interviewer's inquiry about Victim's previous comment that she tried to wake Grandmother. State's Exhibit 1 (circa 9:25-9:50). Absent from the analysis is any explanation as to what information might have been suggested by the forensic interviewer as opposed to information that was volunteered by Victim without suggestion. In the present case, a mature, eleven year-old witness volunteered all the information. None of the pertinent information was originally produced from leading questions – this was not a suggestive interview.

Further, the use of leading questions is merely a single factor in determining, in total, the admissibility of a recorded forensic interview. Victim's recorded interview possesses the particularized guarantees of trustworthiness. The forensic interviewer was trained to conduct investigative interviews of children (R. pp. 41-42), Victim gave a detailed account of the offense, her statement held internal coherence, and the statement was undoubtedly was the result of spontaneous recollection or fresh recall – it was not molded by the questions posed by the forensic interviewer.

Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear

abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) (“The appellate court reviews a trial judge’s ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court.” (emphasis added)). In the present case, the trial court did not abuse its discretion by allowing the video recording to be introduced because the Victim’s account was clearly her own and not suggested by the forensic interviewer’s questions. See State v. Adams, 430 S.C. 420, 845 S.E.2d 217 (Ct. App. 2020) (finding no abuse of discretion in admitting video recording in compliance with section 17-23-175).

Further, Victim’s testimony was corroborated by her brother, who woke up briefly while Appellant was in the bed, and Appellant’s pants, left behind per Grandmother’s testimony. Any error is harmless beyond a reasonable doubt. 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). The “materiality and prejudicial character of the error must be determined from its relationship to the entire case.” State v. Thompson, 352 S.C. 552, 575 S.E.2d 77, 83 (Ct. App. 2003). Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). In the present case, what unfair prejudice might be conceived from the admission of the forensic interview is outweighed by the substantial evidence of Appellant’s guilt.

CONCLUSION

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

Respectfully submitted,

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STATE OF SOUTH CAROLINA

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The State,

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vs.

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PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Brief of Respondent on Appellant by email to Appellant's counsel of record, Robert M. Dudek, at his primary email address provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 15th day of June, 2022.



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Subject: The State v. Robert Wayne Eaves (2019-001683)
Attachments: EAVES Robert - Brief of Respondent - 2019-001683 (03014086xD2C78).PDF

Good Afternoon Mr. Dudek,

Attached please find the Brief of Respondent in The State v. Robert Wayne Eaves (2019-001683). This will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt of this email.

Thank you!

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