THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions
Donald Hocker, Circuit Court Judge

Opinion No. 5968

The State, ... Respondent

v.

Brandon Jerome Clark, ...Appellant.

Appellate Case No. 2019-001477

PETITION FOR REHEARING

On February 8, 2023, this Court affirmed Appellant's conviction for criminal sexual conduct with a minor in the first degree. *State v. Clark*, Op. No. 5968 (Howard Adv. Sh. No. 6 at 45). Pursuant to Rule 221(a), SCAR, Brandon Clark requests this Court grant rehearing on the matter due to issues misapprehended or overlooked by this Court.

In the alternative, Appellant asks the Court to vacate that portion of the opinion which is advisory in nature.

Erroneous limitation of cross examination of forensic interviewer and direct examination of Defendant's expert

In determining petitioner's trial counsel was properly prevented from cross examining the forensic interviewer and properly prevented from presenting testimony by an expert that would call into question the circumstances and conduct of the interview, the Court of Appeals misapprehended the holdings of *State v. Anderson*, 413 S.C. 212 (S.C. 2015) and *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). If allowed to stand, this court's holding would frustrate the essential right of confrontation and create a special class of defendants — those accused by children — who have diminished rights of confrontation.

As noted by this court, the *Anderson* and *Kromah* decisions strictly restrict the state from eliciting testimony from forensic interviewers or experts that would serve chiefly to improperly bolster the credibility of a child witness. The State may not, for example, elicit testimony to suggest that any particular technique employed by the interviewer is designed to produce more truthful or accurate disclosures by child witnesses. Instead, the state is limited in court to using the interviewer to authenticate the video but may use a so-called "blind" expert to educate the jury about other matters involving child witnesses to and victims of crime.

But the authentication colloquy is not the last time the forensic interviewer speaks to the jury. Once the video is authenticated and deemed to meet the threshold for admission under Section 17-23-175 of the South Carolina Code, the interviewer speaks,

alongside the child witness, throughout any video played to the jury. The interviewer asks the child questions. Gives the child instructions. Answers questions the child might have. Steers the child to stay focused or to move on to new topics. The interviewer, every bit as much as the child, communicates vitally important evidence to the jury. But applying the holding of the Court's opinion in this case, Appellant and similarly situated defendants are completely foreclosed from asking the interviewer questions about what is said in the video. The child witness, who is called before introduction of the video in such a trial, may or may not be recalled by either party after the video is played to the jury to be cross-examined about ways in which the out-of-court statements may be subject to questions of accuracy, credibility, and veracity; this court's holding would foreclose any such questioning of the interviewer.

But such a rule conflates the trial court's determination of *admissibility* with the jury's role in assessing the *credibility* of the admitted evidence. The essential function of trial counsel for any defendant is to assist the jury through questioning of the state's witnesses in making that assessment.

At oral argument, the Court was concerned with the unfairness that would arise if defendants were permitted to challenge the reliability of interview techniques while the state cannot introduce testimony about the reliability of the same. But the strategic decision by counsel for any defendant to cross examine a forensic interviewer about the conduct of the interviewer or to introduce expert testimony to challenge the reliability of an interviewer's conduct would eliminate the *Anderson* and *Kromah* prohibitions binding the state in its case in chief. *See State v. Culbreath*, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008)("When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the

latter evidence would have been incompetent or irrelevant had it been offered initially.") With the door opened by the defendant, the state would be free to pursue lines of questioning in redirect or rebuttal that would have been impermissible in the State's case in chief. This is the proper way to strike the balance that were the impetus for the *Anderson* and *Kromah* decisions.

At oral argument, counsel for the petitioner proffered a corollary example in the *Neil v. Biggers* context. 409 U.S. 188 (1972). Where an eyewitness identification is deemed sufficiently reliable to be admissible by the trial court, the admission of that evidence proffered by the state—which arises in the natural course of the trial court's evidentiary gatekeeping role—does not preclude defendants from challenging the officers who conducted the eyewitness identification about the suggestive techniques they may have used in eliciting at that identification. Nor does a finding of admissibility in the Biggers context prohibit the introduction of qualified expert testimony to educate the jury about techniques and circumstances like, for example, cross-racial identification bias, that might lead to a less than reliable identification. The judge's determination of *admissibility* is not and cannot be the final word on *credibility*.

An additional example is also instructive: in cases involving in-custody confessions pretrial litigation often centers on the admissibility of such confessions where the question is whether, as a matter of constitutional law, the circumstances of the confession were so coercive as to render its admission fundamentally unfair. But where the pretrial determination does not result in suppression of an in-custody confession, that determination does not prevent the defendant from bringing the jury's attention through examination and cross-examination of witnesses to the nature and circumstances of the confession that might lead a jury to question its credibility. "Although all the evidence

may be to the effect that a confession made while under arrest was a voluntary one, the jury may not be so convinced; and it is the jury who, in the final analysis, must determine the factual issue of voluntariness." *State v. Santiago*, 370 S.C. 153, 190 (S.C. Ct. App. 2006)(*citing State v. Miller*, 211 S.C. 306 (S.C. 1947)).

It is no more appropriate in the context of a case involving child sexual abuse than it is in a case involving a defendant's statement apparently confessing to homicide to supplant the jury's factfinding role as the arbiter of credibility with the judge's legal determination of admissibility.

The decisions in *Anderson* and *Kromah* gave guidance to trial courts to shield against the State's improper questioning of forensic interviewers and experts in child abuse dynamics and interviewing for the purposes of bolstering the credibility of child witnesses. Rather than furthering the purposes of the limitations set forth in *Anderson* and *Kromah*, if allowed to stand, this Court's opinion would use those decisions as sword to hold at bay proper questioning of witnesses by people accused of crime by children. While defendants will undoubtedly take a risk in eliciting testimony about the suggestive nature of forensic interviews, that is a strategic decision defendants must be allowed to make.

Improper comment on admissibility of the forensic video

This Court held that the proper time for trial counsel to raise concerns about the reliability of the video was before its admission. To the extent that this case turns on a failure to preserve error below, this Court should not have commented on whether the forensic video would have been properly admitted had the proper procedure been followed. This Court's opinion regarding what it deems an unpreserved issue of

admissibility of evidence is advisory in nature, but an appellate court need not address other issues when a single issue is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.Ed.2d 591, 598 (1999). Courts in South Carolina do not render merely advisory opinions. *See*, *e.g. Hitter v. McLeod,* 274 S.C. 616, 619 (S.C. 1980). An appellate court renders an advisory opinion when commenting on an issue will have no practical effect on the outcome of the case. Pursuant to Rule 221(a), SCAR, Appellant respectfully requests this Court withdraw the opinion and reissue it with the portion containing the advisory opinion removed.

In the alternative, Appellant respectfully requests ehearing to address whether the Court's opinion reflects a *per se* finding of ineffective assistance of counsel. Appellant is aware that the South Carolina courts do not recognize "plain error" or "*in favorem vitae*" review. *State v. Torrance,* 305 S.C. 45 (S.C. 1991) (abolishing *in favorem vitae* review, once an exception to South Carolina's rigid error preservation rules). But to the extent the Court's opinion is that trial counsel waived legitimate grounds for suppression of the forensic interview and thereby forfeited all remaining right to challenge the reliability of the interview, Appellant would respectfully seek leave to argue against precedent in favor of adoption of a plain error rule in criminal cases. Such a rule would align with the comparable rule in the Fourth Circuit Court of Appeals, a rule the existence of which has not resulted in any undue flood of reversals of convictions in the circuit. See Fed. R. Crim. P 52(b)("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). This Court and our Supreme Court should recognize that the error in acquiescing to the video's admissibility was plain on its face, that the error affected Clark's substantial rights, and that the error seriously affected the fairness of the proceeding against him—indeed, trial counsel expressed regret to the trial

court about the concession after other rulings upon which she had conditioned her acquiescence to the video's admission. And if that was error, the error was manifestly harmful, since the only time the child witness made factual allegations of criminal sexual conduct with a minor in the first degree was during the forensic interview video.

Conclusion

For the foregoing reasons, Appellant respectfully requests rehearing to address those issues misapprehended or overlooked by this Court or, in the alternative, vacatur of the portion of the Court's opinion that is advisory in nature, or, in the alternative, permission to argue against precedent that the Court should adopt a procedure for plain error review in criminal cases and in applying that rule, reverse and remand this case for further proceedings in the trial court.

Respectfully submitted,

/s Cameron Jane Blazer
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February 23, 2023

Charleston, South Carolina

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCAR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Ambree Muller, Esquire, at the primary email address listed in the Attorney Information System (AIS), which is ambreemuller@scag.gov and Brandon Clark, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 23rd day of February, 2023.

Respectfully submitted,

/s Cameron Jane Blazer
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Attorney for Appellant Brandon Clark

Mr. Brandon Jerome Clark, #381213
Lieber Correctional Institution
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RE: Your case

Dear Mr. Clark:

On February 8, the Court of Appeals affirmed your conviction in the circuit court. I have sought rehearing regarding two issues in the Court's decision. A copy of the petition is enclosed. When I hear from the Court on the petition, I will let you and your sister know.

If you have any questions concerning this matter, do not hesitate to contact me.

Sincerely,

Cameron Jane Blazer
Ninth Circuit Public Defender

Enclosures: Opinion
Petition for Rehearing