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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court Of General Sessions
The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2023-000236

THE STATE, Respondent,

v.

MARCUS ALEXANDER WIGFALL, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. 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.

II. 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.

COUNTERSTATEMENT OF ISSUE ON APPEAL

The trial court properly admitted testimony from both the forensic interviewer and Minor concerning counseling she received because it pertained to routine procedures and experiences without speaking to Minor's credibility.

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant Marcus Wigfall for third-degree criminal sexual conduct with a minor, two counts of second-degree criminal sexual conduct with a minor, and contributing to the delinquency of a minor. He proceeded to a jury trial on February 6-8, 2023, before the Honorable Jennifer B. McCoy. Wigfall 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 contributing to the delinquency of a minor. Regarding third-degree criminal sexual conduct with a minor, Appellant was sentenced to fifteen years' incarceration, suspended to twelve years' with five years of probation. Regarding contributing to the delinquency of a child, Appellant was sentenced to a concurrent three-years' imprisonment. This direct appeal follows.

STATEMENT OF FACTS

On June 8, 2020, seventeen-year-old Minor told her mother that she had been sexually abused by her mother's boyfriend (Appellant) for the last three years. (R. 189). Minor stated the abuse consisted of both Appellant performing oral sex upon her and attempted penetration. (R. 154; 156; 229). At the time, Appellant lived with Minor, her twin brother, and their mother.[1] Minor disclosed to Detective Perez that the assaults occurred approximately two times per week. (R. 229). Minor disclosed to her mother that the assaults occurred in Minor's bedroom and Mother's bedroom. (R. 189). She testified that her mother was not home during the assaults and was mostly at work. (R. 126). Minor stated she did not tell Mother, because she was scared. (R. 120-121). She testified she did not scream or make loud noises during the assaults. (R. 122). Brother stated he usually had his bedroom door closed. (R. 166). Minor testified Appellant placed her hand over his pants above his penis. (R. 116). Minor also testified Appellant had her smoke marijuana.[2] (R. 118; 262).

Minor testified that before the first assault Appellant told her she would have to choose between oral sex or her mother dying. (R. 154). Minor testified Appellant had repeatedly attempted to penetrate her vagina with his penis, but he was unsuccessful. (R. 157). Minor stated the pain was "like a train running through a brick wall." (R. 157). Eventually, Minor told Mother and Ivy Grinnage, a friend, about the abuse. (R. 127). Ivy also testified that one night she was talking to Minor on the phone when she overheard a male voice and Minor's "entire mood changed" before she quickly hung up the phone. (R. 177).

[1] "Brother" is referred to as Minor 2 in Appellant's brief.
[2] Detective Christophersen testified Appellant admitted to providing Minor with marijuana. (R. 262).

Mother spoke with Appellant after Minor's disclosure. Mother testified Appellant admitted to seeing Minor naked. (R. 191). Mother stated Appellant recalled he told Minor that if she could take off her clothes in front of a guy, that meant she liked him. (R. 191). It was after this that he claimed to have seen Minor completely naked but that nothing else happened. (R. 191). Mother testified he had never disclosed this to her before. (R. 191-192). Detective Christophersen testified Appellant denied sexual contact with Minor and stated he would not want to engage in oral sex with Minor because it would make him want to have intercourse with her. (R. 262).

Ultimately, Appellant was acquitted of two counts of second-degree criminal sexual conduct with a minor and convicted of third-degree criminal sexual conduct with a minor and contributing to the delinquency of a minor.

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion." Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

ARGUMENT

The trial court properly admitted testimony from both the forensic interviewer and Minor concerning counseling she received because it pertained to routine procedures and experiences without speaking to Minor's credibility.

The trial court properly admitted the testimony, because it was relevant, and the interviewer explained her standard practice for every child rather than a case specific expression of her opinion.

RELEVANT FACTS

The State called Alix Desch to testify about her involvement in obtaining a statement from Minor. (R. 230). She stated she had worked at the Dee Norton Child Advocacy Center for seven years. (R. 230). She explained her educational background, which included a masters degree. (R. 230-231). As part of her job she aided law enforcement in interviewing Minor. (R. 231). She explained she interviewed Minor in two separate sessions so Minor could complete a medical examination. (R. 231). Ms. Desch explained that during the interview process family members and caregivers are not allowed to be present. (R. 232). She explained Minor disclosed to her she was assaulted in her and Mother's bedrooms. (R. 232-233). Lastly, she explained that she made the standard recommendation "for every child" that comes to their center to have their case staffed with a multidisciplinary team to discuss with investigators, as well as referred a mental health assessment to determine necessary treatment. (R. 233-234).

During Minor's testimony, the State the following:

[State]: And [Minor], after this and after you told, did you go to some counseling?

[Appellant]: Objection, bolstering.

[Court]: I'll allow it as phrased.

[State]: Just yes or no?

[Minor]: Yes.

(R. 143).

DISCUSSION

All relevant evidence in some way "bolsters" the strength of the offering party's case, and a trial court may not exclude evidence that bolsters other evidence absent a constitutional, statutory, or rule-based principle of law providing for exclusion. State v. Perry, 410 S.C. 191, 763 S.E.2d 603, 611 (Ct. App. 2014) (Few, C.J., concurring in part and dissenting in part). "Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness's veracity or where a prosecutor implicitly vouches for a witness's veracity by indicating information not presented to the jury supports the testimony." State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001).

"The central point of the prohibition against improper bolstering is that a witness may not give an opinion for the purpose of conveying to the jury, directly or indirectly, that she believes the victim." 32 S.C. Jur. Witnesses § 63 (Citing Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017)).

"Improper bolstering" is testimony that indicates the witness believes the victim but does not serve some other valid purpose. Chappell v. State, 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019). Yet, an expert's testimony is not improper bolstering when the expert witness gives no indication about the victim's veracity. Id. See also Chamberlain v. State, 819 S.E.2d 303 (Ga Ct.

App. 2018) ([o]fficer's testimony that victim's behavior was consistent with sexual abuse did not improperly bolster victim's credibility where the testimony did not directly address the credibility of the victim or express a direct opinion that the victim was sexual abused).

In State v. Douglas, our Supreme Court found the testimony of a forensic interviewer did not rise to the level of vouching. State v. Douglas, 380 S.C. 499, 500, 671 S.E.2d 606, 607 (2009). In Douglas, the interviewer testified about her previous training, experience, and job responsibilities. Douglas, 380 S.C. 501, 671 S.E.2d 607. Further, the interviewer testified about building rapport with a child and making an agreement with the child to tell the truth. Id. Ultimately, the Douglas Court found this did not rise to the level of vouching because interviewer never stated she believed the child or even that the child agreed to tell the truth. Douglas, 380 S.C. 504, 671 S.E.2d 609.

More recently, our Supreme Court affirmed the trial court in allowing a childhood-trauma expert's testimony regarding various indicators of child sexual abuse, followed by a response that she treated the victim. State v. Makins, 433 S.C. 494, 860 S.E.2d 666 (2021). The Makins Court found this did not amount to improper bolstering, because the "simple affirmation that she provided therapy to Minor" did not convey to the jury that the expert believed Minor. Makins, 433 S.C. 503, 860 S.E.2d 671. The Court warned that applying an "overly broad rule would mean the testimony of a child's treating therapist—even when there was a blind characteristics expert—always indirectly and improperly bolsters the child's credibility." Makins, 433 S.C. 504, 860 S.E.2d 672.

"Improper bolstering occurs when an out-of-court statement of a witness is offered solely to duplicate or corroborate trial testimony." State v. Shelton, 314 S.W.3d 769, 775–76 (Mo. Ct. App. 2009); State v. Lewis, 475 P.3d 956, 962 (Utah Ct. App. 2020) (finding no improper

bolstering where the witness did not opine about Victim's truthfulness, but rather that in his professional experience, it is not uncommon to see variations in the statements of victims who give multiple accounts of their assault); Cohn v. State, 849 S.W.2d 817 (Tex. Crim. App. 1993) ([e]xpert testimony concerning behavioral characteristics typically exhibited by child victims of sexual abuse was admissible relevant evidence, despite defendant's claims that the testimony "bolstered" testimony of complaining witnesses).

In State v. Chavis, our Supreme Court found a forensic interviewer's testimony to be improper bolstering. State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015). In the interviewer's testimony she explained her recommendation that Victim and Appellant remain separate under all circumstances. Chavis, 412 S.C. 109, 771 S.E.2d 340 (2015). The court reasoned that the only interpretation for that statement was that the interviewer believed the victim. Id.

Here, the statements by Alix Desch do not concern the credibility of Minor. The statements aided the jury in understanding the standard procedures associated with the interview. By understanding the broader context, the jury was given a complete and unfragmented version of events, giving the testimony a valid purpose. Cf. State v. Berry, 413 S.C. 118, 131, 775 S.E.2d 51, 57 (Ct. App. 2015) (affirming admission of treating psychotherapist's testimony regarding minor victim's symptoms that were based on personal observations). Desch's statements gave no indication regarding Minor's individual credibility, but rather discussed the process associated with her interview. As stated in Briggs, any statement that indirectly vouches for a child's believability, such as stating the interviewer made a "compelling finding" should be avoided. Yet, Desch never made a statement of that kind. On the contrary she explained her standard recommendations and procedures, and she made abundantly clear the recommendation she made in Minor's case was the exact same one she makes "for every child" she sees. Under such

circumstances, Desch's testimony was not, and could not, logically be constructed as a case-specific expression of her opinion concerning Minor's credibility.

Also, Minor's confirmation that she received counseling coupled with Desch's statement about her routine practices does not constitute improper bolstering. As noted in Briggs, the prohibition exists to allow the jury to determine credibility, not a witness. Here, the testimony neither directly nor indirectly posed a risk of conveying to the jury that Desch believed Minor. Evidence regarding Minor's counseling was part of the complete story of events and showed the impact of abuse. The statement goes beyond merely corroborating Minor's previous testimony. Desch explained that she made the standard recommendation "for every child" that comes to their center. (R. 233-234). Unlike the testimony in Chavis, Desch's testimony could not logically be interpreted as a statement she believed the Minor's testimony. Desch's recommendation of mental health services was simply standard practice and applicable to every child referred to her not based upon believing a child's version of events. Additionally, Minor's statement merely briefly confirmed she received counseling of some sort and provided no further details. Taken in conjunction, the two statements do not improperly bolster testimony, because the record does not indicate that the forensic interviewer believed Minor's testimony. [3]

This Court should affirm.

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[3] Any potential error regarding improper bolstering is harmless due to the minimal risk in admitting evidence of Minor's counseling. State v. Simmons, 423 S.C. 552, 566, 816 S.E.2d 566, 573 (2018) (error is harmless when it could not reasonably have affected the result of the trial).

CONCLUSION

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

Respectfully submitted,

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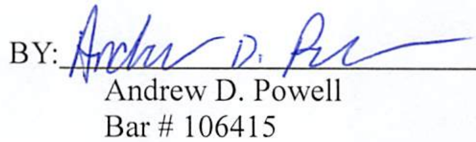
BY: 

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CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent 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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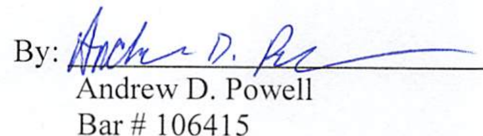
By: 
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PROOF OF SERVICE

I, Grace Sommer, certify that I have served the within Final Brief of Respondent on Joanna K. Delany, Esquire, counsel of record for the Appellant, 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 11th day of June, 2024.

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Good Morning Ms. Delany,

Attached please find a Final Brief of Respondent in The State v. Marcus A. Wigfall (2023-000236). This Brief will be filed today with the South Carolina Court of Appeals via the AIS OneDrive System.

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