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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHARLES M. DEVEAUX,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial court erred in admitting the testimony of a forensic interviewer as an expert witness and in not granting a mistrial because such testimony improperly bolstered Child's credibility, invaded the province of the jury, is not scientific, and did not assist the trier of fact?

2.

Whether the trial court erred in not declaring a mistrial after both the forensic interviewer and investigating officer improperly vouched for Child's credibility and testified about details of the alleged incident?

3.

Whether the trial judge erred in allowing the State to repeatedly refer to section 16-3-657 of the South Carolina Code in opening and closing arguments and in charging this statute to the jury?

4.

Whether the trial court erred in not declaring a mistrial after the State failed to produce the entire file from the Assessment and Resource Center, including a report from a child psychiatrist who examined Child, which denied the defendant due process by preventing him from fully preparing his defense?

STATEMENT OF THE CASE

On June 17, 2009, Charles M. Deveaux ("Deveaux") was indicted in Richland County for criminal sexual conduct with a minor, first degree. R. 749. The indictment alleged that Deveaux committed a sexual battery against his daughter, Child. R. 749.

On October 10 - 13, 2011, Deveaux was tried before the Honorable G. Thomas Cooper and a jury. R. 1. Deveaux was represented by Rhodes Bailey, Brian Shealy, and Joanna Delaney. R. 1. Kathryn Ashton and Nicole Simpson represented the State. R. 1. The jury convicted Deveaux. R. 469, ll. 13 – 18. On November 7, 2011, Judge Cooper sentenced him to thirty years' imprisonment. R. 474, l. 22 – 475, l. 2.

On November 8, 2011, Deveaux's attorney served a notice of appeal. On November 9, 2011, the notice of appeal and proof of service were filed with the Richland County Clerk of Court. This appeal follows.

ARGUMENT

Introduction

This criminal sexual conduct case involves a single alleged instance of abuse brought against Child's father after Child's mother was jailed for violating a visitation order. As the Court will see, there are inconsistencies in the stories told by Child's mother. No physical evidence of abuse existed. Had the trial court not allowed improper corroboration of Child's testimony, it is unlikely the State's slight case would have resulted in a conviction.

The Parents

Charles Deveaux, Child's father, took the stand in his own defense. R. 348, ll. 2 – 8. At the time of trial, he was fifty-seven years old. R. 348, l. 15. He graduated from high school and served fourteen years in the Air Force, receiving an honorable discharge. R. 348, l. 19 – 349, l. 9. After leaving the military, Deveaux returned to South Carolina and worked in Eastover, including eight years as a detention officer and supervisor at Alvin S. Glenn Detention Center. R. 349, l. 23 – 350, l. 17.

Deveaux's relationship with Child's mother, Myers, lasted approximately six months. R. 351, ll. 7 – 10. They broke up and grew apart. R. 351, ll. 8 – 10. Child was born in 1997. R. 113, ll. 3 – 11. A visitation order existed between Deveaux and Myers allowing him to see Child every other weekend, two weeks in the summer, and holidays. R. 351, l. 21 – 352, l. 4.

Myers admitted on cross-examination that she was upset about the visitation order because she had been jailed twice for violating it. R. 118, ll. 18 – 20. Myers spent three days in jail.

The Reporting of the Alleged Abuse

On July 11, 2008, on her way to take Child to her visit with her father, Myers called 911 and told the operator that Deveaux had sexually abused his daughter. R. 107, ll. 5 – 12. As part of their visitation arrangement, Myers would meet Deveaux at a gas station to drop off Child. R. 114, ll. 13 – 22. At trial, Myers claimed Child first told her of the alleged abuse while they were on the way to the gas station. R. 114, ll. 13 – 22. The abuse allegedly occurred during Child's prior visit with her father, approximately two or three weeks earlier. R. 83, l. 13 – 202, l. 3. Myers claimed Myers cried and first tried to call her husband and her friend but could not reach either one of them, and then called 911. R. 106, ll. 15 – 18; R. 114, l. 23 – 115, ll. 1. Myers told the 911 operator that she needed "a police report taken out." R. 116, ll. 2 – 4. She did not say that she needed help or that Child was in danger. R. 116, ll. 5 – 10. She asked for an officer to meet her at the gas station. R. 116, ll. 14 – 17.

Myers and Child continued to the gas station. Myers did not wait for an officer to arrive at the gas station, but instead allowed her daughter, who she claimed had just revealed her father's sexual assault, to go with the alleged abuser alone to his house:

> Q. Ms. Myers, what you're telling us is that Child told you her father had sexually abused her, correct?
>
> A. Yes.
>
> Q. And then you drop her off to go see him?
>
> A. Yes.

R. 121, ll. 17 – 21.

Deveaux's first witness was Richland County Sheriff's Deputy John Hatfield. R. 335, l. 14 – 336, l. 3. Officer Hatfield was the first policeman to respond to Kathy

Myers' call. R. 340, ll. 2 – 9. Officer Hatfield met Myers at the gas station after Deveaux had already left with Child. R. 340, ll. 8 – 11. Deveaux and Child had already left. Myers asked Officer Hatfield two times whether DSS was going to be involved. R. 341, ll. 12 – 15. Myers was not crying. R. 341, ll. 16 – 19. Officer Hatfield could not recall whether Myers talked to him about the visitation order. R. 343, l. 25 – 344, l. 9. Officer Hatfield went to Deveaux's house. He did not speak with Child, but did speak with Deveaux. R. 342, ll. 3 – 10. Based on his assessment, Officer Hatfield declined to arrest Deveaux. R. 343, ll. 16 – 19. Myers left with Child. R. 111, ll. 2 – 4.

Interestingly, Myers told Officer Hatfield a different version of how she found out about the abuse than what she said at trial. Myers told Hatfield at the gas station "that she received **a phone call** from [Child], and [Child] told her that she was sexually abused by the defendant." R. 341, ll. 7 – 11 (emphasis added).

The first time Deveaux heard the allegations of abuse were after taking Child home from the gas station. R. 353, l. 20 – 354, l. 12. He was standing in his backyard and saw a deputy sheriff coming around the corner of his house. R. 354, ll. 2 – 3. The deputy told him that he was accused of touching his daughter inappropriately, shocking and surprising Deveaux. R. 354, ll. 8 – 15.

Investigator Robert Martin headed up the investigation after the initial decision of Officer Hatfield and his supervisor, Officer Monica Johnson, not to arrest Deveaux. R. 146, ll. 14 – 16. On July 24, 2008, Investigator Martin called Deveaux and told him that he wanted to schedule an interview with him on July 28, 2008, but Deveaux insisted on having the interview the very next day. R. 184, l. 8 – 339, l. 4. During this interview, Deveaux told Martin that he did not do anything to his daughter. R. 355, ll. 17 – 22; R.

185, ll. 7 – 14. Investigator Martin did not arrest Deveaux after this interview. R. 355, ll. 23 – 25.

Investigator Martin eventually called Deveaux back and said that he had a warrant for his arrest. R. 356, ll. 1 – 6. The arrest warrant was issued on July 29, 2008. R. 751. This was six days after Child underwent a forensic interview at the Assessment and Resource Center ("ARC"). R. 273, ll. 11 – 12. Deveaux turned himself in after Investigator Martin's phone call. R. 356, ll. 1 – 6; R. 185, l. 25 – 186, l. 2.

The Abuse Allegation

According to Deveaux, the week of the alleged incident was "a fairly normal visitation week." R. 352, ll. 20 – 23. Deveaux noticed that Child seemed withdrawn. R. 352, l. 20 – 353, l. 1. Deveaux told the jury that he did not molest his daughter and that he loved her very much. R. 356, l. 23 – 357, l. 2. Despite repeated, harassing cross-examination that included multiple sustained objections and an admonition from Judge Cooper for asking the same questions over and over, the solicitor could not shake Deveaux's testimony. R. 370, l. 7 – 382, l. 4.

Child was fourteen years old at the time of trial. R. 70, l. 25 – 71, ll. 1. She was in the fifth grade when the alleged incident occurred. R. 74, ll. 10 – 13. Child lived with Myers and her stepfather. R. 73, ll. 13 – 20. Child never lived with Deveaux on a permanent basis. R. 74, ll. 3 – 4.

Child said that one night in June during a week-long visit, Deveaux came into her room and sat on her bed. R. 78, ll. 14 – 17. She said he put a fan in the window and sat back down on the bed. R. 78, ll. 14 – 17. Child claimed that Deveaux lay down beside her and began squeezing her buttocks over her nightgown. R. 79, ll. 11 – 14. She claimed that he then put his hands underneath her nightgown and underwear and "put his

thumb inside [her] vagina." R. 79, l. 24 – 80, l. 2. Deveaux allegedly asked her whether it felt good and she told him "no." R. 80, ll. 19 – 22. Child then claimed Deveaux told her to put on her shoes and they went outside. R. 81, ll. 8 – 9. Once outside, Deveaux allegedly told Child not to tell anybody. R. 81, ll. 24 – 25.

Child spent the rest of the week at Deveaux's house. R. 83, ll. 13 – 17. She did not testify that she called her mother or asked to go home. She did not allege that any other inappropriate behavior occurred during that week. R. 83, ll. 18 – 19.

1.

The trial court erred in admitting the testimony of a forensic interviewer as an expert witness and in not granting a mistrial because such testimony improperly bolstered Child's credibility, invaded the province of the jury, is not scientific, and did not assist the trier of fact.

Relevant Facts

Raymond Olszewski ("Olszewski"), an employee of the ARC, testified for the State. R. 266, ll. 24 – 25. He is a forensic interviewer. R. 267, ll. 4 – 9. He also testified that he interviewed child. R. 273, ll. 8 – 12. The recording of his interview with Child was admitted into evidence over defense counsel's objection. R. 284, l. 17 – 285, l. 3. The State offered Olszewski "as an expert in the field of forensic interviewing and child abuse assessment." R. 271, ll. 10 – 12. During voir dire, Olszewski admitted that he does not take tests that would measure his skill level as a forensic interviewer. R. 271, ll. 20 – 22. Olszewski admitted he does not have a degree in forensic interviewing. R. 271, ll. 17 – 19. Defense counsel repeatedly asked Olszewski whether there was a scientific way to measure the accuracy of a forensic interview. R. 272, ll. 2 – 21. Olszewski attempted to avoid such an admission:

> Q. Okay. So there's no scientific way to measure the accuracy of a forensic interview; is that right?
>
> A. No. Again, we are gathering information. The ultimate determination of whether or not something is truthful, I guess that's a matter for the jury or a judge.
>
> Q. Well, you can't scientifically measure the accuracy of what you do; is that right?
>
> A. No. I'm not sure I understand the question completely, but, no, I guess–
>
> Q. Okay.
>
> A. You can explain – ask the question a little bit differently.
>
> Q. Okay. There's no way to ascertain – there's no way to measure the level of accurate interviews or the amount of accurate interviews or accurate information that comes out of the interviews, is there?
>
> A. **I guess it depends on how you define accuracy.** I mean, is it defined by whether or not the victim has told the truth or whether or not the interviewer has properly conducted interview.
>
> **Q. Can your field be peer tested to determine whether or not a certain percentage of interviews come out with accurate success rates?**
>
> **A. No, I don't know of any study like that.**

R. 272, ll. 2 – 25 (emphasis added). Defense counsel then objected to Olszewski's testimony and qualification, arguing that forensic interviewing is not a science and not the proper subject of expert testimony. R. 273, ll. 3 – 4. The court overruled this objection and permitted Olszewski's testimony. R. 273, l. 5.

Olszewski then testified, over repeated objections, regarding the forensic interview process, including the RATAC protocol and, as will be seen *infra*, favorably compared the Child's interview to the protocol. R. 273, l. 8 – 292, l. 17. Immediately after Olszewski's testimony, the defense moved for a mistrial based on improper

vouching and Olszewski's forays into details of the alleged abuse. R. 304, l. 16 – 305, l. 6. Judge Cooper denied the motion. R. 305, l. 7.

Discussion

The qualification and usage of a forensic interviewer as an expert witness by the State was error in this case. South Carolina's recent decisions show increasing hostility to the State's use of forensic interviewers as expert witnesses in child sex abuse cases. See State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) (State's Pet. Cert. Withdrawn October 17, 2012). The Supreme Court recently held that a forensic interviewer's testimony was properly limited to the foundation necessary to introduce a video recording of a child's interview. State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012); see also State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding there is no need to qualify a forensic interviewer as an expert and Pleicones, J., calling forensic interviewers "human 'truth detectors'" in dissent). The instant case contains many of the same problems as the testimony in McKerley and qualification of the forensic interviewer as an expert was erroneous.[1]

a. Improper Vouching

Section 17-23-175 of the South Carolina Code allows the State to introduce a recording of a forensic interview provided certain criteria are met. S.C. Code Ann. § 17-23-175. In Whitner, the Supreme Court addressed the proper role of the forensic interviewer in relation to section 17-23-175. Whitner at ___, 732 S.E.2d at 867. The Court stated that it had "confronted instances where the State has abused the statute and

sought to have the forensic interviewer, improperly imbued with the imprimatur of an expert witness, invade the province of the jury by vouching for the credibility of the alleged victim." Id. Unlike those cases, the forensic interviewer in Whitner was only used to admit the recording of the child's interview. The interviewer "offered no improper testimony, and included no bolstering testimony that would invade the province of the jury." Id. The Court held that the use of the interviewer as "mere foundational trial testimony" should "serve as a model of how the statute is designed to work." Id.

McKerley presents the opposite scenario: abuse of a forensic interviewer's testimony. In McKerley, there was no other way "to interpret the interviewer's testimony other than as her opinion that the victim was telling the truth." McKerley at 465, 725 S.E.2d at 142. The McKerley interviewer used her testimony regarding the work of forensic interviewers as a trojan horse to lead the jury to her inevitable, "expert" conclusion that the victim told the truth about the abuse. Id. The McKerley court gave numerous examples of improper statements made by the interviewer. Id. at 142-43, 725 S.E.2d at 465-66. The statements held improper in McKerley are virtually indistinguishable from Olszewski's testimony.

The following statements by Olszewski mirror the improper statements in McKerley:

- Forensic interviewers always look "at the level of detail," and that as a child gets older, their ability to provide detail increases. R. 270, ll. 19 – 24.

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[1] Prior to trial, Deveaux moved to prevent the State's experts from offering testimony that would bolster Child's credibility. R. 23, l. 12 – 26, l. 7. Defense counsel referred the trial judge to Jennings, Douglas, and other relevant cases on this issue. R. 24, ll. 3 – 17.

- When discussing the RATAC protocol, Olszewski said it allowed him "to get an idea of how competent they are." R. 277, ll. 3 – 4. He said, "we're assessing their abilities, getting a hint of their competency." R. 277, ll. 10 – 11.
- "[W]e would begin to discover whether or not something has happened to the child." R. 280, ll. 13 – 15.
- Olszewski testified that Child's delay in reporting the alleged abuse was not unusual and discussed the factors that play a role in delayed disclosure of abuse (over defense counsel's objection). R. 285, l. 19 – 287, l. 3. He said, "In my experience, many children, the majority of children, delay in reporting sexual abuse. So it's a rare occurrence where a child sexual abuse victim, makes an immediate outcry right after being abused." R. 286, ll. 1 – 3

These seemingly generic statements are exactly the method used by the interviewer in McKerley to bolster the victim's credibility.

The solicitor also asked Olszewski whether he looks for "signs of potential suggestibility or improper influence." R. 288, l. 25 – 289, l. 1. Olszewski first stated that he tries to avoid asking leading or suggestive questions. R. 289, ll. 2 – 9. Unsatisfied with this response, the solicitor then asked:

> Q. Just the level of detail that you discussed previously. How does that relate to potential improper influence or things of that nature?
>
> A. Okay. By improper influence, you mean the child being influenced by somebody else.
>
> Q. Outside sources.
>
> MR. BAILEY: Objection, Your Honor. Clear vouching.
>
> THE COURT: He can describe the process. Go ahead. Overruled.

> THE WITNESS: Okay. Well, again, my experience, children who have been perhaps influenced by others, maybe to say something in particular, those interviews will often be lacking in detail. **The detail I just talked about.** And that may be because it's easy to remember. The fewer facts you try to remember, the easier it is. So oftentimes when you press for details, they won't be there or they'll be lacking. Or it appears that the child is searching, you know, for an answer. So that's one thing that we look for in relation to that question.

R. 289, l. 10 – 290, l. 4 (emphasis added).

After Olszewski had already testified regarding Child's description of the time and place of the alleged abuse, the solicitor asked the following:

> Q. And in this particular case, what type of peripheral detail was provided? Sort of what happened before and after?
>
> A. Again, well, **she was – even better than young children** being able to provide sort of the time –
>
> MR. BAILEY: Objection, Your Honor.
>
> THE COURT: What's your objection?
>
> MR. BAILEY: Vouching. We're asking for a ruling.
>
> THE COURT: I don't think so. Overruled.
>
> THE WITNESS: Older children, **and in this case [this] Child**, are sometimes better to provide information about the timing of the event, when it took place, more information about the location, details about the location, for example, where the event took place. What was happening before the event.
>
> She was able to describe what she was doing before the event and what led up to the event. Information about what the alleged perpetrator was doing or did just prior to the alleged assault. **And then very detailed information about the act or offense that's being alleged.**
>
> **How the clothing were-how the clothing was manipulated and that kind of thing.** And then, again, after the event, provide information about what happened, again, subsequently after the event ended. So what happened following the event **and that was all provided in this case.**

R. 287, l. 23 – 288, l. 22 (emphasis added). Olszewski told the jury he recommended Child for therapy, that the family continue to cooperate with DSS or law enforcement, and that Child have no contact with her father. R. 291, ll. 1 – 15.

Just as in McKerley, these statements cannot be interpreted as having any function other than providing an expert opinion to the jury on whether Child was telling the truth. See also, Jennings at 482-83, 716 S.E.2d at 95-96 (Kittredge, J., concurring, criticizing the "State's regrettable desire to admit patently inadmissible evidence.") Furthermore, Olszewski's testimony regarding the details of the alleged abuse, including his reference to how the clothing was manipulated, violate the time and place restrictions of Rule 801(d)(1)(D). SCRE 801(d)(1)(D); Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) (holding in a PCR case that a forensic interviewer's testimony "substantially exceeded" Rule 801(d)(1)(D)'s "limitations of time and place.").

Commentators and other courts agree with the Supreme Court's solution to the forensic interviewer problem in Whitner. "The purpose of [this kind of] testimony is to convince the jury that the interview was done properly, thus bolstering the child's credibility." John E. B. Myers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 55 (2010). "[A]llowing the prosecution to offer expert testimony during the state's case-in-chief violates the rule that a party may not bolster the credibility of its own witnesses unless credibility is attacked." Id. at 55-56. "The only proper role for a forensic interviewer during the state's case-in-chief is to lay the foundation for admission of the videotaped interview into evidence." Id. at 56. "Any testimony beyond that, especially expert testimony, is improper bolstering and is unfair to the defendant." Id.; see also Richardson v. State, 43 A.3d 906, 910-11 (Del. 2012) (reversing because of admission of opinion testimony from

a forensic interviewer stating that their "sole role" was to authenticate the recording of the interview and anything further constituted impermissible bolstering). The State should have limited Olszewski to foundational testimony to admit the forensic interview as in Whitner, but instead elicited improper opinion testimony vouching for Child in a case that hinged solely on her credibility.

b. Improper Qualification

Compounding the damage, the trial court's improper qualification of Olszewski as an expert in forensic interviewing and child abuse assessment improperly imbued him with the imprimatur of an expert witness. Whitner at ___, 732 S.E.2d at 867. In order for an expert's testimony to be admissible, the court must exercise its gatekeeping role pursuant to Rule 702 of the South Carolina Rules of Evidence. Watson v. Ford Motor Co., 389 S.C. 434, 445-447, 699 S.E.2d 169, 175 (2010). First, the subject matter must fall outside of the province of the jury. Id. A forensic interviewer's opinions regarding truthfulness directly infringe upon the process of the jury. See id. (citing Douglas for the proposition that forensic interviewer should not have been qualified as an expert witness only to render personal observations). Olszewski's opinion that Child was truthful fell squarely within the jury's domain.

The substance of the expert's testimony must be reliable. Id. In order to determine whether an expert's scientific testimony is reliable, the trial court must consider the following factors: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). Nothing in this record supports a finding that

Olszewski's testimony met these criteria. Defense counsel's pointed questioning during voir dire forced Olszewski to admit that his field cannot be peer reviewed or tested to determine accuracy. R. 272, ll. 22 – 25.

On cross-examination, Olszewski admitted there is no way to measure truthfulness during an interview. R. 293, ll. 15 – 19. Defense counsel questioned Olszewski regarding materials from a course that he teaches on forensic interviewing. He admitted that his course materials describe forensic interviewing as an "art." R. 293, l. 20 – 294, l. 7. Olszewski's own teaching materials describe forensic interviewing as "guided by intuition and creativity and influenced by the interviewer's emotions, beliefs, and background, performed better by those with a flair for empathy." R. 294, l. 11 – 295, l. 21. "Flairs for empathy" cannot be the basis for the qualification of a testifying expert. Nothing in this case supports the qualification of Olszewski as an expert witness.

c. Prejudice

The State fully exploited the erroneous admission of Olszewski's bolstering and unscientific testimony. During closing argument, the solicitor referred to the ARC as "trained professionals." R. 442, l. 23. She further stated:

> Now, you've heard from expert witnesses. . . . You heard from Ray Olszewski, an expert in forensic interviewing in this case. He's had twelve years of interviewing children, thousands of cases. This is a science or a field of expertise. And he came up here and he took the stand. He spoke to you. And these expert witnesses, you're allowed to consider their expertise.

R. 418, ll. 17 – 22. The solicitor clearly was leading the jury to infer that because Olszewski took the stand, he believed Child was truthful. The solicitor further stated:

> And finally, with [Olszewski], he was able to tell you that significant details that Child was able to give about before and after this defendant put his finger in her vagina are significant to him because he would expect that from a ten-year-old because if this was a story, if she

> was improperly influenced, she would get up there and say he put my finger – his finger in my vagina and I can't remember much else. No. She's able to give the description of what happened before and she's able to give a description about what happened after. And he would expect that from a child of her age. And after this interview is over, he determines she needed therapy and he referred her to therapy and he also referred that she not have contact with this man again.

R. 447, ll. 3 – 16. The solicitor stated that Child would have to be "able to fool law enforcement agencies, DSS, Assessment Resource Center, doctors, and you for three years." R. 450, ll. 9 – 11.

The credibility of Child was the determining factor in this case. No physical evidence of abuse existed. The mother's credibility was compromised by inconsistencies and bias. She testified that Child told her about the abuse in the car, but told Officer Hatfield Child called her on the telephone. Myers spent three days in jail for violating a visitation order. A police officer, Officer Hatfield, testified in Deveaux's defense regarding the inconsistencies in the mother's stories. Deveaux maintained his innocence. Without the opinion testimony of Olszewski, it is unlikely that the State would have obtained a verdict. Forensic interviewers should be confined to assisting investigators and, when necessary, laying a foundation pursuant to S.C. Code Ann. § 17-23-175. Olszewki's testimony far exceeded what is permissible. As in McKerley, this Court should reverse and grant Deveaux a new trial.

2.

The trial court erred in not declaring a mistrial after both the forensic interviewer and investigating officer improperly vouched for Child's credibility and testified about the details of the alleged incident.

Relevant Facts

Investigator Robert Martin was the lead investigator in Deveaux's case. R. 158, ll. 8 – 10. He testified outside of the boundaries of SCRE 801(d)(1)(D) and also offered unfounded expert opinions. Martin impermissibly related details of the abuse after being asked the lack of DNA or fingerprint evidence:

> Q. But we are talking about a two-week delay, that transference wouldn't be present in this case, would it?
>
> A. That's correct. You're talking – this was a digital penetration case, so finger, a digit went into – or thumb went into the vagina –
>
> MR. BAILEY: Objection, Your Honor.
>
> THE COURT: What's the objection.
>
> MR. BAILEY: Time and place.
>
> THE COURT: Sir?
>
> MR. BAILEY: Time and place, judge.
>
> THE COURT: All right.
>
> MS. ASHTON: Your Honor, he's just – he's just explaining the reasons why he didn't do certain things in his investigation.
>
> MR. BAILEY: We've got a matter of law, Judge.
>
> THE COURT: Approach the bench.
>
> (WHEREUPON, there was a bench conference out of the hearing of the jury and the Court Reporter.)
>
> THE COURT: I'd ask the court reporter to read back that last answer.

> (WHEREUPON the court reporter read the last answer for the Court.)
>
> THE COURT: All right. Ladies and gentlemen, strike that from the record. This witness doesn't -doesn't have personal knowledge of anything like that. So I'm going to ask you to disregard that in your consideration of this case, and I'm going to ask that it be stricken from the record.

R. 166, l. 11 – 167, l. 11. Investigator Martin also testified that:

> It was delayed reporting, very common in these kind of cases. Victims of sexual assault are not always –
>
> MR. BAILEY: Objection, Your Honor.
>
> THE COURT: I'm sorry what's the objection?
>
> MR. BAILEY: The officer is making a broad speculation about sexual assault victims. He's not a specialist in this area.
>
> THE COURT: Overruled.
>
> THE WITNESS: In more of these cases, they don't come forward – just, it's a long delay sometimes in reporting these cases.

R. 159, l. 23 – 160, l. 9.

As recounted in the previous ground, Olszewski testified regarding the details of the alleged incident. R. 287, l. 23 – 288, l. 22. Following Martin's testimony, the defense moved for a mistrial because Investigator Martin testified in greater detail than time and place. R. 182, ll. 2 – 12. Following Olszewski's testimony, the defense moved for a mistrial on the same issue. R. 304, l. 16 – 305, l. 6. Judge Cooper denied these motions. R. 182, ll. 2 – 12; R. 305, l. 7. Defense counsel also moved for a new trial based on Investigator Martin's inadmissible time and place testimony, which Judge Cooper denied. R. 747-748

Discussion

Investigator Martin and Olszewski's testimony regarding the details of the alleged abuse violated the time and place restrictions of Rule 801(d)(1)(D). SCRE 801(d)(1)(D); Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010). This rule prohibits hearsay testimony about the details of alleged abuse. Id. The only such hearsay that is admissible regards the time and place of the alleged incident. Investigator Martin testified about digital penetration. Olszewski testified about how detailed Child's testimony was and repeated the allegations that Deveaux manipulated Child's clothing. This testimony exceeded the time and place restrictions. The trial judge even granted Deveaux's pre-trial Motion in Limine to limit such testimony. R. 477; R. 68, l. 20 – 69, l. 10.

South Carolina has repeatedly found such testimony constitutes reversible error. Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) (granting a new trial in a PCR case because defense counsel failed to object to social worker's testimony that was inadmissible under Rule 801(d)(1)(D); Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001) (granting a new trial in a PCR case because defense counsel failed to object to hearsay testimony about details of a sexual assault); Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994) (granting a new trial in a PCR case because defense counsel failed to object to hearsay testimony about details of a sexual assault). Testimony such as was given in these cases unfairly bolsters the victim's credibility.

Just as in the cited cases, the issue of Deveaux's guilt hinged on the credibility of Child. One of the State's themes in closing argument was that Child had to painfully tell her story multiple times. R. 432, l. 12. – 433, l. 13. The solicitor listed "multiple agencies," "multiple people," "law enforcement," "DSS" and "a forensic interview." R.

432 l. 17 – 433, l. 4. The solicitor even admitted that Olszewski's testimony exceeded the time and place restrictions. In her closing she said, "And finally, with [Olszewski], he was able to tell you that significant details that Child was able to give about before and after this defendant put his finger in her vagina are significant to him. . . ." R. 447, ll. 3 – 16. Allowing Investigator Martin and Olszewski to impermissibly testify regarding the alleged details of the abuse prejudiced Deveaux and warrants reversal.

3.

<u>The trial judge erred in allowing the State to repeatedly refer to section 16-3-657 of the South Carolina Code in opening and closing arguments and in charging this statute to the jury.</u>

Prior to trial, the defense filed a Motion in Limine to prevent reference in front of the jury to section 16-3-657 of the South Carolina Code by either the State or the Court. R. 481. Section 16-3-657 states, "The testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658." S.C. Code Ann. § 16-3-657. Defense counsel argued that reference to this statute improperly highlighted the victim's credibility and was already covered in the general charge that a jury may believe one witness versus many. R. 20, l. 17 – 23, l. 1. Judge Cooper denied this motion. R. 69, l. 3; R. 476.

While the Supreme Court has stated that it is not reversible error to charge section 16-3-657, this holding is subject to the limitation that the charge is not unduly emphasized. <u>State v. Rayfield</u>, 369 S.C. 106, 117-18, 631 S.E.2d 244, 250 (2006); <u>see also</u> <u>State v. Orozco</u>, 392 S.C. 212, 221-23, 708 S.E.2d 227, 232-33 (Ct. App. 2011). In this case, the charge was unduly emphasized by the combination of the State's references to it in argument and the trial court's charge. The State misleadingly stressed that the

South Carolina Legislature singled out CSC victims as having a special rule for their testimony.

The solicitor referred to the statute in her opening, stating that "**our legislature** has noted that criminal sexual conduct cases are somewhat unique in nature, a little bit different than other cases and they prescribe that the testimony of a victim in a criminal sexual conduct case need not be corroborated by other evidence. But I submit to you in this case it is." R. 67, ll. 14 – 19 (emphasis added). She also referred to it in closing, stating:

> [T]hese crimes are done behind closed doors because they're shameful. No person, no father is going [to] put his finger up a girl's—in someone's vagina and leave behind any evidence because that is shameful. And that is why **the legislature** enacted that statute about how the victim's statement need not be corroborated. **The legislature of South Carolina recognized that. They** recognize this issue, in all these cases, criminal sexual conduct cases.

R. 441, ll. 15 – 23 (emphasis added). Defense counsel again objected after closing arguments to these references and his objection was overruled. R. 450, l. 21 – 451, l. 6. In his charge, Judge Cooper said, "Now, **an additional statute in our law** says that the testimony of a victim in a criminal sexual conduct case need not be corroborated by other testimony or evidence." R. 459, l. 25 – 460, l. 2 (emphasis added). Defendant's post-trial motions on this issue were denied. R. 747-748.

The repeated emphasis placed by the solicitor and the trial judge on the attention given the victim's testimony by the Legislature exceeds what is allowed in Rayfield. The majority in Rayfield did not say trial courts should charge section 16-3-657. In fact, the majority opinion can be read as disfavoring such a charge. As stated by Justice Pleicones in his dissent, the purpose of section 16-3-657 is prevent a court from "finding a lack of sufficient evidence to support a conviction because the alleged victim's testimony is

uncorroborated." Rayfield at 119, 631 S.E.2d at 251. This statute sets an evidentiary standard. It exists for lawyers and judges, not jurors.

In this case, the victim's testimony—despite the improper repetition of it by Olszewski and Investigator Martin—was uncorroborated by any admissible substantive evidence. Without any physical evidence or other testimony, the case hinged on Child's credibility. It was error to give the jury the impression that the Legislature had singled out victims in CSC cases as particularly believable. The court's charge and the solicitors' comments did precisely that and this Court should reverse.

4.

The trial court erred in not declaring a mistrial after the State failed to produce the entire file from the Assessment and Resource Center, including a report from a child psychiatrist who examined Child, which denied the defendant due process by preventing him from fully preparing his defense.

Relevant Facts

Prior to trial, the defense renewed its discovery motions and the State represented there was no material that had not already been provided. R. 10, ll. 2 – 21. Defense counsel asked a question concerning the identity of a "Dr. Watson" whose name appeared on a notation in the ARC file. R. 10, l. 22 – 11, l. 2. Judge Cooper asked the solicitor who Dr. Watson was and she replied "I'm not even sure." R. 11, ll. 14 – 19. Judge Cooper asked the solicitor whether Dr. Watson ever examined Child and she replied, "As far as we know, no, Your Honor." R. 11, l. 20 – 41, l. 3.

This assertion was incorrect. Amy Phipps, an ARC employee, testified on direct examination that her treatment plan was signed off and approved by a psychiatrist. R. 222, l. 23 – 223, l. 8. This was the last question asked on direct by the solicitor. On

cross-examination it was revealed that the psychiatrist who approved her treatment plan was Dr. Lakisha Watson. R. 226, ll. 13 – 19. Phipps testified that Dr. Watson met with Child and her mother and completed her own psychosocial assessment. R. 226, ll. 22 – 24. The evaluation performed by Dr. Watson was placed in Child's chart that was contained in the ARC file. R. 227, ll. 8 – 15. Dr. Watson's evaluation was not in the ARC file given to the defense.

Following Phipps' testimony, defense counsel moved for a mistrial. Defense counsel stated that they had repeatedly asked about information concerning Dr. Watson but the State never disclosed her report or her existence. Defense counsel argued that it was subject to disclosure and the report had been in the ARC's file the entire time. R. 236, l. 15 – 238, l. 16. The trial judge was very concerned about the State's failure to turn over Dr. Watson's report. He grilled the solicitor concerning why they did not have this report and why it was not turned over to the defense. R. 239, l. 1 – 241, ll. 23. Judge Cooper commanded the solicitor to immediately "go get" the file. R. 239, l. 19.

Defense counsel, after examining Dr. Watson's report, stated that he needed expert assistance in interpreting the report and needed to question Dr. Watson about it. R. 242, ll. 17 – 19; R. 568. Before ending court that day, Judge Cooper stated that he was not going to grant the defense's mistrial motion at that point, "but there better be some movement on this issue by morning. Either we're going to bring Dr. Watson in here or I'll consider your motion for a mistrial." R. 249, ll. 12 – 15. The following morning, defense counsel again renewed their motion for a mistrial stating that failing to disclose the complete ARC file constituted a violation of the defendant's Sixth and Fourteenth Amendment rights. R. 255, l. 5 – 414, l. 15. Defense counsel argued that

they could not be quickly prepared to question a psychiatrist without the help of their own expert. R. 258, ll. 11 – 14.

Defense counsel also argued that there appeared to be a systemic problem with disclosure of files from the ARC.[2] R. 259, ll. 22 – 260, l. 15. Trial counsel stated:

> There's one [file] that ARC gives for court purposes and there's another one. I've got up here two files to make court exhibits. One is what we were given in this case, which is roughly half an inch in depth. The other is the ARC file, which, not only does that special ARC file have another two inches of depth stacked up against what we were given, but it also has specifically the psychiatric report by Dr. Watson; and it's got other – in reviewing it today for the first time, the rest of that special ARC file has charts and graphs and diagnostics which we were never given, and I mean – at this point in time under this time constraint, I don't know the relevance. We certainly can't exclude them for this impeachment value or exclude them from potential exculpability, and that's why the only true remedy in this case at this point in time is a mistrial motion, Your Honor, to be granted.

R. 259, ll. 25 – 260, l. 15; R. 568. The trial judge took the mistrial motion under advisement. R. 261, l. 25 – 262 l. 1.

[2] Interestingly, Olszewski's teaching materials describe the investigation of child abuse "as a team process." R. 297, ll. 2 – 25. Olszewski admitted that the other members of the "team" were police officers and solicitors. R. 298, ll. 1 – 8. His teaching materials say that forensic interviewers should resolve any conflicts with a solicitor prior to trial. R. 298, l. 13 – 299, l. 25.

After the State rested, Dr. Watson arrived from North Carolina under subpoena. Defense counsel questioned her *in camera.* R. 312, ll. 10 – 17. She is a psychiatrist. R. 312, ll. 6 – 9. Dr. Watson performed an evaluation of Child. R. 312, ll. 19 – 22. Based on her report, Dr. Watson testified that Child denied symptoms of depression, mania, anxiety, or anhedonia. R. 316, ll. 2 – 19. She had no opinion on whether Child's symptoms were consistent with sexual abuse. R. 317, ll. 14 – 18. Her testimony appeared to contradict Phipps, who "diagnosed" Child as a victim of sexual abuse. R. 218, ll. 6 – 15.

Following Dr. Watson's testimony, defense counsel renewed their mistrial motion. R. 320, ll. 19 – 21. The State attempted to excuse the failure to turn over Dr. Watson's report by blaming the defense and federal privacy regulations. R. 325, l. 1 – 326, l. 14. Judge Cooper denied the defense's motion, stating that Dr. Watson's examination did not materially affect the outcome of the case. R. 329, ll. 16 – 20.

Discussion

"The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)). "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted in the defendant's acquittal." Kyles v. Whitley, 514 U.S. 419, 434 (1995). It is enough that it undermines confidence in the verdict. Id. at 435.

The close relationship between the ARC and the State is troubling in this case. As stated by the solicitor, the prosecution and the ARC worked together for three years on

this case. R. 432, l. 17 – 433, l. 4. The solicitor began her post-qualification examination of Phipps by asking her if it was "okay if I call you Amy?" R. 216, ll. 4 – 5. The State's proffered reason for failing to turn over the bulk of the ARC file which contained Dr. Watson's report was not plausible. The State claimed that federal privacy regulations prevented disclosure—however such regulations obviously apply to all health information, including what was originally disclosed. It is further clear from Judge Cooper's comments throughout the trial that he was deeply disturbed by the State's failure to disclose Dr. Watson's report.

Defense counsel clearly articulated the material nature of the evidence withheld. The State failed to give the defense a report by a psychiatrist that the defense needed expert help to decipher and use. It appeared from Dr. Watson's testimony that her conclusions contradicted those of Phipps. Had the State produced this information in a timely fashion, the defense could have hired its own child psychiatrist to review Dr. Watson's report and either prepare the defense to adequately impeach or cross-examine the State's witnesses or testify in the defense's case. The State's failure to disclose Dr. Watson's report violated defendant's due process rights. U.S. Const. Amend. XIV. The trial court erred in not granting Deveaux's mistrial motion and this case should be reversed.

CONCLUSION

For the foregoing reasons, defendant's conviction should be reversed and he should be granted a new trial.

Respectfully submitted,

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of June, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
JUN 20 2013
SC Court of Appeals

Appeal from Richland County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

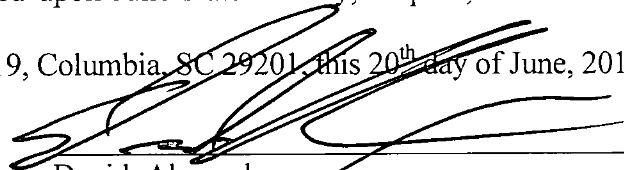
V.

CHARLES M. DEVEAUX,

APPELLANT

CERTIFICATE OF SERVICE

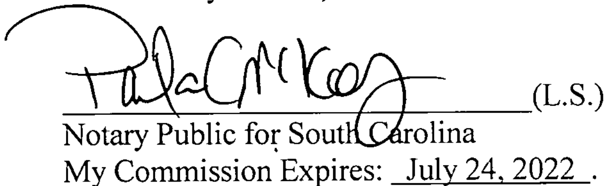
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Julie Kate Keeney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of June, 2013.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of June, 2013.

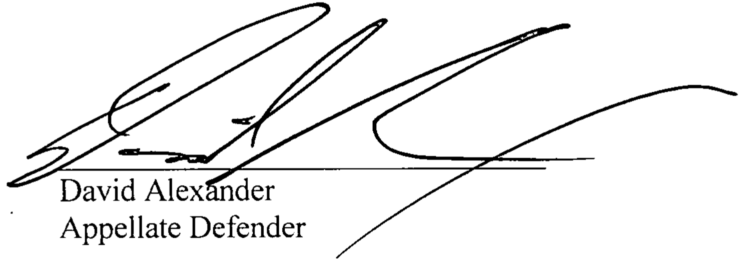


_______________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022 .

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 20th 2013



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