ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BOBBIE ALBERT MCCANN,

APPELLANT

Appellate Case No. 2012-212555

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by overruling appellant's objection that the testimony of Elizabeth Willingham would not assist the trier of fact under Rules 702 and 703, SCRE, where she admitted she had very limited knowledge of the present case, and the unduly prejudicial nature of her testimony outweighed any alleged probative value it had to assisting the jury in deciding appellant's guilt or innocence in this case?

STATEMENT OF THE CASE

Appellant was indicted by the Pickens County Grand Jury for two counts of criminal sexual conduct with a minor in the first degree, and committing a lewd act upon a child. All three charges involved the same alleged victim. R. *.

Appellant's case came on for trial on April 23, 2012 before the Honorable Robin Stilwell, and a jury. Jenny Hamaker was the assistant solicitor. David Cantrell represented appellant. Tr. 1.

The jury found appellant guilty on all three counts. Tr. 314, l. 16 – 315, l. 2. The judge sentenced appellant to twenty-five years imprisonment for the criminal sexual conduct in the first degree counts, and he imposed a five year consecutive sentence for committing a lewd act upon a child. Tr. 321, ll. 5-13.

This appeal follows.

ARGUMENT

The court erred by overruling appellant's objection that the testimony of Elizabeth Willingham would not assist the trier of fact under Rules 702 and 703, SCRE, where she admitted she had very limited knowledge of the present case, and the unduly prejudicial nature of her testimony outweighed any alleged probative value it had to assisting the jury in deciding appellant's guilt or innocence in this case.

Relevant Facts

The solicitor insisted upon her right to tell the jury in her opening statement that "the defendant has been convicted of a prior offense that would classify him and put him on the sex offender registry." Tr. 59, ll. 2-4. That prior offense was being a "Peeping Tom" on one occasion. The solicitor also told the jury:

> And I'm going to go ahead and warn you, I'm not happy with the mother. I don't like her. **I think she's terrible**. Not happy with the grandmother either, don't like her. **I think she's terrible.** I do not think these children are safe with either of them. Y'all are going to find and probably feel the same way, but that's not why we're today. *We are here to determine if he did what he has been indicted for doing.* No, mother and grandmother did not make the right choices. That's probably why we're here in the first place. But listen patiently from this witness stand as little [Juvenile #1] tells you what happened to her. In these kinds of cases, **you can choose to believe just her testimony to convict him. There does not need to be corroborating evidence.** So everything else is everything else.

Tr. 63, l. 19 – 64, l. 8. (emphasis added)

Defense counsel told the jury appellant's seventeen-year-old Peeping Tom conviction mandated that he register as a sex offender which was "pretty harsh." Counsel added that "Bobby's a hardworking man, earns a living, works hard. He came into the life of all of these people as you've been told in mid - - early to mid 2008. Now, of course, the

indictment says it starts in 2007. Well, if it did, it couldn't have been him, he wasn't there. But the indictment says these allegations go over a two-year period." Tr. 64, l. 21 – 65, l. 21. As will be seen infra, the evidence showed that the alleged victim in this case recanted her allegations against appellant on at least two occasions. Her mother also had several boyfriends in and out of the house.

The minor in this case was seven years old at the time of the trial. She was a big sister to her little brother. When asked how she got along with her little brother she answered simply "fighting." This seven year old alleged victim was in the first grade. Tr. 116, l. 18 – 117, l. 22.

When asked by the solicitor if anyone had "ever done a bad touch to you," she responded "Bobby." The solicitor then led the alleged victim through various touches or other acts she alleged happened outside the Dollar General, and at home while her grandmother or mother were "in the kitchen washing dishes, in the bed or making breakfast or watching TV." Tr. 120, l. 23 – 128, l. 19.

Toni Durnil was the mother of the alleged victim, and her younger brother. She said she had five children in all, counting the three step-children by their father, David Bagwell, "my boyfriend." John Howard was the alleged victim's father. Durnil added that Bagwell was in prison for drugs and that her son had a different father who was in Seneca, SC. According to Durnil, neither father had anything to do with the children. Tr. 69, l. 14 – 70, l. 20.

Durnil said in 2009 she was dating Larry Pendergraft. Tr. 70, ll. 23-25. She started dating Bagwell in October of 2010 because she broke up with Pendergraft "because he was doing drugs . . . [and] he took my car and got it crushed [for scrap metal]." Tr. 70, l. 21 –

71, l. 24. Durnil testified that she was not working at the time of the trial, and her boyfriend, Bagwell was on disability. Tr. 71, 25 – 72, l. 4. Durnil claimed she worked three jobs at the time the alleged victim stayed with various people -- including appellant and her mother -- when the alleged abuse occurred. Appellant Bobbie McCann was "my mother's boyfriend," and Durnil said her mother started dating appellant in March of 2008. Tr. 72, ll. 14-21.

Durnil remembered that appellant and her mother moved into "Cecil Durham's house." Durham was "Bobby's boss man [at the saw mill]." Tr. 73, ll. 9-15.

Durnil claimed in March through May of 2008 "I worked three different jobs." She was vague about them, but apparently one was at Oconee Medical Center. The other two apparently involved taking care of an elderly man and an elderly woman at different times during the day. Tr. 74, ll. 9-15.

Durnil told the solicitor that her daughter, the alleged victim, loved appellant. "That was her Papa. She looked up to him like a grandfather." Tr. 75, ll. 22-25. The alleged victim liked to "hang out" with appellant, and he would "buy her things . . . [he] bought her a lot of things actually." Tr. 76, ll. 1-5.

Durnil testified that in December of 2009, she was at Country Corner, a gas station in Pickens, with her boyfriend Larry Pendergraft, when he went into the store. At that point the alleged victim told her she had been abused at the home her mother shared with appellant. Durnil took her daughter to the emergency room. She maintained: "I was in shock and I was really upset, so my friend Carla kind of helped me out, coached me through it." Tr. 77, l. 10 – 79, l. 20. Her friend Carla later called the police after Durnil did not. Tr. 80, l. 8 – 82, l. 16. Durnil that the child alleged appellant abused her at the Dollar General in

Pickens, at Durham's gas station at Six Mile, in her mother's bedroom, living room and bathroom, "and on the swing I got her for Christmas." Tr. 82, ll. 17-22.

Durnil said that after the child reported the alleged abuse she began "grinding her teeth, and she had never done that before [and] wetting the bed and she was always protecting her private area. If you touch her, she'll jump. And she's scared of the dark." Tr. 83, ll. 9-23. However, Durnil continued to allow appellant to spend time with the child "because I love my mother." Tr. 85, ll. 4-6.

Durnil testified that her mother told the child: "Papa never done it," and she claimed her mother asked the child to blame it on somebody else. She also alleged her mother told her if she did not "drop the charges" against appellant she was going to notify DSS that it needed to investigate her further. Tr. 86, ll. 11-23.

Durnil said after the police and DSS got involved her daughter continued to see appellant but she claimed "I was begging my mama to leave Bobby." She said David Bagwell was out of the picture by 2011 because they had an argument and she left him. Tr. 89, l. 1 – 91, l. 15.

Durnil called Detective Burgess in December of 2010 after appellant's arrest "because my daughter was saying that Bobby didn't do it." Tr. 88, ll. 5-12. Durnil maintained that her mother liked caring for her daughter but she did not want to care for her son. Tr. 99, ll. 15-23. She also reasoned that her daughter was always very happy when she was around appellant Bobbie McCann. Tr. 105, ll. 11-17.

Durnil acknowledged in 2007 she thought her ex-boyfriend had molested her daughter because her daughter began touching herself and scratching herself. Tr. 107, ll. 11-22. She admitted she told a doctor that she – and her mother -- suspected sexual abuse by

her ex-boyfriend because the child was asking for adults to perform sex acts on her, and she was acting strangely about sex in other ways. Tr. 109, ll. 2-7.

The alleged victim testified that said she thought sex meant when "somebody falls in love." Tr. 130, l. 12 – 140, l. 15. The following occurred on cross-examination of the alleged victim:

> Mr. Cantrell: Okay. What did you used to call Bobby?
>
> Juvenile #1: Papa.
>
> Mr. Cantrell: And you're - - who is that you're calling Dad now?
>
> Juvenile #1: David Scott Bagwell.
>
> Mr. Cantrell: Now, was there someone that lived with you, another dad that lived with you, before that?
>
> Juvenile #1: Yeah. Lots.
>
> Mr. Cantrell: Lots of different dads?
>
> Juvenile #1: Yeah.

Tr. 141, ll. 16-24.

Detective Rita Burgess acknowledged that on November 24, 2010, Durnil called her and said the alleged victim was "recanting her story . . . saying that Bobby did not do it." The child said that Durnil's other boyfriend, Larry, "did it." Tr. 170, ll. 16-25.

Burgess claimed she heard the alleged victim crying hysterically in the background during this telephone call saying: "Please don't make me say it. Larry didn't do it. Papa did." Burgess testified: "I told Toni not to ask [the alleged victim] any more questions, to leave her as she was, leave her be. Not to allow anyone else to ask her any questions and to bring her to my office." Tr. 171, ll. 1-15.

Defense counsel asked Burgess to acknowledge that there were two if not three recantations on the part of the alleged victim in this case. Burgess said she was told twice that the child had recanted her allegations against appellant. Tr. 183, ll. 16-23.

Burgess said she knew about allegations that Durnil's boyfriend, Larry, had abused the child, and that she was living with Larry at the time the abuse allegations were made against appellant. Tr. 185, ll. 5-24.

The objectionable testimony

The solicitor called Elizabeth Willingham as a witness. Willingham worked for the Julie Valentine Center. She said the center was a child advocacy center involving allegations of abuse, a rape crisis program, and community education and training program about child abuse. Willingham had a PhD in "Counselor Education and Practice" from Georgia State University. Tr. 211, l. 18 – 212, l. 8.

She was recognized as an expert in "counseling children thought to be sexually abused." Defense counsel said he had no objection "to that particular - - to that." Tr. 215, ll. 5-11.

The solicitor then got specific with Willingham who stated that she had never met the alleged victim in this case nor counseled her. "I have very limited information. I was briefed just on the allegations before the trial so I would sort of know what I was speaking to. . . . Tr. 215, ll. 4-25. The following occurred on direct examination of Willingham:

> Ms. Barwick: Okay. That being said, let's talk **a little bit about children who are thought to be abused. Let's talk about disclosure first**. Tell the jury a little bit about disclosure and delayed disclosure?
>
> Ms. Willingham: Okay. We typically say that disclosure is a process - - -

> Mr. Cantrell: Your Honor. Your Honor. At this time, if I could, I would like to have a motion to possibly take up.
>
> The Court: Ladies and gentlemen, if you'd please return to your jury room. Please do not discuss the case.

Tr. 216, ll. 3-14.

Defense counsel objected to this proposed testimony because "we're getting ready to [do] disclosures and that sort of thing, and I think it goes beyond the scope of the ruling [recognizing heer limited expertise]." Defense counsel argued Willingham admitted knowing virtually nothing about this case, and that under Rules 702 and 703, SCRE, Willingham did not have any specialized knowledge that would assist the trier of fact. Further, she was not relying on facts or data that were made known to her before the hearing that were of the type reasonably relied upon by experts in a particular field in forming opinions and inferences on the subject. Tr. 216, l. 24 – 217, l. 23.

The solicitor responded that Willingham would not vouch for the victim in any way, but that the jury needed to understand that it was "a normal thing" for there to be delayed disclosure. Tr. 217, l. 25 – 218, l. 17. The solicitor assured the judge there would be no vouching for the credibility of the alleged victim. Tr. 218, l. 18 – 219, l. 5.

Defense counsel continued to object that this was beyond "the scope of assisting the trier of fact." He also argued that any possible evidentiary value Willingham's testimony would have in this regard - - its probative value would significantly outweighed by its unduly prejudicial effect. The judge overruled defense counsel objection, allowing Willingham to continue testifying. Tr. 219, l. 11-22.

The judge told defense counsel he could lodge a contemporaneous objection if he thought the testimony was vouching for the credibility of the alleged victim. Tr. 219, l. 21 –

220, l. 16. Defense counsel noted that the very nature of the testimony the solicitor wanted Willingham to testify about was vouching for not just this particularly alleged victim "but for all victims in her category." Tr. 220, l. 17 – 221, l. 7.

Willingham then testified that - - citing no authority - - that **seventy percent of victims "have never told anyone" that they were abused**. She said it's very common, therefore, that there be late disclosures. Tr. 222, l. 20 – 223, l. 18.

Willingham offered that different children "respond in different ways." She said that **ninety percent of abused children are abused by someone "who's known and loved and trusted by the child."** Tr. 224, l. 12 – 227, l. 2. Willingham said that perpetrators often "groom" their victims by beginning to touch them as if it was an accident, and buying them gifts and being nice to them in general. Tr. 227, l. 3 – 229, l. 11.

Willingham told the jury that "every child's experience is unique." Some children begin wetting their bed, and others may act out or become promiscuous. She said that some children began doing poorly in school and they had difficulty expressing themselves after being abused. Tr. 232, l. 1 – 235, l. 13.

On cross-examination Willingham refused to say that every case was different, yet at the same time she said "every child's response is unique." Tr. 236, l. 16 – 237, l. 7. Willingham offered: "When you're looking at children's responses as a whole, then if you - - every child's response is unique and each family's circumstances may be unique as far as the dynamics in the family." Tr. 237, l. 3 – 238, l. 5.

The solicitor in her closing argument told the jurors: "Who knows if that other man touched this child? That's not what we're here to discuss today. We're here to discuss if this man touched that child." Tr. 274, ll. 10-12. The solicitor reminded the jury that

appellant was on the sex offender registry: "Why would a man who is on the sex offender registry, who's been accused of these crimes, continue to have contact with this child at her house, at his house, on the same swing he's accused of molesting her on? An innocent man would not do that." Tr. 282, ll. 8-14.

The solicitor noted the similarities between Dr. Willingham's testimony and the alleged victim in this case: "I don't want my Papa in trouble. Consistent with Dr. Willingham and her testimony about patterns she has seen over the years and documented **scientific studies patterns of children who have been sexually abused.** Grooming, the gifts, the caring for, making her feel loved, that's another thing. Dr. Willingham said some of the physical symptoms, stomachaches. Second forensic interview, what did the child say when she really didn't want to talk about it. My stomach hurts. Consistent . . . Kids have problems with sequencing. I don't know if you remember, but when Ericka was on the stand she said, it happened every time I was over there . . . Dr. Willingham testified that children have a hard time with sequencing, especially in cases where there is chronic sexual abuse." Tr. 282, l. 8 – 285, l. 4. (emphasis added).

Discussion

Despite the opinions of the Supreme Court and this Court, the state pushes the envelope once again claiming this junk pseudo science will assist the trier of fact. In reality the testimony was calculated to have a jury conclude that the alleged victim in this case was acting in the same manner as other children who supposedly acted in "verified" cases of child sex abuse.

Willingham, after being qualified as an expert in a very limited area, testified she had never talked to the alleged victim and knew little about the case. However, she

mentioned bed-wetting and acting promiscuous as signs of an abused child. She also said that abused children also very often love the abuser, and the abuser often lavishes them with gifts and treats them well.

Not surprisingly, that matches the alleged facts of this case. This was yet another back-door attempt to have the jury think, through the use of junk science, that the child in the case before them was probably sexually abused also.

In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499, n.5, (2011) the Supreme Court wrote that there was no objection to the qualifications of the witness in that case. However, the Court noted it had previously observed that the witness may not even need to be qualified as an expert. See, State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009). The Court held that it could "envision no circumstance where their qualification as an expert at trial would be appropriate" in the "forensic interviewer" type context. Although the Court was speaking of forensic interviewers, the testimony of Willingham was offered for the same purpose, which was to imply to the jury that someone who worked in this "specialty" of abused children could offer expertise which allegedly would assist the jury within the confines of Rules 702 and 703, SCRE.

Defense counsel correctly argued under Rule 702, SCRE, Willingham could not provide scientific, technical, or other specialized knowledge which would assist the trier of fact to understand evidence or to determine a fact at issue. Further, under Rule 703, SCRE, Willingham testified under oath, or claimed, she knew almost nothing about this particular case, so under Rule 703, SCRE her testimony was not based on facts or data made known to her at or before the hearing. This testimony was not of sufficient reliability scientifically

under our rules of evidence as our Supreme Court explained in State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) and State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012).

Willingham's testimony was calculated to have the jury conclude that from her expertise such as *seventy percent of victims never disclose at all, and ninety percent of children abused are abused by someone they love and trust*, that the alleged victim in this case was probably just another abused child. This was yet another back-door attempt against what was warned against in State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), and State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) and State v. Douglas, supra.

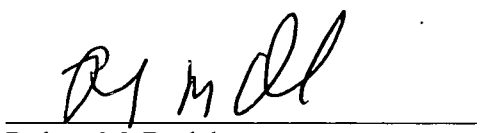
The state will undoubtedly argue the evidence here is sufficiently different, but it is not. The solicitor's closing argument is the final proof it is not. It is same junk science, dressed up slightly differently, with the same purpose of unfairly prejudicing appellant's right to be fairly judged on the evidence against him in this case free of extraneous factors. Defense counsel noted this testimony was not scientific within the meaning of Rules 702 and 703, SCRE, but once it was admitted over his objection the solicitor was free to exploit its "reasonable inferences" in her closing argument.

The facts of this case show a dysfunctional family that even the solicitor said she did not like. She found fault with the mother and grandmother. The mother of the alleged had several boyfriends through the house while the child was at a young age, and the child's confusion may have been understandable. Regardless, appellant is serving a thirty year prison sentence based on the disturbing record shown above. He should be granted a new trial.

CONCLUSION

By reason of the foregoing argument, appellant's convictions should be reversed and this case remanded to the Pickens County Court of General Sessions for a new trial.

Respectfully submitted,



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This 17th day of May, 2013.