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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.

EMERIC HAMILTON,

APPELLANT

APPELLATE CASE NO. 2023-001884

INITIAL BRIEF OF APPELLANT

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Did the trial court err in admitting testimonial evidence regarding the checks and balances in place to bolster the competency of minor witnesses during a forensic interview?

STATEMENT OF THE CASE

Appellant was indicted on September 12, 2023, by a Charleston County grand jury for criminal sexual conduct with a minor in the second degree for an incident that occurred on April 19, 2018. R. * Indictment. Appellant was tried before the Honorable Jennifer B. McCoy and a jury on November 27 – 29, 2023. R. *. Mary Ford represented appellant and Lauren Frierson and Nick Harris appeared on behalf of the state. R. *. The jury found appellant guilty as charged in the indictment and Judge McCoy sentenced appellant to twenty years incarceration. Tr. 539, ll. 1 – 17; Sentence Sheet.

A notice of appeal was timely filed. Due to significant deficiencies in the trial transcript, this Court remanded the case to Judge McCoy for a reconstruction of the record. Order of Court of Appeals filed July 1, 2024. Judge McCoy issued an order requiring Court Administration and the court reporter to conduct an additional search to determine if the recording of the missing portions of the trial could be located. Order Directing Report dated September 6, 2024. This order generated a more complete transcript. A reconstruction hearing was held before Judge McCoy on December 17, 2024. Appellant was present for the reconstruction hearing and represented by his current appellate attorney, Gary Johnson, along with his original trial counsel Mary Ford. Lauren Frierson and Nick Harris appeared on behalf of the state. Several items in the revised transcript were identified as remaining to be resolved, but the record of the trial was deemed substantially complete and supplemented by notes from trial concerning the timing of jury deliberations. 12/17/2024 Tr. p. 21 l. 18 – 25, l. 17. An additional version of the transcript of the trial was completed on January 15, 2025.

Judge McCoy issued an Order Confirming Record of Trial filed January 30, 2025. R. * Order. An additional notice of appeal was filed on February 7, 2025. This brief follows.

STATEMENT OF FACTS

JH claimed that she was taken into appellant's home and vaginally raped on the evening of April 19, 2018. Tr. 158, l. 11 – 160, l. 3. After leaving the home, JH encountered her mother who was actively looking for her with the assistance of the North Charleston Police. Tr. 106, l. 21 – 161, l. 23; 331, l. 9 – 332, l. 10. JH was 11 years old at the time of the alleged assault and had a history of uncontrolled behavior. Tr. 337, l. 3 – 5. These behavioral problems included hospitalizations, counseling, psychiatric treatment, and regular run away problems requiring police assistance. Tr. 337, l. 3 – 339, l. 18. These behavioral problems extended to making up stories and claims to suit her needs. Tr. 180, l. 16 – 181, l. 11.

Based upon her past behavioral problems, the police and JH's mother were actively looking for her on the evening of April 19, 2018, since JH had run away from her grandmother's home. Tr. 331, l. 9 – 332, l. 10. JH's mother found her within half an hour of calling the police for assistance. Tr. 332, ll. 7 – 10. Upon being confronted with the allegation of a sexual assault, appellant denied any sexual activity occurred with JH, both to her mother and to responding officers. Tr. 216, l. 13 – 217, l. 3; 327, ll. 22 - 25.

JH was taken for a medical exam, arriving at the medical facility at 10:51 p.m. Tr. 234, ll. 8 – 12. This was within two hours of the alleged assault. Tr. 234, ll. 12 – 18. There were no injuries to JH's genital areas. Tr. 237, l. 14 – 238, l. 5. Samples were collected for testing. Tr. 232, ll. 6 – 22.

Appellant's DNA was found on JH's anal swabs, one area testing positive for saliva and one for seminal fluid. Tr. 292, l. 2 – 293, l. 6; 390, l. 23 – 394, l. 9. The state's expert acknowledged the potential of transfer DNA as an alternative explanation for this evidence.

> Q. Ms. Boehm, I believe Ms. Ford just asked about transfer. And you said it could be transferred multiple times?

A. That's correct.

Q. Is that -- would you say that's -- is that possible not probable?

A. I don't really know. It is possible. I don't know how often that would happen. I think it would be more probable if it's liquid like blood. If I transfer, if I'm bleeding and I transfer it to a bottle and you grab the bottle and touch my blood, then we'd go into your hands. But I couldn't tell you how probable a dried state would be or anything like that.

Q. So using Ms. Ford's example of male potentially leaving behind ejaculate or smoke saliva in the house, would it be more probable for to transfer if that was still wet versus dry?

A. I would believe so.

Tr. 403, l. 21 – 404, l. 13.

The jury began its deliberations around 3:33 p.m. Order Confirming Record of Trial. After listening to the testimony of several witnesses, the jury returned a note that it was unable to reach a verdict and was deadlocked 10-2 on the issue of penetration. Tr. 522, ll. 17 – 23; Order Confirming Record of Trial. After an Allen[1] charge, the jury found appellant guilty within twenty minutes. Tr. 523, l. 4 – 525, l. 19; Order Confirming Record of Trial.

[1] Allen v. United States, 164 U.S. 492 (1896).

STANDARD OF REVIEW

"[T]he admission of evidence is addressed to the sound discretion of the trial court, and its ruling will not be disturbed in the absence of an abuse of discretion accompanied by prejudice." State v. Nelson, 440 S.C. 413, 420, 891 S.E.2d 508, 511 (2023). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (*quoting* State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)). "Prejudice occurs when there is a reasonable probability the wrongly admitted evidence influenced the jury's verdict." Byers, 392 S.C. at 444, 710 S.E.2d at 58.

I.

The trial court err in admitting hearsay testimony from an unknown male that bolstered JH's claim that appellant sexually assaulted JH.

A. Relevant facts.

As part of JH's statements, she claimed an unknown male was a witness to portions of the alleged sexual assault.

> That's when the man knocked -- when he went, after his friend, that's when one of the homeboys, whatever, who was knock on -- they was banging on the window at first and he wasn't paying no attention because he was so drunk. That's when the other man came in the house and like, get that young girl out this house. And that's when he stopped.

Tr. 159, l. 23 – 160, l. 3. To bolster the impact of this alleged, unknown witness, JH also claimed this person interacted with her and her mother: "And that's when the man told -- told me to tell my mama. He told my mama, your daughter got something to tell you. And I was scared. And then I ended up telling my mama." Tr. 161, l. 3 – 6. These claims were also contained within the forensic interview and played for the jury.[2] State Ex. 7, Ct. Ex 4.

B. Discussion.

Appellant concedes that no contemporaneous objection was made when this evidence was admitted before the jury. However, the issue is preserved for appellate review since the trial court had made a ruling on its admissibility and JH was the state's first witness during trial. Generally, issue preservation rules require that party make a "contemporaneous objection that is

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[2] The trial court summarized this portion of the forensic interview: "He tell my mom, something nasty happened to your daughter. I got to tell you." and that this knowledge was "[b]ecause he's been outside. He'd been the man been outside." Tr. 129, ll. 12 – 14. The forensic interview also contained statements that "the man told your mom something nasty happened to your daughter?". Tr. 129, ll. 16 – 17.

ruled upon by the trial court." State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007). If an evidentiary ruling is pretrial, a party need not renew an objection if the decision is deemed final by the trial court. *See* State v. Wiles, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009). There is also an "exception to this requirement when a judge makes an evidentiary ruling on the record immediately prior to the introduction of evidence." State v. Jones, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021).

In this case, the ruling on the admissibility of this evidence was pre-trial, but was initially introduced by the state's first witness, JH. Moreover, when touched upon during other portions of the trial, appellant's counsel renewed the pre-trial objection. This included prior to the playing of the forensic interview. Tr. 348, l. 17 – 349, l. 7.

The statements made by an unknown male witness who allegedly witnessed some aspect of the interaction between appellant and JH were certainly hearsay. "The hearsay statement of an unknown bystander is admissible under the excited utterance exception only when the circumstances which surround it would affect the declarant in a way that assures its spontaneity and, therefore, its reliability for trustworthiness." State v. Hill, 331 S.C. 94, 99–100, 501 S.E.2d 122, 125 (1998).

The state did not attempt to justify the admission of the statement by arguing any exception to the hearsay rule applied. To the contrary, the state argued:

> And the State's position was, it's not being offered for the truth of the matter asserted. It's merely her explaining her disclosure process. And it's in the forensic interview, which is -- which is coming in. And it goes to just, you know, when -- when Ms. Harrison takes the stand, our intent is merely to ask her, you know, after you found [JH], did you talk to someone? Yes. Without saying what he said, was that what prompted you to notify law enforcement again?

> And then, so it's -- they're -- they're going to have already likely heard that from Ms. Harrison. And her relaying her disclosure, again, it's not offered for the truth of the matter asserted. It's just her explaining what got the ball rolling to get the law -- to get law enforcement involved, and then ultimately into that forensic interview.

Tr. 127, ll. 8 – 22.

Appellant' counsel noted the disingenuous nature of the state's argument:

> I do think even though the State is saying they're not moving to put it in for the truth of the matter, basically, I think it is. Because basically the jury's going to -- to hear about this new other party, this random person that I cannot confront, that I cannot question obviously, or cross-examine that he witnessed something nasty.

Tr. 128, ll. 15 – 20. Certainly, if it was not offered for the truth of the matter asserted, the state had no logical justification for admitting the hearsay statements in the first instance.

The trial court noted that this witness was "somebody that we're -- obviously, is he not a witness? So we don't know who he is. Unknown man is -- is -- what's -- tell me about that." Tr. 129, ll. 20 – 22. The state admitted they had no knowledge of the identity of this alleged witness and that "the initial investigation, or lack thereof, produce[d] no results" and later someone believed "one of the potential witnesses and possibly him is deceased". Tr. 129, l. 23 – 130, l. 3. The state also acknowledged they had no evidence this unknown witness actually witnessed or saw anything: "And so whether he was outside, meaning outside the bedroom or outside the house, because it is kind of a local hangout house where people hang. So we don't, unfortunately, know and we do not have him." Tr. 130, ll. 9 – 12.

Rather than simply redact those portions of the recorded interview that contained the hearsay, the trial court ruled:

> Well, you know, I think it's not offered for the truth. I think it can come in, but obviously, you know, in terms of JH having any recollection as to who he is, where he was, I mean, it seems like

> she didn't at the time of the interview, days after. I'm not sure it's going to be much better now. So I, you know, I think that's a fact the State's going to have to live with. So I'm going to let it in over your objection.

Tr. 130, ll. 13 – 20.

As there was no purpose to the admission of these alleged statements by an unknown male witness other than to bolster the claims of JH regarding the sexual assault, the trial court erred in admitting them over the hearsay objection. *See* State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (noting statements not based on firsthand information by an unknown bystander are not admissible under the excited utterance exception).

C. Prejudice.

Much of the state's case centers around the credibility of JH. As noted in the statement of fact, JH carried significant credibility baggage before the jury. JH admitted to freely lying to suit her needs of the moment. Tr. 180, l. 16 – 181, l. 11. Appellant acknowledges the impact of the DNA evidence on the issue of prejudice. *See* State v. Heath, 433 S.C. 506, 517–18, 860 S.E.2d 673, 679 (Ct. App. 2021) (noting lack of prejudice in CSC case when DNA evidence supporting minor's testimony regarding aspects of the sexual assaults). However, while the state introduced evidence that appellant's seminal fluid was DNA matched to a sample obtained from JH's anal region, the state's expert noted the possibility of transfer DNA, particularly in liquid form, as a potential explanation for the DNA. Tr. 403, l. 21 – 404, l. 13. The evidence from JH herself noted the interior of the location of the alleged sexual assault was unclean. Tr. 158, l. 13 – 16. Importantly, appellant was charged with rape through vaginal penetration. R * Indictment. The jury was within their right to question whether the state established vaginal penetration beyond a reasonable doubt regardless of the presence of the DNA from the anal swab. JH denied anal penetration. Tr. 237, ll. 4 – 6. JH claimed vaginal intercourse without a condom. Tr. 236, l.

25 – 237, l. 3. The sexual assault exam conducted within a few hours of this alleged vaginal penetration was normal. Tr. 237, l. 10 – 238, l. 5.

The jury was required to find a sexual battery. "Sexual battery" means "sexual intercourse, cunnilingus, fellatio, anal intercourse, *or any intrusion, however slight*, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651 (1976 as amended). Due to the requirement of penetration, mere presence of seminal fluid would not mandate a finding of guilt.[3] Appellant's counsel argued extensively that the state's proof of penetration was based on JH's credibility. Tr. 443, ll. 5 – 10. While the DNA evidence in this case should not be ignored, it was not definitive as to the ultimate question before the jury to convict appellant of the crime charged: was there vaginal penetration?

The trial court committed reversible error in admitting hearsay statements from an unknown witness that bolstered JH's claims of a sexual assault. This Court should reverse appellant's conviction and remand this matter for a new trial.

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[3] By way of example, a "person is guilty of criminal sexual conduct with a minor in the third degree if the actor is over fourteen years of age and the actor wilfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under sixteen years of age, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child. However, a person may not be convicted of a violation of the provisions of this subsection if the person is eighteen years of age or less when the person engages in consensual lewd or lascivious conduct with another person who is at least fourteen years of age." S.C. Code Ann. § 16-3-655 (2012). The presence of seminal fluid would be evidence supporting a charge under CSC 3rd degree as well as evidence supporting CSC 2nd degree.

II.

The trial court err in admitting evidence that appellant had been recently released from jail as such evidence was highly prejudicial character evidence that had no relation to the criminal charges begore the jury.

A. Relevant facts.

JH claimed her assailant admitted he had "just gotten out of jail" during the alleged sexual assault. Tr. 163, ll. 11 - 21. The state also introduced this same testimony from other sources during trial. The forensic interview was played with this reference. State's Ex. 7; Court's Ex. 4.[4] The lead investigator related that the minor had indicated the suspect "had recently been released from jail."[5] Tr. 303, ll. 1-2.

B. Discussion.

"Evidence of other bad acts is generally inadmissible to prove a defendant's guilt for the crime charged; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." State v. King, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018) (quoting Rule 404(b), SCRE.). The admission of this type of evidence is particularly prejudicial, as it "fundamentally demonstrates why certain prior bad act testimony is inadmissible, i.e., it is used by the jury to infer that the defendant did in fact commit the crime for which he is on trial." State v. Fletcher, 379 S.C. 17, 26, 664 S.E.2d 480, 484 (2008). Moreover, if bad act evidence is potentially admissible under

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[4] Prior to the forensic interview being played, appellant's counsel renewed the objection. Tr. 348, l. 17 – 349, l. 7.

[5] Appellant's counsel renewed her objection at this stage based upon "prior objection" with the trial court overruling based upon its prior ruling. Tr. 303, ll. 3 - 6.

Rule 404(b), "the trial court must then conduct the prejudice analysis required by Rule 403, SCRE." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013) (*citing* State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009). "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). Even if supported by clear and convincing evidence "it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000).

As with the argument surrounding the hearsay testimony from an unknown witness, Appellant concedes that no contemporaneous objection was made when this evidence was admitted before the jury during JH's testimony. If an evidentiary ruling is pre-trial, a party need not renew an objection if the decision is deemed final by the trial court. *See* State v. Wiles, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009).

In this case, the ruling on the admissibility of this evidence was pre-trial, but the trial court's ruling was made in clear language indicating a final ruling:

> I do think it goes to identification, 100 percent. Also think it -- it goes to [*res gestae*][6] of -- of the case of the State's case. I do think if they were forced to sort of you know, remove that or redact that fact out of evidence that it would be fragmentizing the State's case, I think under our case law. I think it can come in for those reasons.

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6 The transcript from the trial has numerous instances of inaudible and wrong word choices. This matter was remanded by this Court for a reconstruction of the record, and many of those problems have been corrected. However, there are still instances when the actual words spoken during trial have likely been misinterpreted in the final transcript. In those instances, appellant has used brackets to indicate the most likely phrasing actually uttered during trial. In the event the actual phrasing uttered would be central to this Court's ruling on a specific issue raised during trial, an additional remand may be required. By way of example, rather than the phrase "*res gestae*" the transcript contains the words "rest jute." Tr. 126, l. 19.

> And then finally, obviously, you know, understand that the fact that it's jail is prejudicial. But I think that the probative value of that information significantly outweighs any prejudicial effect. *So for that reason over the objection of the Defense, I'm going to let it in. So I wanted to indicate that to you all last night. So you would have plenty of time to plan. And then, of course, we'll put in the record again this morning my ruling -- the basis for that ruling.*

Tr. 125, l. 18 – 126, l. 8 (emphasis added).

The trial court made the determination that the evidence was admissible prior to opening statements to allow both sides "plenty of time to plan." The matter was fully argued, and the ruling was final. *See* State v. Morales, 439 S.C. 600, 607, 889 S.E.2d 551, 555 (2023) ("Here, the ruling was not final because the trial court itself gave no indication of such an intent and there were three intervening witnesses before the sister testified."). By informing the parties of the Court's ruling to allow them to plan accordingly, the trial court here had made a final ruling on this matter. In addition, as with the hearsay evidence addressed *supra*, the evidence was admitted by the very first witness the state called, JH. As such, there was no need for an additional objection. State v. Morales, 439 S.C. 600, 606–07, 889 S.E.2d 551, 555 (2023). Moreover, prior to the forensic interview being played, appellant's counsel renewed the objection regarding this testimony. Tr. 348, l. 17 – 349, l. 7. Appellant's counsel renewed her objection when the investigating officer repeated the statements based upon "prior objection" with the trial court overruling based upon its prior ruling. Tr. 303, ll. 3 - 6.

The admission of this evidence was prejudicial as outlined in Argument I, *supra*. This Court should reverse appellant's conviction and remand this matter for a new trial.

III.

The trial court err in admitting testimonial evidence regarding the checks and balances in place to bolster the competency of minor witnesses during a forensic interview.

A. Relevant Facts.

Over objection, the forensic interviewer was allowed to tell the jury the Dee Norton Child Advocacy Center had checks and balances to ensure competency during an interview.

> Q. All right. Do you have some checks and balances without going into them and in place to ensure competency in an interview?
>
> A. Sure. So I mentioned earlier letting –
>
> MS. FORD: Objection. That goes into something that's been redacted.
>
> THE COURT: Okay.
>
> MS. FRIERSON: I wasn't going into that, just whether or not there are checks and bounds to ensure.
>
> THE COURT: Okay.
>
> MS. FORD: Vouching.
>
> THE COURT: I'll allow it as long as we stay within the bounds of our previous discussions on the record.
>
> MS. FORD: Your Honor, I also believe it's vouching.
>
> THE COURT: Okay. What was the question saying again?
>
> MS. FRIERSON: Are there -- without going into them.
>
> THE COURT: Uh-huh.
>
> MS. FRIERSON: Are there checks and balances in place to ensure competency?

THE COURT: I'll allow. Overruled. Okay.

Tr. 344, l. 16 – 345, l. 10.

B. Discussion.

"The assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Our appellate courts have long cautioned the state about vouching for the veracity of minor witnesses through the use of experts and the forensic interview process. *See* Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017) (finding forensic interviewer's testimony she made the determination the child understood the difference between the truth and a lie implied the child's disclosure was truthful); State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) (holding forensic interviewer's testimony that child victim should not be near defendant improperly bolstered the child's credibility); State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) (holding statements regarding the compelling nature of the evidence improper); State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) (finding descriptions of the disclosure as compelling improperly vouched for veracity of the minor).

This prohibition has been extended to the dangers imposed by allowing the forensic interviewer to discuss methods and techniques.

> There is to be no testimony to such things as techniques, of the instruction to the interview subject of the importance of telling the truth, or that the purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted. This type of testimony, which establishes the "particularized guarantees of trustworthiness," necessarily conveys to the jury that the interviewer and law enforcement believe the victim and that their beliefs led to the defendant's arrest, these charges, and this trial, thus impermissibly bolstering the minor's credibility.

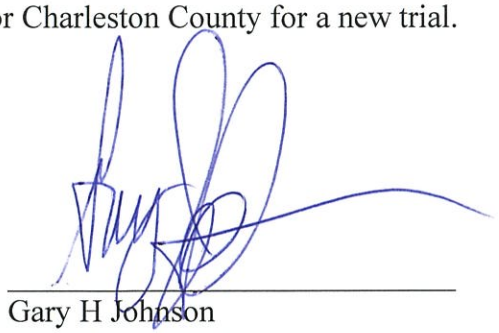
State v. Anderson, 413 S.C. 212, 221, 776 S.E.2d 76, 80 (2015). The prohibition of covering the techniques used during a forensic interview bars "the State from eliciting such *direct-*

examination testimony, for such testimony would serve chiefly to improperly bolster the credibility of the child witness." State v. Clark, 444 S.C. 606, 614, 910 S.E.2d 481, 486 (2024) (emphasis in original).

Here, the state was able to address "checks and balances" that ensure competency in the minor. This improperly vouched for the veracity of JH and is in direct contravention to the warnings outlined in Anderson and Clark. The trial court committed reversible error in allowing the state to improperly vouch for the minor's testimony. As discussed in Argument I, *supra*, this error was prejudicial and a new trial is required.

CONCLUSION

Based upon the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Court of General Sessions for Charleston County for a new trial.



Gary H Johnson
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ATTORNEY FOR APPELLANT

This 30th day of April, 2025.