THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JOHN PETER BARNES,

APPELLANT

APPELLATE CASE NO. 2011-199787

Appeal from Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2013-UP-314

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on July 10, 2013. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Barnes argued two issues on appeal: (1) that the trial court erred in qualifying the ARC interviewer as an expert in child forensic interviewing when his testimony was not required to be presented by an expert witness (2) the trial court erred in denying appellant's motion for a hearing pursuant to State v Sanders, 341 S.C. 386, 534 S.E.2d 696 (2000) to remove one of the solicitors from the case pursuant to Rule 3.7, Rules of Professional Conduct, SCACR. The solicitor was a

necessary witness to testify concerning the interview of the child victim by the two solicitors on the case to determine the trustworthiness of the child's statement given to the solicitors which contained new information.

The Court of Appeals affirmed the trial court on both issues. The Court of Appeals held on Issue One that it was error for the trial court to qualify the forensic interviewer as an expert. However, the Court still affirmed Barnes' conviction because Barnes did not allege that the forensic interviewer vouched for the victim's credibility, and the interviewer's testimony was cumulative to the victim's testimony and Barnes' statement. On Issue Two, the Court of Appeals held that the trial court did not abuse its discretion in denying Barnes' motion for a hearing pursuant to State v. Sanders, 341 S.C. 386, 534 S.E.2d 696 (2000). The Opinion noted that the trial court heard arguments on the issue from both parties, and rendered a decision based on that.

ISSUE ONE: On Issue One, the Court of Appeals ruled that it was "likely" error for the trial court to qualify the forensic interviewer as an expert. The Court misapprehended the other implication of Issue One. Respectfully, it was definitely error, not "likely" error.

John Barnes was charged with committing a lewd act on his biological eleven year old son. He allegedly gave the boy bubble baths with candles and masturbated the boy as he bathed him. September 12, 2011 R. 19, ll. 17 – 24. Amy, the boy's mother was married to William Murray, Jr. They had a daughter who was eighteen at the time of Barnes' trial. September 12, 2011 R. 20, ll. 15 – 21; September 12, 2011 R. 27, ll. 4 – 25. During her marriage to Murray, Amy had an affair with Barnes and had two sons by him: the victim and his younger brother. Barnes' paternity was confirmed through DNA testing. September 12, 2011 R. 20, ll. 15 – 25; September 13 -15, 2011 R. 98, ll. 5 – 25; September 13-15, 2011 R. 100, ll. 2 – R. 101, ll. 25.

Amy and Murray were divorced in 2004, and she returned to South Carolina in 2008. At that time, the two boys began regular visitation with Barnes. September 12, 2011, R. 27, ll. 4 – 24; September 13-15, 2011 R. 102, ll. 1 – 24.

In April, 2010, the boy confided in his sister that Barnes had been inappropriate with him. She had noticed that the boy began sleeping with Barnes. September 12, 2011 R. 27, ll. 3 – 24; September 12, 2011 R. 29, ll. 1 – R. 31, ll. 10. The sister told her stepmother who told the girl's father (Murray) who reported this to the Sheriff's Department. September 12, 2011 R. 32, ll. 9 – 21.

Barnes gave two statements to law enforcement: the first one on June 18, 2010 and the second one on July 1, 2010. In his first statement, Barnes told the deputy that the bathsand candles were the boy's idea. Barnes said he gave his second statement to protect the boy from having to testify and go through all of the interviewing. September 13-15, 2011 R. 103, ll. 1 – R. 110 ll. 13. On cross examination, he denied that he touched his son inappropriately to teach him to masturbate although he admitted that was in his statement. He said he lied in his statement because he just wanted to die. He lied to protect his son. September 13-15, 2011 R. 110, ll. 18 –R. 121, ll. 24.

Investigator Travis Holdorf testified that Barnes gave two statements. He read the second statement Barnes gave where he said he touched the boy's penis to show him how to masturbate. September 13-15, 2011 R. 87, ll. 16 –R. 88, ll. 25; September 13 - 15, 2011 R. 90, ll. 1 – 25; September 13-15, 2011 R. 91, ll. 19 – R. 97, ll. 25.

The boy testified that Barnes did give him the baths because the boy was stressed about school, but the candles were the boy's idea. He described how Barnes did masturbate him during the baths. September 13-15, 2011 R. 48, ll. 18 – R. 49, ll. 25; September 13-15, 2011 R. 50, ll. 11 – R. 54, ll. 22.

Raymond Olszewski conducted two interviews with the boy victim in this case as he was a forensic interviewer with the Assessment and Resource Center (ARC). This was a child advocacy center or child abuse and treatment center. Children are referred by law enforcement or DSS for forensic or investigative interviews which he conducts. He had a Bachelor's Degree in psychology and a Masters' Degree in social work and was a licensed social worker. He had attended numerous workshops including a week long workshop on basic forensic interviewing. He also taught forensic interviewing of children to law enforcement officers, child protection workers, solicitors, and other frontline child abuse workers. He had been qualified as an expert approximately twenty times. The state offered him as an expert in the field of child sexual abuse and child forensic interviewing. Defense counsel objected that the field of child sexual abuse was too broad. The judge granted defense voir dire. September 13-15, 2011 R. 59, ll. 15 – R. 63, ll. 25.

After voir dire, defense counsel objected to Olszewski being qualified as an expert in child sexual abuse because the field was too broad, and in child forensic interviewing because there was no way to test to see if it "is actually a science." The judge qualified him as an expert in child forensic interviewing. September 13-15, 2011 R. 63, ll. 18 – R. 68, ll. 25.

Olszewski then testified that they used a nationally recognized protocol for interviewing known as RATAC which stood for report, anatomy identification, touch inquiry, abuse scenario, and closure. He said they did not have a lot of rules for the interview but did try to have some safeguards, such as no leading questions, to insure the interview was objective. September 13-15, 2011 R. 69, ll. 19 – R. 75, ll. 25.

Olszewski interviewed the boy on two occasions: April 19, 2010 before he turned twelve, and again on August 12, 2010 after he turned twelve. September 13-15, 2011 R. 84, ll. 21 – R. 86,

ll. 21. Olszewski testified that it was not his practice to give the taped interviews to the children to take home and watch. In fact, he had never done so. September 13 – 15, 2011 Supp. R. 1, ll. 6 – 22.

During the pretrial *in camera* hearing to determine if the videos of the two interviews Olszewski conducted of the boy were trustworthy, defense counsel objected to Olszewski being qualified as an expert. Counsel cited the case of State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009), where the Supreme Court ruled that a forensic interviewer did not need to be qualified as an expert, but could still testify to aid the court and jury regarding understanding the interview method used. Counsel argued there was no way to "gauge the science and no way to test the reliability of the methods." Counsel said he would be asking about those issues. Counsel argued again the issue was not the interviewer's education or background, but whether the field was a field of expertise. The judge ruled that he would be qualified as an expert in child sexual abuse and forensic interviewing. Defense counsel objected to Olszewski being qualified as an expert. September 13-15, 2011 R. 37, ll. 3 – 34, ll. 8.

In State v. Douglas, Id. , the state introduced the forensic interviewer and had her qualified as an expert in forensic interviewing. She testified that she was employed as the Sumter County Victim's Assistant Officer and had interviewed hundreds of victims. She did not have a college degree but had attended a forty hour training course in forensic interviewing, and completed two weeks of training classes. She had testified in court several times. She used the RATAC method of interviewing.

The Supreme Court ruled that it was not necessary for her to be qualified as an expert because she "testified as to her personal observations and experiences and her interview with the victim." The Supreme Court cited Rule 701, SCRE, that lay witnesses were permitted to "offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on

the witness' perception, and will aid the jury in understanding testimony, and do not require special knowledge."

The same scenario exists in Barnes' case. The forensic interviewer, Olszewski, had more education than the interviewer in Douglas, but his testimony was basically the same. His testimony was based on his interviews with the boy, and was based on Olszewski's perceptions, personal observations, and his experience.

In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the Supreme Court wrote in dicta that they could envision no circumstance where a forensic interviewer should be qualified as an expert. The Supreme Court also wrote: "it is an escapable fact that jurors can have a tendency to attach more significance to the testimony of experts."

It was highly probable that the jury attached more significance to the interviewer's testimony because he was qualified as an expert. This was prejudicial to Barnes. The trial court erred in qualifying Olszewski as an expert in child forensic interviewing.

The Court misapprehended that it was still prejudicial to Barnes for the interviewer to testify as an expert because the jury would attach more importance to his testimony as an expert. Olszewski's testimony was merely cumulative to the victim's testimony. In Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), the Supreme Court held that improper corroboration testimony that is merely cumulative tot eh victim's testimony in criminal sexual conduct prosecution cannot be harmless because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.

ISSUE TWO: Raymond Olszewski testified that he conducted two interviews with the boy victim in this case as Olszewski was a forensic interviewer with the Assessment and Resource Center (ARC) which was a child advocacy center or child abuse and treatment center. Children are referred

by law enforcement or DSS for forensic or investigative interviews which he conducts. Olszewski interviewed the boy on two occasions: April 19, 2010 before he turned twelve, and again on August 12, 2010 after he turned twelve. September 13-15, 2011 R. 84, ll. 21 – R. 86, ll. 21.

Investigator Travis Holdorf testified that when he received a report of a child sexual abuse case, the best course of action was to send the child to professionals where they can be interviewed by trained people so they have an interview that was not contaminated. He did not talk with the boy victim at all but sent him to the ARC. September 13-15, 2011 R. 87, ll. 16 – R. 89, ll. 17.

In a pretrial motion, defense counsel moved to have a hearing pursuant to State v. Sanders, 341 S.C. 386, 534 S.E.2d 696 (2000) to determine if one of the solicitors should be removed from the case according to Rule 3.7 of the Rules of Professional Responsibility, SCACR. Counsel argued that they were informed the previous week that the two solicitors prosecuting Barnes interviewed the boy without anyone else present. Counsel argued that child victims were different because there was a statute with specific guidelines on how interviews of child victims should be conducted and videotaped if the child's statement was to be admitted. He said it took a trained professional to interview these children. September 12, 2011 R. 4, ll. 5 – R. 5, ll. 22.

Counsel explained that new information was obtained from the boy during the solicitors' interview. He said a hearing was necessary so the defense could learn from the solicitors the manner they used to interview this child, and the questions they asked and if any influences occurred. Counsel pointed out that if one of them were removed from the case, a hearing would not be necessary as they could call the removed solicitor as a witness to testify regarding the safeguards used in the interview. September 12, 2011 R. 6, ll. 1 – r. 9, ll. 23.

The solicitors argued that they were not necessary witnesses because the boy was going to testify. The judge ruled that she was not going to remove one of the solicitors and a hearing was not

necessary. Defense counsel then asked for a proffer from the solicitors to establish a record, but added that the proffer was not technically testimony. The judge allowed the solicitor to proffer information about the interview. September 12, 2011 R. 9, ll. 24 – R. 14, ll. 16.

Solicitor Bodman then proffered that the boy met with her and the second solicitor. They did not use any leading questions, but did not videotape their interview. They allowed the boy to take the videos of the two prior ARC interviews home with him to review them. He returned for a second interview and disclosed three pieces of new information which the solicitors provided to defense counsel. (1) He said he would use the excuse he had to pee in order to get the masturbation to stop when his father allegedly gave him a bath and masturbated him as he bathed him.(2) He also remembered that his father played music during the bath. (3) Around November 2009, it happened multiple times. The judge ruled that this was trial preparation, and denied defense counsel's motion. Defense counsel objected. September 12, 2011 R. 14, ll. 13 – R. 18, ll. 4.

S.C. Code 17-23-175, enacted in 2006 and entitled the "Sex Offender Accountability and Protection of Minors Act", provides that an out-of-court statement of a child may be admitted in a general sessions court if the statement was given in response to an investigative interview; the statement was preserved on film or videotape; the child testifies at the proceeding; and the court finds in a hearing outside the jury that the totality of the circumstances surrounding the making of the statement provide guarantees of trustworthiness.

To determine trustworthiness, Sec. 17-23-175(B) provides that the factors to be considered include if leading questions were used; if the interviewer was trained in conducting investigative interviews of children; if the statement contained a detailed account; if the statement has internal coherence; and sworn testimony of any participant deemed necessary by the court.

Section 17-23-175(F) provides that recorded statements are given preference. However, an electronically unrecorded statement made to a professional may be considered if the necessary audio and visual recording equipment was unavailable; the circumstances surrounding the making of the statement; the relationship of the professional and the child; and if the statement possesses particularized guarantees of trustworthiness.

Rule 3.7 of the Rules of Professional Conduct provides:

Rule 3.7 LAWYER AS A WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case;

(3) disqualification of the lawyer would work substantial hardship on the client;

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

In State v. Sanders, 341 S.C. 386, 534 S.E.2d 696 (2000), the Supreme Court held that defendant's Sixth Amendment right to counsel was violated when counsel was removed before trial on the ground that she was a necessary witness although the record did not support her removal. The Court held that an evidentiary hearing was appropriate to review the evidence supporting counsel's removal. The Court wrote:

> We take this opportunity to set forth the proper procedure when counsel's removal is sought under rule 3.7. As a procedural safeguard, an evidentiary

> hearing is appropriate to determine whether there is evidence to support counsel's removal. This procedure will enable the trial judge to fully assess counsel's anticipated role as a necessary witness before restricting the defendant's exercise of his right to counsel. Further, it will provide a record for meaningful review of the issue on appeal.

Although Sanders concerns the removal of a defense attorney under Rule 3.7, the same procedure would be proper for the removal of a state's attorney. That is, an evidentiary hearing would be necessary to evaluate the evidence to remove, and to provide a record for appeal. The trial judge in Barnes' case erred by not holding the evidentiary hearing.

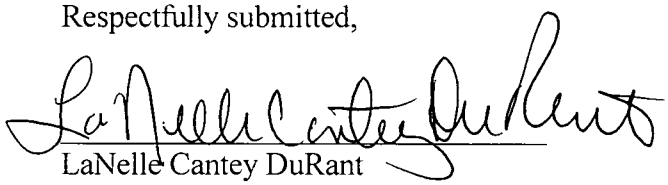
In Collins Entertainment, Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (2005), the Court of Appeals held that the co-owner of the business had to choose between (1) acting as trial attorney for the business or (2) testifying as trial witness for the business regarding damages element of its breach of contract case.

A hearing was needed to insure that the interview was conducted in a trustworthy manner. That interview should be required to meet the statute 17-43-175 if the new information was to be admitted. The proffer was not sufficient evidence of the trustworthiness of the interview and new information. Law enforcement sent the child to a person trained in interviewing children. There was no evidence the solicitors had received such training for child sex abuse victims. The statute requires a hearing for the testimony of the child forensic interviewer to determine trustworthiness. The solicitors needed to testify to the trustworthiness in a hearing.

The Court of Appeals held that the trial court considered the issue and a hearing was not necessary. The court held that there were not constitutional issues in Barnes' case as there were in Sanders. However, the issue in Barnes' case involves a potential violation of the statute 17-23-175 for interviewers of child sexual victims. A hearing would have clarified the issue.

THEREFORE, we respectfully request the Court of Appeals to reconsider its ruling.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

This 25th day of July, 2013.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Jennifer Ellis Roberts, Esquire,at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 25th day of July, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 25th day
of July, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.