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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court Of General Sessions
The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2023-0000832

THE STATE, Respondent,

v.

MAVRIC JORDAN SMITH, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court did not err in admitting the testimony of Kelli Clune, because the statement was made for the purpose of a medical diagnosis or treatment and did not concern the credibility of Minor.

STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant Mavric Smith for second-degree criminal sexual conduct with a minor, kidnapping, and incest. He proceeded to a jury trial on May 15, 2023, before the Honorable Perry H. Gravely. Appellant was convicted as charged. Regarding second-degree criminal sexual conduct with a minor, Appellant was sentenced to sixteen years' incarceration. Appellant also received a concurrent fifteen years' sentence for kidnapping and a concurrent sixteen years' sentence for incest. This direct appeal follows.

STATEMENT OF FACTS

Minor lived with her brother and mother (Samantha Miller) in Spartanburg. (R. 151). Appellant and Samantha were married in 2018. (R. 152). After they were married, the family moved to Anderson. (R. 153). Appellant and Samantha had their first child in 2018, and their second child in 2020. (R. 332; 356).

Appellant was rarely home due to his jobs. (R. 523). Appellant was a long-haul truck driver and served in the National Guard. (R. 519). As a result, Minor wanted to accompany Appellant on a ride along. (R. 530). The company Appellant worked for required any passenger to be at least thirteen; at this time Minor was twelve.[1] (R. 211; 266). Appellant testified that time spent away from home was not desirable, which motivated him to end his time with the National Guard in January of 2020. (R. 523-524).

Since Appellant was a long-haul truck driver, he had a sleeper cab for extended trips. (R. 579). This sleeper cab consisted of a small bed in the back of the truck. (R. 579). On March 1, 2020, Appellant was driving through Anderson, SC on a route. (R. 580). On the way, Appellant stopped at a gas station to meet Samantha, Minor's siblings, and Minor. (R. 580). Disregarding the regulations set out by Appellant's employer, Samantha and Appellant decided for Minor to ride with Appellant as he finished this route. (R. 580-581). Samantha and the two children followed as he finished up for the night. (R. 338).

During the drive, Minor sat in the front seat, playing games on her phone and chatting with Appellant. (R. 159). Minor testified that Appellant reached his hand out and touched her chest area over her clothing. (R. 159). Minor stated she told Appellant to stop and tried to push him away. (R. 160).

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[1] The company also required employees to fill out an authorization form and seek approval prior to a ride along. (R. 281; 337).

Once they finished the route, Appellant told Minor to hide in the sleeper area since she was not supposed to be in the vehicle. (R. 161-162). Minor went to the bed and played games on her phone. (R. 161-162). Appellant went around back to park the vehicle while Samantha and the children waited. (R. 162).

Minor testified that at this time Appellant went back in the sleeper area and laid in the bed with her. (R. 162-163). She stated Appellant put her phone aside and began to undress her. (R. 163). Minor stated Appellant held both of her hands down with one of his own hands. (R. 164-165). Minor stated she froze and was unable to tell Appellant to stop. (R. 165). Minor testified he performed oral sex on her and penetrated her digitally. (R. 166-168). Minor asserted that at this point Appellant undressed. (R. 168). Minor further testified that Appellant attempted to put his penis inside of her vagina but was unsuccessful. (R. 168). Minor stated that it was painful, burned, and felt like a throbbing pain. (R. 169). After this, the two got dressed and exited the truck to ride back home with Samantha. (R. 170-171).

Once the family got home, they all went to bed because it was late. (R. 172). The next morning, Minor went to school and told several friends about the incident. (R. 174-178). Ultimately, her principal reported the incident to law enforcement. (R. 49-50). Minor was taken to a medical center for an examination. (R. 178). DNA collected from Minor's vaginal swabs matched Appellant and his male relatives. (R. 307). Minor also attended a forensic interview where she further explained what happened. (R. 104-105). Minor testified that she recanted her disclosure multiple times because she felt like an outcast.[2] (R. 189).

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[2] Additionally, Samantha (Minor's mother) did not initially believe Minor. (R. 109).

At trial, Appellant confirmed that he picked up Minor at the gas station in Anderson. (R. 580). He also stated he told Minor to get in the sleeper in the back so that nobody could see her. (R. 580-581). He denied any contact of a sexual nature with Minor. (R. 582).

At trial, the State called Kelli Clune, a child abuse practitioner. (R. 379). After explaining her training and background, the court admitted her as an expert in the area of pediatrics and child sexual abuse. (R. 381). Clune testified that she conducted a chronic medical examination on March 5, 2020. (R. 382-383). Clune explained she looked for injuries, examine photographs, study investigative information, and review prior medical history. (R. 383-384). Clune further stated that she typically interacts with the child throughout the exam. (R. 385). Next, the State elicited the following testimony:

> [State]: And did she disclose to you whether she had been sexually assaulted?
> [Clune]: Yes, she did.
> [State]: Did she indicate to you the location or place where she was sexually assaulted?
> [Clune]: Yes, she did.
> [State]: What did she say?
> [Clune]: It was in a truck.
> [State]: Okay. What was the chief medical complaint that you were following up on, meaning potential sexual battery that the child had endured in this case?
> [Clune]: Was for sexual abuse.
> [State]: Okay. Let's go through those one by one. Did, was there any allegation, did the child disclose oral sex in this case?
> [Clune]: Yes, she did.
> [State]: And was that oral sex performed on her or did she have to perform it on somebody?
> [Clune]: It performed on her.
> [State]: Did [Minor] disclose vaginal penal penetration or contact?
> [Clune]: Yes, she did.
> [State]: And did she disclose anything else related to her vagina in this case?
> [Clune]: She disclosed touching with a hand on her vagina.
> [State]: Okay. I want to go one by one.
> [Court]: Hold on.
> [Appellant]: May we approach?

(R. 388-389).

Subsequently, Clune explained that it was important to understand all of the points of contact so that she can perform the correct STD testing. (R. 390). Clune also testified Minor's pelvic exam was normal but did not rule out sexual abuse. (R. 394-395).

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 did not err in admitting the testimony of Kelli Clune because the statement was made for the purpose of a medical diagnosis or treatment and did not concern the credibility of Minor.

The trial court properly admitted the testimony because it related to Clune's treatment and diagnosis, namely Minor's disclosure was critical in assisting Clune determine whether Minor contracted a sexually transmitted disease.

DISCUSSION

Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. Turner v. Thomas, 431 S.C. 527, 848 S.E.2d 353 (Ct. App. 2020). Yet, under Rule 803, SCRE statements made for the purposes of medical diagnosis or treatment are admissible as a hearsay exception, regardless of the availability of declarant. To be admissible, the statement must be (1) made for the purpose of and be reasonably pertinent to medical diagnosis or treatment; (2) describe the patient's medical history, past or present symptoms, pain or sensations, or the inception or general character of their cause or external source; and (3) reasonably relied upon by the medical professional. Glinyanay v. Tobias, 436 S.C. 137, 145, 871 S.E.2d 193, 198 (Ct. App. 2022). These statements are exempt due to their inherent trustworthiness. Id.

Statements identifying a perpetrator often are inadmissible because they seldom are pertinent to the diagnosis or treatment. State v. Simmons, 423 S.C. 552, 564–65, 816 S.E.2d 566, 573 (2018) (holding physician's testimony inadmissible hearsay to the extent it recounted statements by the minor patient concerning the identity of his abuser that were not made for the purposes of medical treatment or reasonably pertinent to it); State v. Burroughs, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997) (nurse's testimony that rape victim told her defendant had asked if he could hug victim before he assaulted her was not admissible under Rule 803(4),

as statement "in no way can be viewed as 'reasonably pertinent' to victim's diagnosis or treatment").

First, the testimony of Clune properly falls within the hearsay exception. Clune noted that the disclosures of Minor were critical for the testing done as it relates to sexually transmitted diseases. (R. 390). It was reasonably pertinent to the treatment Minor was currently receiving, it described the pain and general source of her condition, and was reasonably relied upon. Disclosures of this nature support the inherent trustworthiness prescribed to statements concerning medical treatment and diagnosis as Minor was at risk for possibly contracting sexually transmitted diseases. Further, the testimony was limited to whether or not these acts were disclosed to Clune. The testimony does not identify the perpetrator or speak as to the specific details of each act.

Next, 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.

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 Kelli Clune do not concern the credibility of Minor. The statements aided the jury in understanding the standard procedures associated with the examination and Minor's treatment. By understanding the broader context, the jury was given a complete 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). Clune's statements gave no indication regarding Minor's individual credibility, but rather discussed the process associated Minor's examination and medical testing. 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, Clune never made a statement of that kind. On the contrary she explained her standard procedures, did not identify Appellant as the perpetrator, and did not refer to any advice or treatment that indicated she believed Minor's version of events. Under such circumstances, Clune's testimony was not, and could not, logically be constructed as a case-specific expression of her opinion concerning Minor's credibility.

Even if the testimony given was an error, any error is harmless. Admission of evidence in error is harmless when the erroneously admitted evidence is merely cumulative in light of the

cumulative evidence of Appellant's guilt. In State v Mitchell, the South Carolina Supreme Court found that error is harmless when it could not reasonably affect the result of a trial. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d. 150, 151 (1985). In Mitchell, the court ruled hearsay testimony of a law enforcement officer regarding the ownership of a black jacket associated with a crime by Appellants wife during interview was inadmissible as hearsay. Id. Though the court affirmed the trial court did err in admitting the hearsay, the court ruled because there was abundant evidence in the record from which the jury could have found appellant guilty notwithstanding the hearsay, the error was harmless. Id. In State v. Chavis, the South Carolina Supreme Court ruled that the testimony of two witnesses used to support other statements was inadmissible as hearsay; yet the overwhelming evidence of substantial guilt rendered the error harmless. State v. Chavis, 412 S.C. 101, 109, 771. S.E.2d 336 (2015).

Like Mitchell and Chavis, other evidence presented, not simply Clune's testimony, supported a conviction. First, the testimony of Minor gives a complete version of events. Next, Samantha's testimony corroborates the testimony of Minor and outlines the timeline. Detective Davis established that Minor identified a perpetrator of sexual abuse that occurred on March 1, 2020, at the site of Appellant's employer. (R. 107). In addition, Minors disclosure to friends and administration at her school corroborate Victim's testimony. Lastly, the DNA match on Minor's vaginal swab ties Appellant to the crime. Given the circumstances, any error would not have reasonably affected the outcome.

This Court should affirm.

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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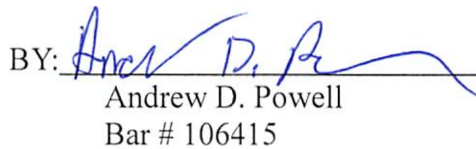
BY: 

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THE STATE, Respondent,

v.

MAVRIC JORDAN SMITH, Appellant.

PROOF OF SERVICE

I, Grace Sommer, certify that I have served the within Final Brief of Respondent on Lara M. Caudy, 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 20th day of August, 2024.

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Good Morning Ms. Caudy,

Attached please find a Final Brief of Respondent in The State v. Marvic Jordan Smith (2023-000832). This Brief will be filed today with the South Carolina Court of Appeals via the AIS OneDrive System.

If you will, please confirm receipt of this email.

Thank you!

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