STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DANIEL L. WILLIS,

APPELLANT

APPELLATE CASE NO. 2013-001317

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing Dr. Mary Crosswell to testify as an "expert" that the minor's mother was honest and forthcoming, and that what the alleged victim told her was consistent since this "expert" testimony impermissibly bolstered the credibility of the state's two fact witnesses in this case?

STATEMENT OF THE CASE

Appellant was indicted by the Greenville County Grand Jury for the offenses of criminal sexual conduct with a minor in the first degree, and criminal sexual conduct with a minor in the second degree. R. 298-301. His case was called to trial on June 5, 2013 before the Honorable G. Edward Welmaker. Lisa Bentley was the assistant solicitor. Randy Chambers represented appellant. Tr. 1.

The jury found appellant guilty on both counts. R. 290, ll. 1-8. Judge Welmaker sentenced appellant to twenty-five years imprisonment for criminal sexual conduct in first degree, and, twenty years concurrent for criminal sexual conduct in the second degree. R. 296, ll. 15-20.

This appeal follows.

ARGUMENT

The court erred by allowing Dr. Mary Crosswell to testify as an "expert" that the minor's mother was honest and forthcoming, and that what the alleged victim told her was consistent since this "expert" testimony impermissibly bolstered the credibility of the state's two fact witnesses in this case.

Relevant Facts

Greenville County Sheriff's Deputy James Massey was dispatched on May 20, 2011 around 4:00 p.m. to the home where the minor lived with her mother. R. 47, l. 5 – 48, l. 14. Massey spoke with the fourteen-year-old minor, and she claimed she had been sexual abused for a number of years by her father, appellant. "She wasn't crying at the time that I spoke with her." R.. 49, ll. 6-20.

As will be seen infra, the minor's mother was angry because she thought the minor was sexually active. The mother insisted the minor go to the Health Department, and be put on birth control pills. The mother went with her, and after routine tests were run there it was discovered the minor had a sexually transmitted disease. At this point the accusation against appellant was aired.

Deputy Massey recalled that the minor told him that the abuse ended the weekend before this call to the police after she learned of her sexually transmitted disease. Massey testified that he learned the minor had been taken to the health department to get birth control pills, and she was advised there that she had gonorrhea. R.. 50, l. 12 – 52, l. 17. The minor's allegations involving appellant concerned him improperly touching her, and later allegedly performing oral sex on her. R.. 52, l. 6 – 53, l. 13.

The mother's testimony

Melanie Owens was the thirty-four year old mother of the minor. R.. 70, l. 14 – 72, l. 19. Appellant was the child's father. Ms. Owens met appellant while in high school and they dated for three or four years. R.. 71, l. 17 – 74, l. 2.

Owens testified she separated from appellant when they were both arrested for criminal domestic violence. However, about four years later, they reestablished their relationship. Ms. Owens arranged for appellant to have visitation with the minor, and then unsupervised visitation began when the minor was six-years-old. The minor saw appellant about twice a month after that. R.. 74, l. 3 – 77, l. 16. Owens said that although she was friendly with appellant they never became involved romantically again. R.. 77, ll. 15 – 18.

Owens described appellant as a "doting father." It also appeared the minor liked spending time at appellant's house. Owens said she wanted the minor on birth control pills because she believed the minor was sexually active even though the minor denied it. R.. 80, l. 3 – 82, l. 14.

As a result of the child going to the health department to get birth control pills at the behest of Ms. Owens the minor learned she had a sexually transmitted disease. R.. 83, l. 8 – 85, l. 16. Although Ms. Owens said she thought the minor was lying about not having sex she claimed the minor was a very truthful child, and never got in trouble for lying at school or at home. R.. 85, l. 17 – 88, l. 10.

On cross-examination Owens admitted she thought the child had been having sex, and the fact she had a sexually transmitted disease "initially" reinforced that opinion. However, she made it clear she now believed her daughter when the minor alleged sexual abuse by appellant. R.. 93, l. 13 – 94, l. 17.

Owens admitted her other children had been involved with DSS. However, Owens said DSS was involved because she was a drug addict. She claimed it had nothing to do with other abuse of any kind. R.. 94, l. 21 – 96, l. 10.

Dr. Mary Crosswell

Dr. Mary Crosswell was a "child abuse pediatrician" in the "Division of Forensic Pediatrics, Child Abuse and neglect." She was employed by the Julie Valentine Center in that capacity. R.. 99, l. 25 – 100, l. 9.

Crosswell had a medical degree from the University of Louisville, and she had gone to a two-day child abuse conference in Charleston, and a prior a "child abuse radiology conference in Florida." Crosswell also maintained she kept up "with literature on child abuse." R.. 101, l. 8 – 102, l. 7. She was qualified as an expert without objection. Crosswell testified that the child's mother, Melanie Owens, was *"honest and forthcoming in her presentation on the past history of her child and abuse*." R.. 104, ll. 1-10. (emphasis added).

Crosswell said the minor disclosed sexual abuse to her, and she maintained it started at six years old and lasted until a few weeks before her "normal" medical examination. Crosswell said it was possible for the minor to have a normal physical exam and still have had had sexual intercourse. There was no allegation appellant had sexually intercourse with the minor, and Crosswell admitted having a sexually transmitted disease from only having contact with the mouth of another person -- allegedly appellant -- would be very unusual. R.. 105, l. 11 – 107, l. 16.

Crosswell said she was aware of other disclosures of sexual abuse the minor made which were "partly the same, but there were additional disclosures that she did not share

with me during evaluation." R.. 107, ll. 21 – 24. Crosswell said this did not bother her because "sometimes they just emotionally are not as ready to share all of the information and to share information with strangers about very intimate details. So it did not concern me that she did not share all the abuse that she described to other professionals or to other people." R.. 107, l. 21 – 108, l. 10.

Crosswell also maintained that the minor's earlier disclosures to the police were consistent with what the child told her. R.. 114, ll. 1 – 7. Crosswell said she was aware the minor had gonorrhea even though she denied that she was not sexually active, and even though there was no accusation of sexual intercourse in this case. R.. 120, l. 4 – 121, l. 16.

Minor's testimony

The minor testified that she last saw her father in March or May of 2011. R.. 133, l. 20 – 134, l. 13. She claimed appellant started abusing her when she was five or six years old. She maintained she was not sexually active, and that she did not have a boyfriend. She acknowledged making the accusation of sexual abuse by appellant when she learned she had gonorrhea. R.. 137, l. 9 – 143, l. 11.

The minor said when the appellant touched her she told him to stop. R.. 143, ll. 2-15. The minor claimed she told her grandmother about the sexual contact when she was seven or eight years old. She maintained her grandmother "[t]old me to stay near her and that she would try to fix it." R.. 145, l. 18 – 146, l. 3.

The minor testified that she was depressed, and she would sleep a lot. "I'd listen to a lot of devil worshipping music, as my mom would say… I was real depressed…I wore a lot of black. I would isolate myself from everybody. And I would cut myself." R.. 166, ll. 5 –

22. Minor claimed that by cutting herself she let out the pain "that had been building up for so many years. I was letting out my secrets that I couldn't tell anybody." R.. 167, ll. 1-5.

The minor admitted she told Crosswell that she was not sexually active. She said she did not consider her alleged sexual contact with appellant "normal" -- "I don't know how to explain it." R. 168 , l. 1–18. The minor acknowledged that she only told the deputy that appellant allegedly touched her with his hands. R.. 185, l. 2 – 186, l. 17.

The minor admitted that after she made the allegations against appellant her relationship with her mother improved. The minor maintained: "[A]fter I shared the information I had nothing to hide." Minor then admitted her mother was upset and mad at her after she went to the health department because she thought she was pregnant. R.. 190, l. 17 – 192, l. 17.

The state also presented evidence that appellant was arrested in Kentucky although he did not fight extradition back to South Carolina. Appellant was also tested but he did not have a sexually transmitted disease even though the alleged victim had gonorrhea.

Jane McLean was a mental health therapist who worked at the Piedmont Center for Mental Health Services in Greer, South Carolina. R.. 218, l. 24 – 219, l. 4. McLean testified that the minor's mother brought her for therapy but that the minor was "avoidant" of therapy. "She did not want to talk in detail about what happened. And that is not uncommon for adolescent girls because they've already been interviewed by multiple officials and caseworkers, so that's not uncommon for that to happen." R.. 221, l. 10-16.

McLean said the minor had low self-esteem when she first began talking with her but after she was put on Zoloft by a psychiatrist "that seemed to help her a lot. She functioned a lot better when she was on it." McLean maintained that "every client is a

unique patient." At the same time she said that while the minor was manipulative she reasoned that most teenagers were manipulative. R.. 222, l. 23 – 223, l. 11; 229, l. 15 – 24.

Discussion

As seen, Dr. Crosswell testified that the minor was very honest and forthcoming in her accusations against appellant. Dr. Crosswell also said the minor's disclosures were consistent with what she earlier told the police. Dr. Crosswell also stated that the minor's mother was honest and forthcoming.

Dr. Crosswell strongly conveyed to the jury as an expert that they believed that the minor and her mother were genuine in this case, that they were telling the truth, and that they were credible.

It is apparent that solicitors are now making a concerted effort to no longer use forensic interviewers to testify. It is also apparent that, as in this case, the solicitors are still seeking to have witnesses fulfill the impermissible purpose of having "experts" convey to the jury that they believe the child is telling the truth. Here, as an expert in "child abuse pediatrician" in the "Division of Forensic Pediatrics, Child Abuse and neglect."

In State v. Kromah, 401 S.C. 340, 737 S.E. 2d 490 (2013), the Supreme Court held that forensic interviewers do not need to be qualified as experts, and the Court stated it could not envision any circumstance where their qualification as an expert would be proper. They could be used as a law enforcement "tool" to investigate, like a polygraph examination, but their courtroom testimony should be admitted.

In this case, the jury essentially heard that Dr. Crosswell, the "expert," found the state's two fact witnesses very credible. Merely, giving the interviewing "expert" another title -- "child abuse pediatrician" -- rather than "forensic interviewer" attempts to make a

mockery out of the precedents of the Supreme Court and this Court on the subject. See State v. Kromah, 401 S.C. 340, 357, n.5, 737 S.E. 2d 490, 499 n. 5 (2013). See, also, State v. McKerley, 397 S.C. 461, 464, 725 S.E. 2d 139, 141 (Ct.App. 2012); State v. Hill, 294 S.C. 280, 294, 715 S.E. 2d 368, 376 (Ct.App. 2011).

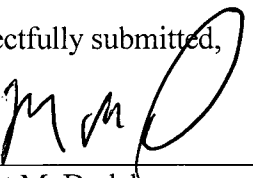
There was no need to qualify Dr. Crosswell as an expert, and her opinion which strongly conveyed to the jury that the minor and her mother were telling the truth constituted impermissible bolstering and impermissible vouching for their credibility. See State v. Douglas, 369 S.C. 424, 632 S.E. 2d 845 (2006). This case was a swearing contest between an obviously mentally disturbed teenager who listened to devil worshipping music, dressed in gothic clothes, and was involved in self-mutilation. The jury would be reticent to believe her testimony.[1] Consequently, the impermissible bolstering that occurred in this case was not harmless error.

[1] Although there was no objection to the qualifications of Dr. Crosswell, or to her inadmissible testimony which improperly bolstered the credibility of the minor and her mother, appellant submits for the sake of judicial economy that this Court may want to reach the issue now rather than forcing appellant to raise it in an action for post-conviction (PCR) relief.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed and this case remanded to the Greenville County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of May, 2014.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Daniel L. Willis states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge G. Edward Welmaker, which was held on June 6, 2013, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Daniel L. Willis.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of May, 2014.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictments;
(2) Entire trial transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.

May 5th, 2014

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Attorney for Appellant

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."

May 5, 2014

Robert M. Dudek
Chief Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Daniel L. Willis, #355675 at Lee Correctional Institution, 990 Wisacky Hwy, Bishopville, SC 29010, this 5th day of May, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of May, 2014.

Rhonda Denise Dorsey (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021 .