STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of General Sessions
The Honorable Walton J. McLeod, Circuit Court Judge

Appellate Case No. 2022-001775

THE STATE,

Respondent,

v.

CLAYTON THOMAS JONES,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

BYRON GIPSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, SC 29201
(803) 576-1800

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and rules

Secondary sources

STATEMENT OF THE ISSUE ON APPEAL

Whether Jones was denied the right to confrontation when a forensic interviewer gave remote video testimony—subject to cross-examination—to lay the foundation for and authenticate a forensic interview recording, and whether Jones was prejudiced.

STATEMENT OF THE CASE

A Richland County grand jury indicted Appellant Clayton Jones for third degree criminal sexual conduct with a minor. Jones proceeded to jury trial before the Honorable Walton J. McLeod, Circuit Court Judge, on July 11–14, 2022. Jones represented himself with the assistance of standby counsel. Jones was convicted and sentenced to 15 years' incarceration. This direct appeal follows.

STATEMENT OF FACTS

The State agrees with the facts as stated in the Brief of Appellant.

STANDARD OF REVIEW

A trial court's decision to allow videotaped or closed-circuit testimony is reviewed for an abuse of discretion. State v. Johnson, 422 S.C. 439, 449, 812 S.E.2d 739, 744 (Ct. App. 2018).

ARGUMENT

Jones's right to confrontation was not violated by the trial court's decision to allow two-way video testimony to establish the admissibility of the child witness's forensic interview pursuant to S.C. Code §17-23-175, and Jones was not prejudiced because the same facts could have been established through other witnesses.

Jones's right to confrontation was not violated by Dr. Allison Foster's remote testimony at an in camera hearing held pursuant to S.C. Code §17-23-175, which provides for the admission at trial of a child witness's forensic interview if the interview contains sufficient guarantees of trustworthiness, or by her subsequent trial testimony authenticating the video. The testimony was permissible given the "necessities of the case," its unquestioned reliability, and because Jones had the ability for effective cross-examination. Further, Jones was not prejudiced because the same facts could have been elicited through other witnesses. This Court should affirm.

A. The trial court erroneously held Dr. Foster was personally required to testify pursuant to S.C. Code §17-23-175.

It is important to note at the outset that this entire issue is the product of an erroneous ruling made at the beginning of trial. The trial court sua sponte raised the issue whether the forensic interviewer who conducted the child's interview—Dr. Allison Foster—was personally required to lay the foundation for admission of the interview pursuant to S.C. Code §17-23-175. Despite the State's argument that Dr. Alicia Benedetto—the director of the advocacy center—could lay the foundation instead, the trial court ruled Dr. Foster must testify because she conducted the child's interview. (R.p.25–26, 32–33). This was error.

The court cited State v. Anderson, which does state that "the statute requires that the interviewer be called to testify in camera." State v. Anderson, 413 S.C. 212, 220, 776 S.E.2d 76, 80 (2015). However, the trial court's reading of Anderson was too literal. The statute, by its terms, does not require the interviewer to testify at all. Rather, the State must only meet the requirements of §17-23-175(A). This section provides:

> (A) In a general sessions court proceeding or a delinquency proceeding in family court, an out-of-court statement of a child is admissible if:
> (1) the statement was given in response to questioning conducted during an investigative interview of the child;
> (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
> (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
> (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

S.C. Code Ann. § 17-23-175.

Supplementing subsection (A)(4)'s requirement that the court find guarantees of trustworthiness, subsection (B) lists nonexclusive factors that the court "may" consider. Three of these factors—whether the statement was elicited by leading questions, whether the statement represents a detailed account of the alleged offense, and whether the statement has internal coherence—may be determined by simply viewing the interview recording.

The fourth factor is whether the interviewer has been trained in conducting investigative interviews of children. S.C. Code §17-23-175(B)(2). This fact was

established by Dr. Alicia Benedetto, the director of the Metropolitan Children's Advocacy Center in Columbia. As the director of the advocacy center, Dr. Benedetto had personal knowledge of the center's operations, including Dr. Foster's qualifications. She testified Dr. Foster has been employed in the field for at least 27 years and is accredited as a forensic interviewer in accordance with the qualifications set by the National Children's Alliance. (R.p.7). This testimony met the statutory requirements because section 175 does not require a forensic interviewer explain her own qualifications.

The final factor listed is the "sworn testimony of any participant which **may be determined as necessary by the court.**" S.C. Code 17-23-175(B)(5) (emphasis added). This presence of this factor shows it is within the court's discretion to determine which witnesses are "necessary" to allow the court to determine whether an interview has sufficient guarantees of trustworthiness. Section 175 concludes: "After considering these factors and additional factors the court deems important, the court will make a determination as to whether the statement is admissible pursuant to the provisions of this section." Thus the statute does not require the specific interviewer who interviewed the child witness to testify at the in camera hearing.

Likewise, nothing in the statute requires the forensic interviewer who interviewed the child to testify before the jury. There is language in Anderson that supports this conclusion. See Anderson at 220, 776 S.E.2d at 80 ("Assuming the court determines that the interview is admissible under the statute, the forensic

interviewer will be called to testify before the jury."). However, this language merely reflects that the forensic interviewer who was called to testify in Anderson to authenticate the video was the person who conducted the interview. This is common practice, and will be true in most cases. However, the statute does not require it. There is no reason why a witness such as Dr. Benedetto, who has personal knowledge and can just as easily establish indicia of reliability (and is also a forensic interviewer) should not be allowed to do so.

The State presented Dr. Benedetto's testimony in camera, and this testimony established the admissibility of the interview. However, the trial court erroneously ruled Dr. Foster's testimony was necessary. This erroneous ruling affected the remainder of trial. Because Dr. Foster was testifying at a separate trial in the state of Washington, the State presented her testimony remotely. However, as shown above, this testimony was superfluous. Accordingly, Dr. Foster's in camera testimony was cumulative and did not prejudice Jones, as will be discussed below.

B. Dr. Foster's in camera testimony did not violate the Confrontation Clause and did not prejudice Jones.

a. The Confrontation Clause did not attach at this in camera hearing.

The United State Supreme Court has not explicitly stated whether and to what extent the Confrontation Clause applies during in camera hearings held to determine the admissibility of evidence. See Christine Holst, The Confrontation Clause and Pretrial Hearings: A Due Process Solution, 2010 U. Ill. L. Rev. 1599,

1606 (2010). However, Supreme Court precedent strongly suggests there is no right to confrontation at such a hearing. The Court has explained:

> The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion **for the jury** to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.

Barber v. Page, 390 U.S. 719, 725 (1968) (emphasis added). See also Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) (explaining "the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination"); Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (explaining "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing **before the trier of fact**") (emphasis added).

In McCray v. Illinois, the Supreme Court rejected an argument that the right to confrontation was violated where the police refused to reveal the identity of a confidential informant for purposes of a probable cause hearing. The informant's hearsay statements were introduced at the hearing. The Supreme Court held the Confrontation Clause was not violated, explaining it had never "approached the formulation of a federal evidentiary rule of compulsory disclosure where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake." McCray v. Illinois, 386 U.S. 300, 311 (1967). The Court held McCray' Confrontation Clause claim was "absolutely devoid of merit." Id. at 314.

McCray was cited in United States v. Matlock, where the Court again rejected a Confrontation Clause claim based on hearsay admitted at a suppression hearing. The Court explained, "[t]here is, therefore, much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel. . . . certainly there should be no automatic rule against the reception of hearsay evidence in such proceedings . . . ." United States v. Matlock, 415 U.S. 164 (1974). Discussing McCray, the Court explained: "In the course of the [McCray] opinion, we specifically rejected the claim that defendant's right to confrontation under the Sixth Amendment and Due Process Clause of the Fourteenth Amendment had in any way been violated." Matlock, 415 U.S. at 174–75.

State courts have likewise concluded there is no right to confrontation at suppression hearings. The Supreme Court of New Mexico explained that a "trial focuses on the ultimate issue of an accused's guilt or innocence, whereas in a pretrial hearing the focus is generally on the admissibility of evidence." State v. Rivera, 192 P.3d 1213, 1216 (N.M. 2008). The Wisconsin Supreme Court came to the same conclusion in State v. Zamzow, 892 N.W.2d 637, 643 (Wis. 2017) (collecting cases).

A hearing pursuant to §17-23-175 is comparable to a suppression hearing. In both, the trial judge determines whether certain evidence will be presented to the

jury. The trial judge is not bound by the rules of evidence, and hearsay is admissible. See Rule 104, SCRE. Jones had no constitutional right to face-to-face confrontation at the in camera hearing.

b. Dr. Foster's remote testimony was admissible under Maryland v. Craig.

Even if the Confrontation Clause attached at the in camera hearing, Dr. Foster's remote testimony was permissible under Maryland v. Craig, 497 U.S. 836 (1990). Craig approved the use of closed circuit television for cross-examination in a child sexual abuse case in order to avoid the trauma to the child witness which would result from face-to-face confrontation with her abuser. The Craig court explained the Confrontation Clause reflects a "preference" for face-to-face confrontation, but the right is not absolute. Rather, "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and **the necessities of the case**." Craig, 497 U.S. at 848 (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)) (emphasis added). The Court has "accordingly interpreted the Confrontation Clause in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process." Id.

The Craig court emphasized that under the Maryland statute in question, the "defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies." Id. at 851. Likewise, Jones had the ability to effectively cross-examine Dr. Foster in this case. Significantly, because

Jones represented himself, he personally cross-examined Dr. Foster during the in camera hearing. In Craig, the child witness never even saw the defendant. See United States v. Gigante, 166 F.3d 75, 80 (2d Cir. 1999) ("The closed-circuit television procedure utilized for Savino's testimony preserved all of these characteristics of in-court testimony: Savino was sworn; he was subject to full cross-examination; he testified in full view of the jury, court, and defense counsel; and Savino gave this testimony under the eye of Gigante himself.").

The Craig court explained face-to-face confrontation may be modified "where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Craig, 497 U.S. at 850. See also State v. Johnson, 422 S.C. 439, 449, 812 S.E.2d 739, 744 (Ct. App. 2018). Contrary to Jones's argument, the trial court did identify an important policy reason for allowing the remote testimony: Jones's right to a speedy trial. (R.p.36). See Harrell v. State, 709 So. 2d 1364, 1370 (Fla. 1998) (explaining "there is an important state interest in resolving criminal matters in a manner which is both expeditious and just"). Crucially, the State had been ordered to call the case for trial during this particular term of court in response to Jones's speedy trial motion. (R.p.29). The State had only ten days to secure the attendance of its witnesses. (R.p.27).

Of course, Jones is still entitled to a fair trial and should not be made to sacrifice any substantial rights for the sake of expediency. But it is patent that Jones was not denied a fair trial by this remote testimony. The reliability of Dr.

Foster's testimony was beyond question. There was no doubt that her very limited testimony—as to her qualifications and the circumstances of the interview—was accurate. See Matlock, 415 U.S. at 175 (noting "there is nothing in the record to raise serious doubts about the truthfulness of the statements themselves"). The substance of her testimony was confirmed by Dr. Benedetto's in-person testimony and did not foreclose Jones's ability to question the circumstances of the interview.

Dr. Foster's testimony was not of the type for which fairness demands face-to-face confrontation. Her in camera testimony was not presented to the trier of fact; it was for the court only, and was offered to meet a preliminary question of admissibility, not for the ultimate question of guilt or innocence. Dr. Foster was not accusing Jones of anything; she was merely providing a foundation for the admission of the child victim's interview. Thus it does not implicate the core concern of the Confrontation Clause: that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" Coy v. Iowa, 487 U.S. 1012, 1019 (1988).

Courts across the country have allowed remote two-way video testimony under the principles of Craig. For example, the Montana Supreme Court approved expert testimony via Skype in City of Missoula v. Duane, 355 P.3d 729 (Mont. 2015). In that animal cruelty case, the veterinarian who performed an autopsy on a dog was allowed to testify remotely because she lived in another state and requiring her personal presence at each of the three co-defendants' trials "would impose a prohibitive expense on the City and a significant burden on [the witness]." Id. at

734. See also State ex rel. Montgomery v. Kemp, 371 P.3d 660, 664 (Ariz. Ct. App. 2016) (collecting cases).

Remote testimony was approved in these cases even though the testimony in question was much more substantive than Dr. Foster's testimony in this case. The trial court correctly considered the fact the Dr. Foster's testimony didn't "address the merits of the case as much as just the administrative process of how this interview was conducted." (R.p.36). Given these circumstances, the trial court acted within its discretion by allowing remote testimony.

c. Jones was not prejudiced.

Finally, Jones was not prejudiced because Dr. Foster's testimony was cumulative. Dr. Benedetto provided substantially the same information regarding Dr. Foster's qualifications and the circumstances of the interview. (R.p.3–18). As discussed above, Dr. Foster's testimony was not necessary and was only offered because the trial court erroneously ruled it was required. This Court should affirm.

C. Dr. Foster's trial testimony did not violate the confrontation clause and did not prejudice Jones.

a. Issue preservation.

While Jones claims on appeal that he was denied the right of confrontation during Dr. Foster's trial testimony, he did not raise this as an independent issue at trial and the trial court did not specifically rule on this argument. Dr. Foster's testimony before the jury was limited to authenticating the recording of the victim's interview. However, the trial court's ruling regarding the admissibility of her

remote testimony concerned her foundation testimony pursuant to §17-23-175. Because the trial court did not rule specifically whether Dr. Foster's limited trial testimony violated the Confrontation Clause, this issue is not preserved for review.

The discussion regarding Dr. Foster focused on her in camera testimony laying the foundation for admissibility under §17-23-175. The court repeatedly made clear it was concerned with whether the statute required the "guarantees of trustworthiness" to be established by the person who conducted the interview. (R.p.19, 24–26, 32–33). The court interpreted Anderson to mean that "the statute requires that the interviewer be called to testify in camera. Cite to 17-23-175." (R.p.24, lines 1–2). The court was clear that it was concerned with whether Jones was able to cross-examine Dr. Foster "on the trustworthiness issue." (R.p.24, lines 7–8). The court stated that it did not believe it "appropriate to allow the non-interviewing person to do the in camera hearing for the forensic interview." (R.p.25).

Prompted by the trial court's concerns, Jones objected to Dr. Foster being allowed to testify remotely at the in camera hearing. (R.p.21). Jones argued "[t]he statute requires the testimony of the interviewer, not the supervisor, the interviewer. . . . I would, therefore, ask to exclude the video from evidence . . . ." (R.p.21). Jones argued the statute required Dr. Foster to be present. (R.p.35, line 7). But he never raised a distinct Confrontation Clause objection to the testimony she gave before the jury, which was limited to her explaining that she provided a copy of the interview to police. (R.p.106).

The closest Jones came to an objection to this testimony was his statement that the defense was "uncomfortable" with remote testimony, explaining he was "not entirely sure how the jury would respond" to zoom testimony. (R.p.31). This vague statement is not sufficient to preserve the issue for appellate review. State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) ("An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error."). It is not apparent from the record whether trial court ever considered whether Dr. Foster's remote testimony before the jury—for authentication purposes only, apart from section 175 concerns—would be improper, on Confrontation Clause or any other grounds. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and **ruled upon in the trial court** will not be considered on appeal.") (emphasis added). Even after this statement by Jones, the court clarified he was addressing the "foundation for the forensic interview outside the presence of the jury." (R.p.33). The court only ruled on the propriety of Dr. Foster testifying remotely during her in camera testimony pursuant to §17-23-175.

By renewing his previous objection, Jones only preserved the arguments he made during the in camera hearing, which—responsive to the court's concerns—focused on Dr. Foster's testimony for purposes of §17-23-175 findings of guarantees of trustworthiness. Jones's "previous objection" concerned section 175, and did not touch on authentication before the jury, a separate issue. Accordingly, this issue is not preserved for review.

b. The remote testimony was permissible under Maryland v. Craig.

Even if preserved, Dr. Foster's trial testimony did not violate the Confrontation Clause. While her trial testimony does implicate Confrontation Clause concerns, her testimony meets the factors announced in Maryland v. Craig for the same reasons discussed above. Her testimony was limited to authenticating the interview by explaining that she "provided a recording" to law enforcement. (R.p.106). This statement was undeniably true, and its "reliability . . . [was] assured." Craig, 497 U.S. at 850. Jones had the opportunity to contemporaneously cross-examine Dr. Foster before the jury but chose not to, presumably because her testimony was essentially procedural and not in dispute. Dr. Foster was unavailable because she was in trial in another state and the State had been ordered to try the case during this term of court in response to Jones's motion for a speedy trial. As the Supreme Court did in Craig, this Court should interpret the Confront Clause "in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process." Id. at 848. The testimony in question did not deny Jones a fair trial.

c. Jones was not prejudiced.

Even if the trial court erred by allowing Dr. Foster to testify remotely before the jury, the error was harmless. As explained in Anderson, the "sole purpose of [a forensic interviewer's] jury testimony is to lay the foundation for the introduction of the videotape, and the questioning must be limited to that subject. . . . none of the evidence necessary for the trial court's determination of whether a statement

possesses particularized guarantees of trustworthiness' and thus admissible under §17-23-175(A)(4) and (B) is to be presented to the jury . . . ." Anderson, 413 S.C. at 220–21, 776 S.E.2d at 80.

Consistent with Anderson, the only purpose of Dr. Foster's testimony was to authenticate the video. The only questions asked of her concerned whether she interviewed the victim and "provide[d] a recording" of the interview to law enforcement. (R.p.106–07). Authentication could have been accomplished by Dr. Benedetto, who testified in camera that the victim's forensic interview was provided to law enforcement. (R.p.9). However, the trial court's erroneous pretrial ruling set in motion a chain of events whereby the State had to resort to remote testimony to introduce the recording. The State did not present Dr. Benedetto's testimony to the jury because the trial court had already ruled that Dr. Foster's remote testimony was admissible.

The lead investigator also could have authenticated the video. He testified he observed the victim's interview at the advocacy center and authenticated a diagram used at the interview. (R.p.172). The video had already been introduced at this point in the trial, but the State would have merely had to ask the investigator whether the interview was the same one he witnessed. Of course, it was. The only reason the State did not ask this simple question is because it had already authenticated the video through Dr. Foster pursuant to the trial court's ruling that

this was the proper way to introduce it.[1]

Thus while Dr. Foster's trial testimony was not strictly speaking cumulative to other evidence the jury heard, the State could have easily authenticated the video through two separate witnesses if the trial court had not ruled Dr. Foster's testimony was necessary for authentication and deemed her remote testimony admissible. Accordingly, there is not a reasonable probability the result of the trial would have been different if Dr. Foster's testimony had been excluded. See Byers, 392 S.C. at 448, 710 S.E.2d at 60 ("No definite rule of law governs [a finding of harmless error]; rather **the materiality and prejudicial character of the error must be determined from its relationship to the entire case**. Error is harmless when it could not reasonably have affected the result of the trial.") (emphasis added). This Court should affirm.

[1] The child witness did not remember the interview and thus could not authenticate the video.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

BYRON GIPSON
Solicitor, Fifth Judicial Circuit

BY: _____
Joshua A. Edwards
Bar # 101188

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 26, 2024