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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS
Appeal From Pickens County
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2023-000641

THE STATE, ...RESPONDENT,

v.

BRANDON JEROME CLARK,..... PETITIONER.

Opinion No. 5968 (S.C. Ct. App. filed February 8, 2023)

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner was indicted by the Pickens County Grand Jury for first-degree criminal sexual conduct (CSC with a minor). On August 19-22, 2019, Petitioner proceeded to a jury trial before the Honorable Donald B. Hocker. Jenny L. Barwick, Esquire, represented Petitioner. The jury found Petitioner guilty as charged and the trial judge sentenced him to twenty-five years' incarceration. Petitioner timely filed his appeal. On February 8, 2023, the South Carolina Court of Appeals affirmed the convictions in a published opinion, State v. Clark, 438 S.C. 495, 884 S.E.2d 212 (Ct. App. 2023). A timely filed petition for rehearing was denied on March 24, 2023. (App. 630). A timely Petition for Writ of Certiorari was filed on May 22, 2023. This Return follows.

STATEMENT OF FACTS

On August 22, 2017, Appellant was indicted for first-degree CSC with a minor. (R.pp.537–38.) Victim was five years of age at the time of the abuse. When Appellant's trial occurred two years later on August 19–22 2019, Victim was seven and about to start second grade. (R.p.24, line 13–R.p.26, line 17).

At trial, Victim testified about the abuse that occurred. In 2017, Appellant lived with Victim, her younger sister, and their mother Brittany Hudson, Appellant's girlfriend, in the mother's home. One night, Appellant picked Victim out of bed and carried her to the downstairs of the home. Appellant pulled down his pants and "peed in [her] private[s]." Victim remembered telling her parents about the event, and later being interviewed by a woman named "Amber." Victim recalled telling Amber true facts about what had happened, but also making untrue statements such as Appellant having a camera in his eyes and that Victim had driven a car, but could not recall why she had made these statements. (R.p.26, line 18–R.p.33, line 22).

Trial counsel cross-examined Victim, eliciting information that the Victim could not recall the number of conversations Victim had with various individuals, including her parents and the State's prosecutor, about the sexual assault. However, Victim affirmed that no one told her what to say during her interview with Amber or at trial. (R.p.33, line 22–R.p.40, line 9).

Brandon Gantt, Appellant's father, testified that on March 20, 2017, Victim approached him and his then-girlfriend Sarah and disclosed the sexual abuse. During the conversation, Victim was "crying, shaky, nervous." Following the disclosure, Appellant immediately took Victim to the hospital. On cross-examination, Gantt testified that Victim told him the abuse occurred on the downstairs couch of Hudson's home. (R.p.140, line 13–R.p.154, line 14).

Hudson confirmed that she and Appellant dated in early 2017 and that he lived with her and her two daughters for about a year and a half or two years, including February and March of that year. Hudson noted Victim had never seen any movies or other media which contained nudity or sexual acts. Hudson also explained that Victim did not know the proper terminology for her private, calling both her vagina and her buttocks her butt. The first time Hudson heard about the abuse was when Gantt called her on March 2017 after Victim informed Gantt that she had been abused on the downstairs couch of the home. (R.p.154, line 24–R.p.170, line 11).

Elaine McGowans, Gantt's sister and Victim's aunt, spoke with Victim the day after Victim returned from the hospital. Victim, upset, told her the assault occurred at her mother's house and that it wasn't her fault. (R.p.170, line 22–R.p.173, line 13).

Allison Meena was a nurse who worked at the hospital to which Victim was taken on March 20, 2017. Meena met with Victim who told Meena about the sexual abuse and that it occurred two days prior to the E.R. visit. She informed the doctor, law enforcement, and several agencies including the Julie Valentine Center, about the reported abuse. (R.p.187, line 8–R.p.215, line 21)

Zack Wilson, a caseworker with the Pickens County Department of Social Services, also spoke with Victim on March 20, 217 and was told by Victim that she had been abused in Hudson's home after Appellant approached her in her sleep and tried to get her to go downstairs. (R.p.251, line 23–R.p.266, line 10).

Dr. Mary-Fran Ratchford Crosswell, a child abuse pediatrician with Prisma Health System in Greenville and an expert in child sexual assault medical exams, performed a medical evaluation on Victim on April 13, 2017. Based on Victim's claims of abuse, Dr. Crosswell performed testing on Victim but did not find any physical evidence of abuse, a common result of the physical exams she performs on assault victims. (R.p.216, line 13–R.p.244, line 22).

Victim's Forensic Interview Evidence

Prior to trial, the parties discussed the propriety of admitting the forensic interview of Victim into evidence. Trial counsel noted she was consenting to the forensic interview "on the condition that, [1], the child testifies; [2], the forensic interviewer testifies; and [3], the transcript [of the interview is admitted into evidence]." The trial judge pressed trial counsel about her condition that the transcript be admitted into evidence, to which trial counsel responded by requesting the judge "let [her] ponder on that a little bit." When the parties revisited the matter several minutes later, trial counsel noted that if the transcript were not allowed into evidence, she would not object to the admission of the video provided the trial judge found it met the statutory requirements for admission as listed in S.C. Code Ann. Section 17-23-175. (R.p.2, line 3–p.3, line 3; p.4, line 12–p.6, line 21).

Trial counsel admitted that the video of the forensic interview "is probably the best evidence. You can see and hear." Trial counsel argued that it was important not only to see Victim's responses during the interview, but also the manner in which the questions were being asked. Trial counsel also admitted the purpose of the transcript was to support an argument that the interview was not reliable and it tainted any future testimony by Victim. (R.p.6, line 22–p.56, line 11).

In response, the State argued the best evidence rule required the video of the interview, not its transcript, be given to the jury. Further, reading the transcript could distract the jury from watching the video, which is supposed to be the basis upon which the jury bases its conclusions. The State also explained that it believed several statements could be taken out of context if read rather than observed. The trial judge noted he would review the cases referenced by both parties, State v. White, 416 S.C. 135, 784 S.E.2d 695 (Ct. App. 2016). (R.p.11, line 17–p.16, line 4).

After reviewing White and S.C. Code § 17-23-175, the trial judge concluded transcripts of forensic interviews are only admissible in situations in which the video of such a poor quality that a transcript is necessary to understand what is occurring during the recorded interview. However, in Appellant's case, the video of the forensic video was good quality, and a transcript was unnecessary. However, the trial judge indicated he would hold off issuing a definitive ruling on the admissibility of the transcript until after the video was played at trial, in case any shortcomings with the courtroom's technology necessitated the use of the transcript. As to the general admissibility of the video under section 17-23-175, the trial judge found the totality of the circumstances surrounding the video and its content allowed its admission, including: (1) trial counsel not objecting to the video being admitted into evidence; and (2) the fact that leading questions were not used in the interview. (R.p.20, line 5–p.21, line 10; p.22, line 17–p.23, line 3; p.53, lines 4–15).

Amber Hiott Cheney was the forensic interviewer who met with Victim following her reports of abuse. Cheney, then an employee of the Julie Valentine Center, conducted a recorded interview of Victim on March 28, 2017. During trial, Cheney confirmed she interviewed Victim and explained the purpose of the interview was to use a "child-friendly approach to try and get information as part of an active investigation" in a "neutral, fact-finding, non-biased interview." The State did not ask Cheney about any details of the interview but she identified the recording of the interview which was introduced into evidence along with the anatomical drawings utilized during the interview to memorialize Victim's language for describing the various parts of her body. (R.p.42, line 4–.p.48, line 17; State's Exhibit 1).

On cross-examination, trial counsel questioned Cheney about the purpose of the Valentine Center, and whether a "center that advocates for children" can perform "a neutral and unbiased

interview of a child." The State objected to the line of questioning, noting case law prevented the witness from testifying to any specifics of her interview with Victim because such answers could improperly bolster Victim's testimony; the sole purpose of Cheney's testimony was to authenticate the recording of the forensic interview. The Court agreed Cheney could not testify in any way that would appear to vouch for Victim's credibility. Trial counsel noted her question was whether someone working at a child advocacy center could be neutral and unbiased and signaled she was ready to move on. The trial judge, acknowledging trial counsel's plan to ask questions about Cheney's prior knowledge of Victim's case from before the interview, allowed counsel to proffer her planned questions in-camera. (R.p.48, line 18–R.p.52, line 22).

In camera, trial counsel began asking questions such as: "When you interview children, is it not the best practice to ask non-leading and open-ended questions?" which led into questions about specific questions asked by Cheney and responses given by Victim during the interview. While the trial judge was initially inclined to allow trial counsel's line of questioning, the State argued that State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), prevented Cheney from testifying to such matters. After reviewing the case, the trial judge agreed with the State's assessment that Anderson prevented the forensic interviewer from providing any testimony regarding her techniques used or observations of Victim. The trial judge ruled trial counsel could cross-examine Cheney about her neutrality, but not about any other areas explored during cross-examination. The trial judge also noted the parties could debate the merits of the forensic interview during closing arguments. (R.p.52, line 23–p.95, line 17).

When the jury returned, trial counsel questioned Cheney about what material she had received prior to the forensic interview, to which she responded by explaining she had read a police report and spoken to a DSS caseworker, both of which were normal protocol pursuant to her

training and were used as information to inform her as to the subject matter of the interview. However, she emphasized she did not use leading questions "and bring information into the room that [she] [previously] obtained." (R.p.95, line 18–p.100, line 24).

The following day, trial counsel claimed that when she consented to admitting the forensic interview, "[she] personally did not stipulate to the factors listed in 17-23-175 as [she] did not believe the video possessed any particularized guarantees of trustworthiness." However, the trial judge noted he already ruled that the forensic video satisfied the factors listed in section 17-23-175, and no objection was made at that time nor was there a motion to redact any portions of the forensic interview. Appellant also renewed his request to submit the transcript of the recorded interview into evidence, to which the State again argued the video itself was the best evidence, and the jury utilizing a transcript would lead to them not focusing on the best evidence of the interview: it's recording. The transcript did not and could not capture the physical cues exhibited by the Victim. Further, the State noted that trial counsel sought to use the transcript in order to cross-examine Cheney on specific comments made by Victim, which was an improper request to ask Cheney to interpret Victim's behaviors and responses. Trial counsel even admitted the transcript was "impeachment evidence. [It] was impeaching what the forensic interviewers on the interviewing [sic] saying the child did." Ultimately, the trial transcript was not admitted into evidence. (R.p.118, line 12–p.136, line 12).

Shauna Galloway-Williams testified as the State's expert witness in child abuse dynamics. Galloway-Williams teaches courses on the issue; provides local, statewide, and national training to various people and agencies; has published various peer-reviewed articles on the issue; and has testified as an expert witness in over forty trials. Trial counsel did not object to her qualifications. Galloway-Williams never met with Victim and only testified regarding general concepts involved

in child abuse dynamics, including: (1) accidental and purposeful disclosures; (2) delayed and immediate disclosures; (3) disclosures as a process in which additional information may be revealed over extended periods of time; (4) factors that impact disclosures such as a child's age and vocabulary; (5) the impact of trauma on a child's memory; (6) the existence of "grooming"; and other dynamics. On cross-examination, trial counsel questioned Galloway-Williams about interviewer influences and how interviewers are trained to use non-leading questions during forensic interviews. Galloway-Williams agreed that interviewers should generally use open-ended questions but emphasized "there's no interview where every single question is an open-ended question," an assertion with which trial counsel agreed. (R.p.347, line 6–p.382, line 14).

Dr. Amanda Salas's Proffered Testimony

The trial judge denied trial counsel's motion to allow him to introduce his own expert witness to testify regarding "the proper methodology for forensic interviews," noting the case law provided by the State throughout trial indicated that forensic interviewers are prohibited from discussing methodology and their own observations about a child victim's behavior because such testimony would improperly bolster that victim's testimony. Therefore, if the State is prohibited from presenting that evidence, the defense should also be prohibited from presenting evidence of that type, as the inference to be drawn from the defendant's evidence would be "don't believe the child." To preserve the record, the trial judge allowed trial counsel's witness to proffer her testimony. Dr. Amanda Salas was a medical doctor of psychiatry who spent two years specializing in adolescent psychiatry from 2006 to 2008, and eventually became board certified in adult psychiatry, child and adolescent psychiatry, and forensic psychiatry, with about a quarter of her active practice involving child psychiatry. However, when the State questioned her about the forensic interview style called ChildFirst which was used to interview Victim, Dr. Salas conceded

she had no substantive knowledge of it but "ha[d] heard of it. When questioned about trials in which she testified regarding techniques and best practice with a forensic interview, Dr. Salas could not recall the details about those cases, only that one case occurred in Charleston and one in Orangeburg. Dr. Salas also did not dispute that the literature supports ChildFirst and other nationally recognized protocols for interviewing children. (R.p.427, line 23–p.428, line 19; p.443, line 9–p.456, line 7).

As to general techniques for interviewing children, Dr. Salas, like Galloway-Williams, explained the importance of making children feel comfortable and using open-ended questions. Dr. Salas shared the acronym of another child interview theory she discovered in her month of research leading up to the trial, called NICHD that was looked on favorably in jurisdictions outside of South Carolina. Trial counsel also asked Dr. Salas her opinion on specific sections of the forensic interview, in which she critiqued, among other things, the questions asked by Cheney. (R.p.458, line 1–p.481, line 3).

The trial judge noted Dr. Salas had a lot of credentials, but due to the case law could not qualify her as an expert for the purposes of commenting on Cheney's testimony. (R.p.456, line 8–p.457, line 25).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). "[T]he appellate court does not re-evaluate the facts based upon its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." State v. Miller, 375 S.C. 370, 378-79, 652 S.E.2d 444, 448 (2008).

ARGUMENT

I. The Court of Appeals properly upheld the lower court's decision to refuse to allow Appellant to cross-examine Victim's forensic interviewer about the specifics of Victim's forensic interview pursuant to Anderson and Kromah.

Petitioner argues the Court of Appeals erred in affirming the trial judge's decision to refuse allow Appellant to cross-examine Victim's forensic interviewer about the specifics of Victim's forensic interview because it is not supported by this Court's precedent and cannot withstand constitutional scrutiny. Petitioner's argument is invalid because the admissibility of evidence is within the discretion of the trial judge. Declining to allow questioning on topics prohibited by precedent; instructing instead that the interview was "fair game" for closing argument was not an abuse of discretion.

During a trial, the scope of cross-examination is a matter falling within the discretion of the trial judge. State v. Colf, 337 S.C. 622, 625, 525 S.E.2d 246, 247-248 (2000); see State v. Avant, 85 S.C. 570, 575, 67 S.E. 908, 910 (1910) ("The conduct of the case in respect to cross-examination must be left, in large measure, to the sound judgment of the presiding Judge[.]"). However, a trial judge should not permit a solicitor or defense counsel to cross-examine a witness in such a matter as to force that witness to attack the veracity of another witness. State v. Bryant, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994); see State v. Sapps, 295 S.C. 484, 486, 369 S.E.2d 145, 145-146 (1988) ("It is improper for the solicitor to cross-examine a witness in such a manner as to force him to attack the veracity of another witness."); State v. Benning, 338 S.C. 59, 63, 524 S.E.2d 852, 855 (Ct. App. 1999) ("It is improper to cross-examine in a way that requires a witness to attack another witness's credibility."). Such "argumentative questioning" constitutes improper witness pitting. Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998).

"'Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror.'" State v. Taylor, 404 S.C. 506, 514–15, 745 S.E.2d 124, 128 (Ct. App. 2013) (quoting State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009)). Generally, bolstering is prohibited to prevent a witness from testifying whether another witness is credible, which is exclusively within the province of the jury. Id.

In Anderson, the person who conducted a forensic interview of the child victim was qualified "as a forensic interviewer in child abuse assessment" without the trial court holding a hearing to determine if the forensic interviewer possessed the requisite experience in child abuse assessment. State v. Anderson, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015). This Court found it was error for the trial court to deny an in camera hearing to determine if the forensic interviewer possessed the requisite expertise. This Court also noted the forensic interviewer's behavioral expert testimony vouched for the Victim's credibility because she testified "only to those characteristics **which she observed** in the minor." Id. at 219, 776 S.E.2d at 79 (emphasis added). The Supreme Court found the following limitations should be placed on her testimony before the jury:

> "The sole purpose of her jury testimony is to lay the foundation for the introduction of the videotape, and the questioning must be limited to that subject. There is no testimony to such things as techniques, of the instruction to the interview subject of the importance of telling the truth, or that the purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted."

Id. at 220-21, 776 S.E.2d at 80.

In the instant case, the trial judge's decision to limit the cross-examination of Cheney aligns perfectly with Anderson. Appellant sought to cross examine Cheney on the techniques she used and her specific observations about Victim's reactions to her techniques and questions. Cheney's responses to these questions and any questions used by the State to rehabilitate her on these matters would necessarily involve testimony prohibited by Anderson. The Court of Appeals found "Clark is of course right that he is not trying to bolster, but if he can attack method and training, the State must necessarily dispute Clark's viewpoint, and it is difficult to envision how the State could dispute the attack without bolstering." State v. Clark, 438 S.C. 495, 504, 884 S.E.2d 212, 216 (Ct. App. 2023).

Just because Petitioner was prohibited from cross-examining Cheney in his desired manner does not mean Petitioner was unable to defend against the interview. Most importantly, the jury was able to review the evidence and draw their own conclusions from the recording. Further, trial counsel was free to (and did) argue about the conclusions which could be drawn from the video during her closing argument. Accordingly, the Court of Appeals did not err in upholding the lower court's ruling prohibiting trial counsel from cross-examining Cheney on matters prohibited by Anderson.

II. The Court of Appeals did not err in addressing the admissibility of the forensic interview after determining the issue had not been preserved for review because it merely answered the question as it was presented and did not give an advisory opinion.

Petitioner argues the Court of Appeals erred when it gave an advisory opinion regarding the admissibility of the forensic interview after determining the issue had not been preserved for review. This argument lacks merit because the Court of Appeals did not issue an advisory opinion.

The question of whether the circuit court erred in admitting the forensic interview was presented to the Court of Appeals. In its opinion the Court of Appeals held that this issue was not

preserved, but even if it had been preserved, their ruling on the issue would not change even if they reviewed the admissibility of the forensic interview on the merits because they could find no basis for finding the circuit court abused its discretion in concluding that Victim's allegation of abuse in the interview satisfied the standard for admission. This was not an advisory opinion, but simply answering the question as presented, in the event that this court disagreed with the Court of Appeals preservation argument to avoid having to then rehear and determine what the merits ruling would have been.

III. The issue of revisiting the error preservation rules was not presented in the petition for rehearing and therefore is not preserved for review by this Court.

Petitioner argues that this Court should revisit its error preservation rules to provide for an exception where, as here, errors are so plain and so harmful that to delay their correction until collateral review would be unjust and wasteful of judicial resources. "Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. Similarly, a petition for rehearing must "state with particularity the points supposed to have been overlooked or misapprehend by the court." Rule 221(a), SCACR. "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011). The United States Supreme Court has stated "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented here." Adams v. Robertson, 520 U.S. 83, 86-87, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997). This Court recently ruled in State v. Morales, that because defendant failed to properly object to a witness's

testimony, the merits of the argument that the testimony was not admissible was not preserved for appellate review. State v. Morales, No. 28154 (S.C. Court filed May 31, 2023). This issue of revisiting the error preservation rules was not presented as an issue in the Court of Appeals and also not presented as an issue in the petition for rehearing and therefore is not preserved for this Court to review.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and convictions of the lower court be affirmed.

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CERTIFICATE OF SERVICE

I, Anne Mueller, certify that I have served the Return to Petition For Writ Of Certiorari on Cameron Jane Blazer, counsel of record for Petitioner, by sending one copy by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served. This day 20th of June 2023.

Anne Mueller

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