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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARCUS A. WIGFALL,

APPELLANT

APPELLATE CASE NO. 2023-000236

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial court erred where it admitted evidence that upon interviewing Minor 1 about the alleged abuse, the forensic interviewer recommended that the case be staffed with law enforcement and that Minor 1 receive a mental health assessment, where testimony which vouches for a complainant's credibility is inadmissible, since the evidence conveyed to the jury that Minor 1 was credible because her case was referred for follow-up?

2.

Whether the trial court erred where it admitted evidence Minor 1 received counseling after she disclosed the alleged abuse, where testimony which improperly bolsters the credibility of the complainant is inadmissible, since the evidence conveyed to the jury that Minor 1 was credible because counseling was given?

STATEMENT OF THE CASE

On April 20, 2021, a Charleston County Grand Jury indicted Marcus Wigfall, Appellant, for third-degree criminal sexual conduct with a minor and contributing to the delinquency of a minor. Appellant was also charged with two counts of second-degree criminal sexual conduct with a minor. Appellant was tried before the Honorable Jennifer B. McCoy and a jury, from February 6 – 8, 2023. Mary Ford and Kaitlin Cornwell-Goulooze represented Appellant. Deborah Herring-Lash and Catherine Fries prosecuted the case.[1]

Appellant was acquitted of two counts of second-degree criminal sexual conduct with a minor. He was convicted of third-degree criminal sexual conduct with a minor and he was sentenced to fifteen years' imprisonment suspended upon the service of twelve years' imprisonment and five years of probation. Appellant was also convicted of contributing to the delinquency of a minor and he was sentenced to a concurrent three-year term of imprisonment.[2]

This appeal follows.

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1 R. 395; R. 1.

2 R. 377, l. 21 – 378, l. 16; R. 390, l. 13 – 391, l. 1.

STANDARD OF REVIEW

In criminal cases, this Court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). Thus, on review, the appellate court is limited to determining whether the trial court abused its discretion. *Id.* at 6, 545 S.E.2d at 829. A trial court abuses its discretion when its ruling is unsupported by the evidence or controlled by an error of law. *State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002). "In general, rulings on the admissibility of evidence are within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion resulting in prejudice to the complaining party." *State v. Halcomb*, 382 S.C. 432, 443, 676 S.E.2d 149, 154 (Ct. App. 2009).

STATEMENT OF FACTS

In June of 2020, seventeen-year-old Minor 1 told her mother that she had been sexually abused by her mother's boyfriend, Appellant. Appellant had been living with Minor 1, her twin brother (Minor 2), and their mother (Kandra Pear), since 2015. Minor 1 told Pear the abuse happened approximately two or three times every couple of weeks for the last three years. Minor 1 alleged Appellant once placed her hand on his crotch over his pants so that she felt his penis. Minor 1 further claimed Appellant had performed oral sex on her multiple times. According to Minor 1, Appellant had also repeatedly attempted to penetrate her vagina with his penis, but he was never successful because she was "closed" due to being a virgin. Minor 1 also said Appellant gave her marijuana.[3]

Pear confronted Appellant, who denied the sexual abuse allegations. Appellant said he had, however, seen Minor 1 naked once, and Appellant admitted he had given Minor 1 marijuana. A pediatric sexual assault nurse examiner examined Minor 1 and found her to have normal genital anatomy. About a year *before* the disclosure, Pear had asked Minor 1 if anyone had touched her inappropriately or "do[ne] anything" to her and Minor 1 "said no." Appellant moved out after Minor 1's allegations, but he and Pear continued their relationship.[4]

Appellant's work schedule was similar to the children's school schedule, so he watched them regularly. Minor 1 claimed the abuse occurred in Pear's bedroom while Pear was at work. According to Minor 1, Appellant would text or call her from the bedroom to say, "Come here." However, the State only introduced one text message from Appellant to Minor 1 in which he

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3 R. 183, l. 12 – 186, l. 22; R. 89, ll. 17-21; R. 229, ll. 6-15; R. 153, ll. 15-19; R. 116, l. 10 – 124, l. 12; R. 157, l. 10 – 158, l. 8; R. 118, ll. 1-25.

4 R. 203, ll. 20-25; R. 191, l. 7 - 193, l. 14; R. 262, ll. 11-14; R. 204, ll. 4-11; R. 198, ll. 11-25; R. 276, l. 13 – 277, l. 4; R. 281, l. 18 – 283, l. 5.

asked her to come here for the entire time span of alleged abuse. Minor 1 said Minor 2 was at home when the abuse occurred. Minor 2's bedroom was next door to Pear's bedroom. Pear said Minor 2 usually had his bedroom door open. Minor 2 never saw anything sexual happen between Appellant and Minor 1. Pear had never seen anything sexual happen between Appellant and Minor 1. Pear said it was not unusual for her to stop by the home unannounced between shifts, and she was shocked and confused that abuse could have happened. However, Pear said there were times when she came home to find Appellant in his and Pear's bedroom on their bed and Minor 1 on the floor watching television, which seemed suspicious in hindsight.[5]

During the testimony of Minor 1, and again during the forensic interviewer's testimony, the solicitor improperly elicited that Minor 1 received counseling as a result of her disclosure. During Minor 1's direct testimony, the following occurred.

> Q. And [Minor 1], after this and after you told, did you go to some counseling?
>
> MS. FORD: Objection, bolstering.
>
> THE COURT: I'll allow it as phrased.
>
> BY MS. HERRING-LASH:
>
> Q. Just yes or no?
>
> A. Yes.
>
> Q. And [Minor 1], are you thankful that you told?
>
> A. Yes, ma'am.[6]

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5 R. 111, ll. 5-15; R. 189, ll. 22-23; R. 121, ll. 5-21; R. 144, l. 18 – 145, l. 1. R. 201, ll. 13-15; R. 166, ll. 18-20; R. 211, ll. 20-25; R. 202, l. 2 – 203, l. 19; R. 188, ll. 6-17; R. 121, ll. 10-14; R. 139, l. 20 – 143, l. 11; R. 393-394.

6 R. 143, ll. 12-20.

Later, the State put up testimony by Alix Desch, the forensic examiner who had interviewed Minor 1.

Q. And as part of your job, do you aid law enforcement in interviewing victims?

A. Yes, I do.

. . .

Q. Did [Minor 1] tell you about being sexual [sic] assaulted?

A. Yes.

. . .

Q. Did you make any referrals to her?

A. So we make standard—

MS. FORD: Objection, vouching.

THE COURT: Overruled. Go ahead.

BY MS. FRIES:

A. At Dee Norton, we make a standard recommendation for every child that comes to our center to have their case staffed with our multidisciplinary team so that we can all convene and discuss with the investigators what's going on, as well as referring for a mental-health assessment to see if any ongoing support or treatment is needed after an initial consult.

Q. And is that pretty standard?

A. Yes, ma'am.

Q. Do you know if she followed through with that referral?

A. I don't have those records in front of me, but I have been informed that she did follow up—

MS. FORD: Objection.

THE COURT: Sustained. She can only testify of her own personal knowledge.[7]

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[7] R. 231, l. 3 – 234, l. 10.

The jury struggled with the case. It deliberated for approximately six hours. It asked to be recharged twice. Ultimately, it acquitted Appellant of the two most serious charges and convicted him of the two remaining offenses.[8]

8 R. 366, l. 2 – 368, l. 24; R. 374, l. 22 – 377, l. 11.

ARGUMENT

1.

The trial court erred where it admitted evidence that upon interviewing Minor 1 about the alleged abuse, the forensic interviewer recommended that the case be staffed with law enforcement and that Minor 1 receive a mental health assessment, where testimony which vouches for a complainant's credibility is inadmissible, since the evidence conveyed to the jury that Minor 1 was credible because her case was referred for follow-up.

Testimony by the forensic interviewer, Alix Desch, that she interviewed Minor 1 and, as a result, 1) referred the case for a multidisciplinary team to meet with law enforcement investigators, and 2) referred Minor 1 for an assessment of her mental health needs, improperly invaded the jury's role in determining witness credibility. Appellant correctly objected to the testimony as vouching for Minor 1's credibility. The trial court's admission of this evidence was error.

"The assessment of witness credibility is within the exclusive province of the jury." *State v. Makins*, 433 S.C. 494, 501, 860 S.E.2d 666, 670 (2021) (quoting *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). "[A] witness cannot bolster the credibility of another witness because doing so invades the province of the jury." *Makins*, 433 S.C. at 502, 860 S.E.2d at 670-71 (citing *Briggs v. State*, 421 S.C. 316, 328, 806 S.E.2d 713, 719 (2017)). "[I]t is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *State v. Kromah*, 401 S.C. 340, 358-59, 737 S.E.2d 490, 500 (2013). "Juries do not require the assistance of human 'truth detectors' in assessing the credibility of testimony." *State v. Douglas*, 380 S.C. 499, 505, 671 S.E.2d 606, 610 (2009) (Pleicones, J., dissenting).

"[A] forensic interviewer may not be permitted to give testimony that improperly bolsters the credibility of the victim." *Briggs*, 421 S.C. at 323, 806 S.E.2d at 717 (citing *State v. Douglas*, *supra*). "[A] witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." *Briggs*, 421 S.C. at 324, 806 S.E.2d at 717. A forensic interviewer should avoid the following kinds of statements at trial:

> that the child was told to be truthful; a direct opinion as to a child's veracity or tendency to tell the truth; **any statement that indirectly vouches for the child's believability**, such as stating the interviewer has made a 'compelling finding' of abuse; **any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter**; or an opinion that the child's behavior indicated the child was telling the truth.

State v. Kromah, 401 S.C. at 360, 737 S.E.2d at 500 (cleaned up) (emphasis added).

See State v. Whitner, 399 S.C. 547, 559, 732 S.E.2d 861, 867 (2012) (forensic interviewer may not "invade the province of the jury by vouching for the credibility of the alleged victim"); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (trial court erred in "allowing the State to introduce the reports because they allowed the forensic interviewer to improperly vouch for the children's veracity); *State v. Anderson*, 413 S.C. 212, 220-21, 776 S.E.2d 76, 80 (2015) (forensic interviewer may not testify, *inter alia*, "that the purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted); *State v. Douglas*, 380 S.C. at 505, 671 S.E.2d at 610 (Pleicones, J., dissenting) (forensic interviewer vouched for victim's veracity by testifying she determined victim needed a medical exam—the only reasonable conclusion to be drawn from the testimony was based on her training she believed victim was being truthful). *See also Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010) (testimony by forensic interviewer that she found victim's statement to be believable and had no reason not to be truthful bolstered victim's credibility); *Thompson v. State*, 423 S.C. 235, 244,

814 S.E.2d 487, 492 (2018) (failure to object to testimony of detective and forensic interviewer which conveyed to jury they believed victim was telling the truth about abuse was deficient performance).

Alix Desch, a forensic interviewer, interviewed Minor 1 about her disclosures. Desch's testimony on direct was only four pages long. She stated: 1) she worked at a child advocacy center; 2) her job was to assist law enforcement with investigations by "interviewing victims"; 3) she had interviewed Minor 1 twice; 4) she referred Minor 1 to mental health professionals; and 5) she referred the case to a multidisciplinary team who would meet with law enforcement investigators. Desch's statements were improper because they indirectly vouched for Minor 1's credibility. The appellate courts of this State have held there are legitimate functions for the testimony of a forensic interviewer at trial. Desch did not perform those functions.

Instead, the State entered prohibited evidence through Desch. "It is undeniable that the primary purpose for calling a 'forensic interviewer' as a witness is to lend credibility to the victim's allegations." *State v. Kromah*, 401 S.C. at 358, 737 S.E.2d at 499. Desch was not put up for a purpose that has been found to be legitimate, such as to lay the foundation to admit a recording of the forensic interviews. The recordings were inadmissible since Minor 1 was seventeen at the time of interview. *E.g.*, S.C. Code Ann. § 17-23-175 (requirements for admissibility of out-of-court statement of child sexual abuse victim under age of twelve); *State v. Whitner*, 399 S.C. at 559, 732 S.E.2d at 867 (forensic interviewer's testimony was for limited purpose of laying proper foundation for admission of videotape and did not vouch for credibility of alleged victim). Nor did Desch give testimony about child sexual abuse dynamics: the State put up a blind expert on that subject but that was a different witness. *See, e.g.*, *State v. Jones*, 423

S.C. 631, 636, 817 S.E.2d 268, 271 (2018) ("behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized").

Instead, Desch indirectly conveyed to the jury that she believed Minor 1 because she determined a multidisciplinary team should meet with law enforcement investigators about the matter, and Minor 1 should be referred for a mental health assessment. *See Briggs*, 421 S.C. at 329, 806 S.E.2d at 720 (forensic interviewer's testimony improper where it indirectly revealed she believed disclosure was truth). In *Briggs*, the Supreme Court explained that although forensic interviewers may aid law enforcement in determining whether a criminal investigation is warranted, this function is not a proper topic for the jury's consideration. *Briggs*, 421 S.C. at 328, 806 S.E.2d at 719. "Improper bolstering is testimony that indicates the witness believes the victim, but does not serve some other valid purpose. Improper bolstering also occurs when . . . there is no other way to interpret the testimony other than to mean the witness believes the victim is telling the truth." *Chappell v. State*, 429 S.C. 68, 75, 837 S.E.2d 496, 499–500 (Ct. App. 2019) (cleaned up). There was no permissible purpose for Desch's testimony other than to vouch for Minor 1's credibility. Desch's testimony invaded the province of the jury and its admission was error.

This problem was not saved by the fact that Desch said the recommendation to refer the case for law enforcement and mental health actions was a "standard" recommendation. *See Chappell v. State*, 429 S.C. at 78, 837 S.E.2d at 501 ("a comment on the credibility of a class of persons to which the victim belongs is a comment on the credibility of the victim").

"An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result." *State v. Kromah*, 401 S.C. at 360, 737 S.E.2d at 501. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v.*

Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). "Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002).

The error was not harmless on these facts. The jury struggled with the case, deliberating for six hours, asking to be recharged twice, and ultimately acquitting on two offenses. Although Minor 1 claimed that the sexual abuse happened frequently for three years, and that her brother was always home at the time, her brother did not see any misconduct. Her mother did not see misconduct when she would come home unexpectedly between shifts. The case was dependent upon Minor 1's credibility. *See Thompson*, 423 S.C. at 249, 814 S.E.2d at 494 (PCR applicant was prejudiced by admission of forensic interviewer's bolstering testimony which vouched for victim's credibility where the only evidence petitioner was perpetrator was victim's testimony); *Smith v. State*, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (applicant prejudiced by forensic interviewer's improper bolstering of victim's credibility where the outcome of the case "hinged on the Victim's credibility regarding identification of the perpetrator, and there was otherwise an absence of overwhelming evidence of Smith's guilt"); *Chappell v. State*, 429 S.C. at 81, 837 S.E.2d at 503 ("our courts have found improper bolstering testimony was prejudicial in every South Carolina case in which the State presented no physical evidence of the defendant's guilt or relied solely on the victim's testimony to establish the details of the crime").

2.

The trial court erred where it admitted evidence Minor 1 received counseling after she disclosed the alleged abuse, where testimony which improperly bolsters the credibility of the complainant is inadmissible, since the evidence conveyed to the jury that Minor 1 was credible because counseling was given.

The solicitor asked Minor 1: "after this and after you told, did you go to some counseling?" Appellant objected to bolstering, but Minor 1 was permitted to answer affirmatively. This testimony improperly encouraged the jury to conclude that Minor 1 was telling the truth because counseling was given.

"The assessment of witness credibility is within the exclusive province of the jury." *State v. Makins*, 433 S.C. 494, 501, 860 S.E.2d 666, 670 (2021) (quoting *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). "[A] witness may not give testimony that improperly bolsters the credibility of the victim." *Chappell v. State*, 429 S.C. 68, 75, 837 S.E.2d 496, 499 (Ct. App. 2019) (cleaned up). "Improper bolstering is testimony that indicates the witness believes the victim, but does not serve some other valid purpose. Improper bolstering also occurs when . . . there is no other way to interpret the testimony other than to mean the witness believes the victim is telling the truth." *Id.* at 75, 837 S.E.2d at 499–500 (cleaned up).

In *State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015), the Supreme Court found a forensic interviewer's testimony that she recommended the defendant not be around the victim for any reason could only be interpreted as the interviewer believing the victim's claim the defendant sexually abused her. The Court found the testimony improperly bolstered the victim's credibility. *Id.* Similarly, in this case, Minor 1's testimony that she received counseling imparted to the jury that a counselor believed she had been sexually abused. This should be

considered in light of the erroneously admitted testimony discussed above in Issue 1, that the forensic interviewer referred Minor 1 for a mental health assessment to determine her counseling needs. The testimony indirectly conveyed the counselor's opinion on Minor 1's credibility. *Cf. Briggs v. State*, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017) ("a witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim"); *State v. Douglas*, 380 S.C. 499, 505, 671 S.E.2d 606, 610 (2009) (Pleicones, J., dissenting) (forensic interviewer vouched for victim's veracity by testifying she determined victim needed a medical exam—the only reasonable conclusion to be drawn from the testimony was based on her training she believed victim was being truthful).

"An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result." *State v. Kromah*, 401 S.C. 340, 360, 737 S.E.2d 490, 501 (2013). "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). "Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002). The error was not harmless on these facts, where the jury deliberated for six hours, asked to be recharged twice, and acquitted on two offenses. Although Minor 1 claimed that the sexual abuse happened frequently for three years, and that her brother was always home at the time, her brother did not see any misconduct. Her mother came home unexpectedly between shifts and did not see misconduct. The case was dependent upon Minor 1's credibility. *See Chappell v. State*, 429 S.C. at 81, 837 S.E.2d at 503 ("our courts have found improper bolstering testimony was prejudicial in every South Carolina case in which the State presented no physical evidence of the defendant's guilt or relied solely on the victim's testimony to establish the details of the crime").

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of June, 2024.

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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 April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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This 11th day of June, 2024.

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STATE OF SOUTH CAROLINA

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THE STATE,

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MARCUS A. WIGFALL,

APPELLANT

APPELLATE CASE NO. 2023-000236

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Andrew D. Powell, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS) this 11th day of June, 2024.

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Date: Tuesday, June 11, 2024 10:05:00 AM
Attachments: 2023-000236 The State v. Marcus A. Wigfall Final Brief of Appellant.pdf

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Good Morning,

Attached for service in the above-referenced case is the Final Brief of Appellant which will be filed today, June 11, 2024, with the Court of Appeals via email filing.

Respectfully,
Kaylynn

Kaylynn Warren
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