STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Deandra G. Benjamin, Circuit Court Judge
Appellate Case Tracking No. 2012-21905

THE STATE,

RESPONDENT,

-v-

ISAAC ANTONIO ANDERSON,

APPELLANT

BRIEF OF APPELLANT

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Whether it was prejudicial error for the trial court to qualify a forensic interviewer as an expert in "forensic interviewing," where the only reason to qualify her as an expert was to bolster child's testimony?

2.

Whether it was prejudicial error for the trial court to qualify a forensic interviewer as an expert in "child abuse assessment," where the only purpose for qualification was to bolster the child's testimony?

3.

Whether admitting testimonial hearsay by the child victim, pursuant to South Carolina Code Ann. § 17-23-175, unconstitutionally circumscribed the Appellant's Sixth Amendment right of confrontation where he was denied the opportunity to contemporaneously cross-examine the victim when the statements were introduced?

Statement of the Case

Procedural Facts

On February 9, 2010, the State arrested Isaac Antonio Anderson on suspicion of Criminal Sexual Conduct with a Minor in the First Degree, a violation of S.C. Code Ann. § 16-3-655(A)(1). After a four-day trial, a jury returned a verdict of guilty. On September 7, 2013, the Honorable Deandrea G. Benjamin sentenced Anderson to life in prison without parole.

The Notice of Appeal was filed on September 11, 2011.

Factual History

Almost seven years before his arrest in 2009, Appellant Isaac Antonio Anderson started a relationship Jaime Carter. R. p. 231 ll. 8–9. After a year, Anderson moved in with Carter and the child, Carter's five-year-old daughter. R. p. 208 ll. 12–13. Anderson and Carter eventually had three children, with a good relationship developing between the child and her siblings. R. p. 209 ll. 16–21. By all accounts, the relationship between Anderson and the child was also a good one, with the two bonding almost immediately. R. 213:14–20. Anderson even assumed the role of father figure to the child, R. p. 311 ll. 6–8, whose own biological father had spurned her. R. p. 228 l. 9 – p. 387 l. 17.

In 2007, Anderson and Carter moved their family into a small three-bedroom house at 116 Archie Drive, in Richland County. R. p. 203 ll. 2–5. The couple's two boys shared a room while the child and her sister shared another room. R. p. 206 ll. 3 –8. Anderson and Carter slept in a bedroom right next to girls' room, R. p. 206 ll. 3–8, usually sleeping with their door closed. R. p. 218 ll. 17–19. The doors to the children's

bedrooms were never shut at night. R. p. 218 ll. 12–16. It was not unusual for all of the children to sleep together in the same room. R. p. 217 ll. 22–25.

Over time, the relationship between Anderson and Carter soured and eventually the couple separated. R. p. 203 ll. 9–14. During the course of the year-long separation, both Anderson and Carter began seeing other people. R. p. 223 ll. 10–17. The only thing that remained between them was their children. Id. Anderson and Carter eventually reconciled for their children's sake, id., and Anderson moved back into the Archie Drive home in October of 2009. R. p. 203 ll. 9–23.

On the evening of November 2, 2009, Carter left her home to pick up Anderson from his job at a local super market. R. p. 198 ll. 1–8. Before leaving, Carter told the child to take a bath. R. p. 198 ll. 5–8. When the child had not taken her bath by the time Carter returned, Carter briefly scolder her. R. p. 198 ll. 20–25. The child began to cry, Tr. 356:23–25, before going to the bathroom to run her bath. R. p. 197 ll. 1–3. Moments later, Carter went into the bathroom, R. p. 197, ll. 4–10, and saw that her daughter was still crying. R. p. 197 ll. 5–6. When Carter asked her daughter why she was crying, R. p. 197 ll. 5–6, the child replied, "No reason." R. p. 197 l. 7.

Carter pressed her daughter further. R. p. 197 ll. 4–10. "My private area hurts," she told her mother. R. p. 357 l. 11. Carter told her daughter to finish taking her bath, after which she would check her for irritation. R. p. 197 ll. 12–16. Before the child's bath was finished, however, Carter returned to the bathroom and asked her daughter if anyone had touched her. The child said that it was Anderson who had touched her. R. p. 198 ll. 20–22.

While all of this was happening, Anderson was in the living room watching TV. R. p. 198 ll. 17–19. Carter confronted him with the allegations made by her daughter. At first, Anderson thought it was joke. R. p. 198 ll. 23–25. Carter told the child to finish her bath and then get ready to leave. R. p. 201 ll. 2–7. Carter again confronted Anderson, demanding that he leave the home. R. p. 201 ll. 14–15. Anderson insisted that they call the police and take the child to the doctor. R. p. 201 ll. 16–23. Carter then left Anderson with the other three children and took the child to her godmother's home. R. p. 202 ll. 1–18.

Over the course of the next few days, the child was physically examined by three doctors. S. R. p. 26 ll. 2–18. None of the doctors found any abnormalities or indications of sexual abuse. S. R. p. 19 ll. 20–24; S. R. p. 28 ll. 2–18. One of the examining doctors, Dr. Susan Breeland Luberoff, later testified as an expert at trial. S. R. p. 5 ll. 5–21. According to her testimony, the normal examination was not unusual. S. R. p. 20 l. 21–p. 21 l. 11. On recross-examination, Dr. Luberoff admitted that a normal examination would also be expected if no sexual abuse had occurred. S. R. p. 34 ll. 18–21.

On November 23, 2009, the child met with Heather Smith, a non-medical interviewer at ARC. R. p. 100 ll. 13–18. The interview, according to Smith, was conducted in a small but comfortable room where Smith and the child met alone. R. p. 95 ll. 13–17. During the interview, which was recorded by close circuit camera, the child told Smith that Anderson had sexual intercourse with the child multiple times since she was about seven years old. R. p. 102 ll. 12–15.

Prior to trial, Anderson objected to Heather Smith's qualification as an expert witness. Trial counsel specifically objected that qualifying Smith as expert would only

serve to "lend impermissible weight to the child's testimony." R. p. 53 ll. 3–4. The state countered, and the trial court agreed, that the interview required expert testimony as it concerned issues outside the common knowledge and experience of the jury. R. p. 53 ll. 15–25, p. 218 ll. 3–15. The trial court also found it necessary to qualify Smith as an expert not only what a forensic interview was but that the forensic interview had been performed correctly:

> [b]ut as far as her being an expert, I think for the purposes of her explaining to the jury what a forensic interview is, how a forensic is conducted, is it conducted with standards of—the national standards.

R. p. 60 ll. 3–7.

At trial, Smith stated that she had conducted more than a thousand interviews and had received various training in forensic interviewing protocols. R. p. 244 l. 7 – p. 242 l. 17. Based on this testimony, Smith was admitted as expert in forensic interviewing and child abuse assessment. R. p. 247 ll. 8–11. Trial counsel made contemporaneous objections to Smith's qualifications, which were overruled. R. p. 246 l. 21 – p. 248 l. 2.

Smith testified that a "forensic interview" was a "fact-finding interview for investigative purposes." R. p. 245 ll. 14–15. Smith then made it clear that forensic interviews were not medical or therapeutic but, rather, performed "in order to gather information to have an investigation to be conducted." R. p. 245 ll. 18–20. Moments later, the solicitor had Smith again define forensic interviews, which Smith again testified, "[a] forensic interview is a fact-finding interview where it is solely for the purpose gathering information so that investigation can be conducted." R. p. 248 ll. 7–10.

Smith testified that, prior to the interview, various background information on the child, including medical, sexual, and mental health information, would be made available

to the interviewer. R. p. 258 ll. 1–12. Smith testified that forensic interviews are conducted in comfortable yet non-diversionary settings where the interviewer and the child meet alone. R. p. 259 ll. 1–5. In this setting, the child is asked open-ended questions, with "leading and suggestive questions or suppositional questions" avoided. R. p. 256 ll. 24–25. Smith testified, "[w]e want to make—we want the child to be comfortable to tell what might have happened so that we can talk, you know, as long as they want about a topic." R. p. 256 ll. 13–16.

After testifying about the forensic interview process, Smith proceeded to testify about "delayed disclosure," which she defined as

> a term used to describe when children wait to tell about something that has happened with them, specifically when they wait to tell about if they had been, you know, if they had been hurt or if they have had some type of inappropriate touch.

R. p. 266 ll. 10–15. Trial counsel immediately objected. R. p. 266 ll. 20–23. After trial counsel's objection was overruled, Smith described the numerous factors that impact the timing of disclosure of sexual abuse. R. p. 272 l. 25 – p. 273 l. 17. Smith testified that she had encountered timeframes for disclosure ranging "anywhere from two weeks to 20 years." R. p. 273 l. 21. Smith went on to state that the same factors affecting the timing of disclosure also impacted the process of disclosure. R. p. 275 ll. 4–19.

Arguments

1. 2.

The trial court erred by unnecessarily qualifying Heather Smith as an expert forensic interviewing, thereby allowing Smith to bolster the child's testimony, prejudicing the Appellant (Issue 1).

The trial court erred by unnecessarily qualifying Heather Smith as an expert in child abuse assessment, thereby allowing Smith to bolster the child's testimony, prejudicing the Appellant (Issue 2).

Facts Relevant to Issues 1 and 2.

Heather Smith was the second-to-last witness called to the stand by the state. During her qualification as an expert, Smith testified that

> [f]orensic interviewing–its purpose is a *fact-finding interview for investigative purposes*. So it is not counseling or therapy. It is–typically we see children at the request of law enforcement or the Department of Social Services *in order to gather information to have an investigation to be conducted.*

R. p. 245 ll. 14–20 (emphasis supplied). Then, just after being qualified as an expert in "forensic interviewing," the state asked Smith to remind the court again "what exactly is a forensic interview." R. p. 248 ll. 5–6. Smith replied, "[a] forensic interview is a fact-finding interview where it is solely for the purpose of gathering information so that investigation can be conducted." R. p. 248 ll. 7–9. One question later, Smith was again reminding the jury that forensic interviews were fact-finding endeavors: "[f]orensic interviewing is solely, you know, it is at the request and for the purpose of investigation." R. p. 248 ll. 20–22.

Smith began her testimony as an expert by introducing the RATAC interviewing protocol used in the interviews. R. p. 249 ll. 17–21. She carefully expounded on the acronym's meaning: R is for "rapport building;" A is for "anatomical identification;" T is for "touch inquiry;" A is for "abuse scenario;" and C is for "closure." R. p. 250 ll. 3–18. She explained that during the "rapport building" phase of the interview, the interviewer attempts "to build some type of communication with the child, trying to help them become comfortable." R. p. 249 ll. 22–24. At the same time, during the same phase, the interviewer is "assessing [the child] for verbal and cognitive ability." R. p. 249 l. 24 – p. 250 l. 1. In the next phase, "anatomical identification," Smith testified that

> we use drawings of anatomical bodies to show the child's anatomy. And we ask the child in this phase to identify their names for body parts so that we can use the child's language. It is very important to make a child feel comfortable, to use the words they use.

R. p. 250 l. 22 – p. 251 l. 2. After explaining the last stages of the protocol, Smith confirmed that this protocol was "widely used" and "nationally accepted." R. p. 251 ll. 22–25.

Once Smith had explained the various stages of the protocol, Smith went into detail about the methodology of the interviews.

> And we want to make sure that we're not asking any leading or suggestive questions in the interview, so we do often remind the child and tell the child that, you know, our job is to understand what they are trying to tell us, to make sure that we get it right, we want to make sure that we understand what it is that they are telling us. *We will have a conversation with children about the importance of truth-telling* and how important it is that we–if we make a mistake we want–

R. p. 252 ll. 5–15. At this point, trial counsel objected and, after a bench conference, the objection was overruled. R. p. 252 ll. 16–24. Smith continued her testimony, stating that the interviewer and the child are alone during the interview, with the child being

reminded that she can correct the interview if the interviewer "get[s] something wrong about what they are saying." R. p. 253 ll. 4–17.

The solicitor then had Smith circle back to the rapport building phase. R. p. 254 ll. 15–22. Smith testified about assessing the competency of the child, stating that "[w]e are making sure that they–that we can understand them, you know, whether they have a verbal and cognitive deficit. In that sense, we do–we do assess them for that." R. p. 254 ll. 19–22. Smith was then guided by the solicitor back to the method of questioning children. R. p. 255 l. 24 – p. 256 l. 2. Smith expanded on her earlier comments on "leading or suggestive questions," stressing that "[w]e definitely try to avoid leading and suggestive questions or suppositional questions where the interviewer assumes the answers." R. p. 256 l. 24 – p. 257 l. 2.

Finally, the solicitor asked Smith about the child's interview. R. p. 258 ll. 13–14. Smith testified that she interviewed the child on November 23, 2009, at ARC. R. p. 258 ll. 13–22. The interview was conducted in a small room, with comfortable seating and no distractions. R. p. 259 ll. 1–9. There, the child disclosed to Smith that she had been sexually abused from second grade until the seventh grade. R. p. 260 ll. 12–15. Smith then testified that, according to the child, the abuse had occurred while she was living at her current residence and a prior residence on Satchel Ford Road. R. p. 260 ll. 19–21.

Smith then testified on the subject of "delayed disclosure," defining the term as "when children wait to tell about something that has happened with them, specifically when they wait to tell about if they had been, you know, if they had been hurt or if they have had some type of inappropriate touch." R. p. 265 ll. 10–15. Anderson objected to

this line of testimony. R. p. 265 ll. 20–23. In overruling Anderson's objection, the court ruled

> I know. Y'all have been saying it the whole time that she didn't tell anybody. I mean, they have a right—and in every case I'm reading up here they are allowed to testify about delay because she is not commenting on law. I think y'all are stretching the ruling of McKerley as a comment.
>
> Anything—at this point, if that is the case, anything that they put up is going to be a comment or bolstering the victim. And she—I mean, delayed—they can believe it or not believe it. Y'all have the right to cross-examine her about the delayed disclosure and refute that, you know, anything regarding delayed disclosure.
>
> So I'm going to overrule the objection, allow her to testify about the delayed disclosure. She can't—but her testifying about that does not mean that this was a case where the child waited or it doesn't mean that she is saying that the child is telling the truth or not telling the truth. She is actually just talking about what delayed disclosure is.

R. p. 270 l. 8 – p. 271 l. 4. Smith continued to testify as to the factors that contribute to delayed disclosure, stating that a child may wait to disclosure sexual abuse

> particularly if it is happening within a family structure so that if it is a family member, a trusted family member, someone who is in a position of authority over them, someone who they consider to be a caregiver, that could contribute to a child waiting to tell.
>
> There may also be threats made to a child that would prevent the child from coming forward and talking about something that might have happened.
>
> Also, if they don't feel like they are being supported in the home, sometimes that can contribute.
>
> They may also have a fear of going into foster care or the family unit breaking apart. That can contribute to a child waiting to report.

R. p. 272 l. 25 – p. 273 l. 17. Smith then went on testify that timeframes for delayed disclosure range from two weeks to 20 years. R. p. 273 ll. 18–21. Once Smith's testimony was finished, a redacted copy of the forensic interview was played for the jury. R. p. 288 ll. 13–14. At no time did Smith express an opinion regarding delayed disclosure and the child.

Discussion

In South Carolina, witnesses are qualified as experts where "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence." Rule 702, SCRE. There is no need to qualify a witness as an expert, however, where the witness will only testify as to her experience and personal observations. State v. Douglas, 380 S.C. 499, 502-03, 671 S.E.2d 606, 608-09 (2009). Even qualified as an expert, a witness may not violate the longstanding rule of commenting directly or indirectly on credibility of another witness. State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)), reh'g denied (May 21, 2012)(citing Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998); State v. Sapps, 295 S.C. 484, 485–86, 369 S.E.2d 145, 145–46 (1988)). To this end, a forensic interviewer may not bolster the testimony of the child. McKerley, 397 S.C. at 464 (citing Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010)). "The assessment of witness credibility is within the exclusive province of the jury." McKerley, 397 S.C. at 464(citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)).

In recent years, this State's appellate courts have paid special attention to the expert testimony of forensic interviewers and the problems arising therefrom. Most recently, the Supreme Court in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), held that the Court could "envision no circumstance where their qualification as an expert at trial would be appropriate." Id. at 357n.5. In so ruling, the Court expressed the dangers of calling and qualifying a forensic interviewer as an expert witness: "It is undeniable that the primary purpose for calling a "forensic interviewer" as a witness is to lend credibility

to the child's allegations. When this witness is qualified as an expert the impermissible harm is compounded." Id. at 358.

(1) It was prejudicial error for the trial court to qualify Heather Smith as an expert in "forensic interviewing" (Issue 1).

Heather Smith's testimony in this case gave the undue impression that the child's "forensic interview" was a meticulous, almost scientific process from which only the truth could emerge.

As a matter of law, there was no need to qualify Smith as an expert in the first place. In State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009), forensic interviewer Gwen Herod was qualified as an expert and testified about her training as a forensic interviewer, the number of interviews she had conducted, and that she employed the RATAC protocol. Id. at 500. Herod also testified about interviewing the child and concluding that the child needed a medical evaluation. Id. at 501. The Supreme Court concluded that Herod's testimony did not require qualification as an expert. Id. at 502. "Herod testified only as to her personal observations and experiences, and her interview with the Victim in this case. Accordingly, we find it was unnecessary for the trial court to have qualified her as an expert." Id. at 502-03. The Douglas opinion was handed down just a few months before Anderson's trial.

If it was unnecessary for the trial court to qualify Gwen Herod as an expert, then Heather Smith's qualification was clear error. During direct examination, the critical mass of Smith's testimony regarding the forensic interview was devoted to the procedures and protocols employed. See generally R. p. 243–281. Out of approximately 339 lines of responsive transcript testimony, approximately 214 lines, or 63%, of Smith's

testimony concerned the procedure and guidelines employed in the subject interview and forensic interviews in general. Id. Smith's personal observations of the child, on the other hand, are in response to a few perfunctory questions. See generally R. p. 258 l. 13 – p. 259 l. 23, p. 260 l. 10 – p. 261 l. 1, p. 264 ll. 1–10. Nevertheless, the trial judge ruled pretrial that

> as far as [Smith] being an expert, I think for the purposes of her explaining to the jury what a forensic interview is, how a forensic interview is conducted, is it conducted within the standards of–the national standards. It is not within the knowledge of lay persons and it is not within the knowledge of a lay person regarding forensic interviews in child sexual assault cases.

R. p. 60 ll. 3–10. Anderson's attorney again objected during trial but was overruled. R. p. 74 l. 21 – p. 86 l. 2. The court's ruling was in derogation of Douglas.

The problem with Smith's qualification as an expert is not just that it was unnecessary but that it lent impermissible weight to the child's story. In Kromah, the Supreme Court underscored the obvious rationale for calling witnesses like Smith to the stand: "It is undeniable that the primary purpose for calling a 'forensic interviewer' as a witness is to lend credibility to the victim's allegations. When this witness is qualified as an expert the impermissible harm is compounded." Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). At trial, the state maintained and the judge agreed that it was necessary for Smith to testify as an expert in order to explain the forensic interview process.

The purpose behind Smith's qualification, however, was not to aid the jury in its assessment of the facts. It was, instead, to lend her expert credibility to the interview process and, finally, to the child. Through Smith's testimony, the interview process was portrayed a thorough and controlled event, guided by a seemingly scientific, "nationally

accepted," and "widely used" interview protocol. It was designed for "fact-finding" and was meant to ensure "truth-telling" by the child. The impression left for the jury was that if the child's statements survived the scientific crucible, then they must be credible.

All of this, of course, has been squarely denounced by the Supreme Court.

> The title of "forensic interviewer" is a misnomer. The use of the word forensic indicates that the interviewer deduces evidence suitable for use in court. It also implies that the evidence is deduced as the result of the application of some scientific methodology. The exact scientific methodology applied apparently defies identification. The RATAC style of interviewing is not scientific. It merely represents the objectives and topics of discussion between the interviewer and the child. Somehow RATAC is supposed to convert the interviewer into a human truth-detector whose opinions of the truth are valuable and suitable for the jury's consumption.

Kromah, 401 S.C. at 356 n.4. See also State v. J.Q., 252 N.J.Super. 11, 40, 599 A.2d 172, 188 (App. Div. 1991)(citing Biro v. Prudential Ins. Co., 110 N.J.Super. 391, 401, 265 A.2d 830 (App. Div. 1970), *rev'd on dissent*, 57 N.J. 204, 271 A.2d 1 (1970)("There is simply no scientific foundation for an expert's evaluation of the credibility of a witness or for the conclusion that a psychologist or other social scientist has some particular ability to ferret out truthful from deceitful testimony. Absent a question of capacity, an expert is no better qualified than a lay person to assess the credibility of a witness.").

(2) It was prejudicial error for the trial court to qualify Heather Smith as an expert witness in "child abuse assessment" (Issue 2).

Heather Smith was also qualified as an expert in "child abuse assessment." The very name of this "expertise" implies that Smith, a trained and experienced professional, was looking for evidence of sexual abuse. Since Smith was testifying in a criminal prosecution for sexual abuse, she must have found credible evidence of sexual abuse. As the majority of the information that Smith gathered concerning sexual abuse in this case

came from the child, Smith must have found the child's statements believable. At least, this is what the jury was meant to believe.

Compounding the damage done by Smith's qualification was her testimony regarding "delayed disclosure." This testimony was a direct comment on the credibility of the child. The very purpose of the delayed reporting testimony was to establish that there was nothing wrong or otherwise unusual with a child waiting years to disclose allegations of abuse. See People v. Dunnahoo, 152 Cal.App.3d. 561, 577, 199 Cal.Rptr. 796, 804 (Ct. App. 1984), *declined to follow on other grounds*, People v. Jones, 51 Cal.3d 294, 270 Cal.Rptr. 611(1990)("There was evidence that Rebecca and Tara did not immediately tell the police about the acts Dunnahoo had committed. Therefore, *obviously concerned with bolstering Tara and Rebecca's credibility*, the prosecution questioned two officers qualified as experts in the field of child molestation, whether it was unusual for a victim of child molestation to be reluctant to tell the truth." (emphasis supplied)).

The delayed reporting of a crime may be considered by a jury in questioning the credibility of the child. See State v. Myers, 649 N.W.2d 604, 609 (Minn. 1984)("If the victim of a burglary failed to report the crime promptly, a jury would have good reason to doubt that person's credibility."). Here, however, Smith's testimony regarding the myriad facts that may impact the child's disclosure of alleged sexual abuse directly bolster the child's credibility and vouched for her testimony. It merely tells the jury that the child waited to tell the truth and that there was nothing unusual with this sort of behavior. This sort of testimony has been recognized as bolstering by numerous courts. See Myers, 649 N.W.2d at 609(citing State v. Middleton, 294 Or. 427, 657 P.2d 1215 (Or. 1983)(discussing how "[b]ecause of the child's confusion, shame, guilt, and fear,

disclosure of the abuse is often long delayed" and "[b]y explaining the emotional antecedents of the victim's conduct and the peculiar impact of the crime on other members of the family, an expert can assist the jury in evaluating the credibility of the complainant"); Middleton, 294 Or. at 435-36(expert testimony concerning "superficially bizarre behavior" of a child victim permissible to aid a jury in assessing the victim's credibility); Wheat v. State, 527 A.2d 269, 273 (Del. 1987)(finding it necessary and permissible for expert testimony regarding "the unique interpersonal dynamics involved in prosecutions for intrafamily child sexual abuse" in order to aid the jury's assessment of the victim's credibility); Smith v. State, 100 Nev. 570, 572, 688 P.2d 326, 327-28 (Nev. 1984)(agreeing with Middleton and permitting admission of delayed disclosure expert testimony); Commonwealth v. Baldwin, 348 Pa.Super. 368, 502 A.2d 253 (Pa. 1985), *disapproved by* Commonwealth v. Davis, 518 Pa.Super. 77, 541 A.2d 315 (Pa. 1988)(agreeing with Middleton); State v. Geyman, 224 Mont. 194, 729 P.2d 475 (Mont. 1986)(citing Middleton and holding that expert testimony [regarding delayed disclosure] is admissible for the purpose of helping the jury to assess the credibility of a child sexual assault victim); State v. Kim, 64 Haw. 598, 645 P.2d 1330 (1982), *rev'd in part by* State v. Batangan, 71 Haw. 552, 799 P.2d 48 (Haw. 1990)(finding it may be necessary for an expert to testify as to the behavior of a child victim); Batangan, supra (overruling Kim and finding expert testimony "regarding general principles of social or behaviorial [sic] science of a child victim in a sexual abuse case" impermissibly bolstered the credibility of the victim even where he did not specifically comment on whether the victim was being truthful); State v. Alberico, 116 N.M. 178, 861 P.2d 219 (1991), *rev'd by* 116 N.M. 156, 861 P.2d 192 (discussing that one of the possible purposes of admitting expert

testimony regarding victim behavior, including delayed disclosure, "is to rehabilitate the credibility of the alleged victim").

Prejudice

Anderson's trial was a case based on credibility. There was no direct evidence of sexual assault. Three medical examinations failed to turn up any evidence of sexual trauma or abuse. There were no witnesses to the crime, which occurred in a small home with several other individuals around. Instead, the state relied largely on the child to prove its case, as the solicitor argued during closing argument:

> Because the testimony of the victim need not be corroborated in a criminal sexual conduct case. And I submit that it is here. We do have corroboration. But we don't have to have it. If you believe [the victim] beyond a reasonable doubt, that is enough. And I emphasize the word of the victim here.

R. p. 331 ll. 7–14. Moments later: "Because if–because of the statute, if you believe [the child] beyond a reasonable doubt, then that is really all you need to convict the defendant." R. p. 332 ll. 8–10. The solicitor then instructed the jury, "So what you must ask yourself is, why should we believe [the child]? Why should we believe her?" R. p. 332 ll. 11–12. The solicitor then answered her own question:

> Well, I am going to talk about why we should believe her. [The child] took an oath in this case. She placed her hand on that Bible and she swore to tell the truth, the whole truth, and nothing but the truth, so help her God. What reason did she have to come up here and perjure herself? She had no incentive to lie. What reason did she have to come before 14 strangers and this entire courtroom and talk about what happened?

R. p. 332 ll. 13–22. Finally, "[a]nd you know what the reality is? Yes, children do lie. Adults lie. But children lie. But the reality is, they are just not very good at it. They are just not good at it. And then, if this is a lie, [the child] deserves an Academy Award." R. p. 337 ll. 3–8.

Of course, Anderson, who also testified at trial, also placed his hand on the Bible and swore an oath to tell the truth. R. p. 332 l. 23 – p. 333 l. 1. Anderson's testimony, however, was not buttressed and bolstered the same way the child's was by Heather Smith. For this reason, the Court should reverse Anderson's conviction.

3.

South Carolina Code Ann. § 17-23-175 unconstitutionally circumscribes the Sixth Amendment right of confrontation and it was prejudicial error for the trial to admit the child's previously recorded statement pursuant to this statute.

S.C. Code Ann. § 17-23-175 provides that a statement given during a forensic interview is admissible at trial 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 . . .;
> (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. Pursuant to this statute that child's forensic interview was admitted into evidence at Anderson's trial. The admission of the forensic interview pursuant to this statute and without having the child on the stand and subject to contemporaneous cross-examination, was a violation of Anderson's right of confrontation under the Sixth Amendment of the United States Constitution.

The right of confrontation is one of the most important rights in a criminal trial. Confrontation has been called by the United States Supreme Court the "greatest legal engine ever invented for the discovery of the truth." Kentucky v. Stincer, 482 U.S. 730, 736, 108 S.Ct. 2658, 2662 (1987)(quoting California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935 (1970)). Anderson was denied this important right when the child's forensic interview was admitted into evidence.

The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, guarantees a criminal defendant the right to face his accusers. "The primary object of the [confrontation clause]," according to the United States Supreme Court,

> [t]he primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits ... being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242–43, 15 S.Ct. 337, 339–40 (1895).

At the forefront of Confrontation Clause jurisprudence is the watershed case Crawford v. Washington, 541 U.S. 36, 100 S.Ct. 2531 (2004). Crawford dealt specifically with testimonial hearsay of unavailable declarants, abrogating the Court's prior decision in Ohio v. Roberts, 448 U.S. 56, 63 S.Ct. 2531 (1980). Roberts had previously held that the admission testimonial hearsay by an unavailable declarant did not violate the Confrontation Clause where the statement qualifies under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." Id. at 66. Crawford rejected this flatly. As Justice Scalia wrote for the Court,

> The Roberts test allows a jury to hear evidence, *untested by the adversary process*, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability.

Crawford, 541 U.S. at 62, 124 S. Ct.at 1370 (emphasis supplied).

While Crawford largely abrogated Roberts, it has been argued that Crawford never overruled or recognized an abrogation of many of the Court's earlier Confrontation Clause cases, such as Delaware v. Fensterer, 474 U.S. 15, 106 S.Ct. 292 (1985), and United States v. Owens, 484 U.S. 554, 108 S.Ct. 838 (1988). See People v. Sharp, 825 N.E.2d 706, 711 (Ill. Ct. App. 2005), *opinion vacated on other grounds by* 391 Ill.App.3d 947 ("[T]he Court's decision in Crawford neither overruled nor called into question its two earlier decisions that addressed and resolved this issue [Fensterer and Owens]."). It is based on these and similar cases which courts–including this Court and the South Carolina Supreme Court–have held that the Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." State v. Stokes, 381 S.C. 390, 401-02, 673 S.E.2d 434, 439 (2009)(citing Owens, 484 U.S. at 559; Fensterer, 474 U.S. at 19–20; Stincer, 482 U.S. at 739).

At the same time, it has also been recognized that Crawford did not overrule or otherwise abrogate Craig v. Maryland, 497 U.S. 836, 110 S.Ct. 3157 (1990). See Blanton v. State, 978 So.2d 149, 157 (Fla. 2008)("While Craig predates Crawford, the Supreme Court has not indicated that Craig has been overruled or abrogated. Indeed, Crawford does not discuss or even mention Craig."). Craig dealt with a constitutional challenge to the mode of testimony at trial. There the victim testified pursuant to Maryland law via one-way closed circuit camera from outside the courtroom. Craig, 497 U.S. at 840–42. The Supreme Court upheld the Maryland law, finding that

> We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and must testify under oath; 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.

Craig, 497 U.S. at 851, 110 S. Ct. at 3166 (emphasis supplied). It is clear, then, the opportunity for effective cross-examination as envisioned by the Sixth Amendment must be contemporaneous in order to pass constitutional muster.

Owens and Fensterer, which both predate Craig and Crawford, dealt with challenges to effective cross-examination in a context wholly apart from that in the case sub judice. In Fensterer, FBI Special Agent Allen Robillard was unable to recall the basis of his opinion that the victim's hair had been forcibly removed. Fensterer, 474 U.S. at 16. Fensterer claimed that the agent's forgetfulness at trial denied him the right to effective cross-examination. Id. The Supreme Court found no constitutional violation:

> it does not follow that the right to cross-examine is denied by the State whenever the witness' lapse of memory impedes one method of discrediting him. Quite obviously, an expert witness who cannot recall the basis for his opinion invites the jury to find that his opinion is as unreliable as his memory. That the defense might prefer the expert to embrace a particular theory, which it is prepared to refute with special vigor, is irrelevant. The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.* Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

Id. at 20 (quotations and citations omitted; emphasis in original).

John Foster, the victim in Owens, testified at trial but had trouble recalling events surrounding his assault. Owens, 484 U.S. at 556. To the consternation of Owens trial counsel, most importantly, Foster could not remember that he had initially accused another suspect of the attack. Id. Again, the Supreme Court found no constitutional infringement. Justice Scalia, writing for the majority, opined that "[w]e do not think that a constitutional line drawn by the Confrontation Clause falls between a forgetful witness'

live testimony that he once believed this defendant to be the perpetrator of the crime, and the introduction of the witness' earlier statement to that effect." Id. at 560.

Owens and Fensterer dealt with (and rejected) constitutional challenges to the sufficiency of cross examination with a witness who was presently on the stand. It is in this context that the Court applied the constitutional requirement for an "opportunity for effective cross-examination." Even in California v. Green, 399 U.S. 149, 90 S.Ct. 1930 (1970), which was cited favorably in Owens, Fensterer, Craig, Roberts, and Crawford, the constitutional challenge was lodged against cross examination of a witness who was still on the stand. Id. at 166-67. Neither Owens, Fensterer, nor Green dealt with testimony of one witness introduced by *another* witness after the first witness had already left the stand. This places the issue squarely within the requirements set forth in Craig: cross-examination must be *contemporaneous*. Craig, 497 U.S. at 851.

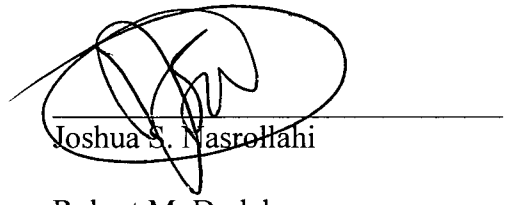
Forensic interviews of child victims are testimonial and otherwise inadmissible unless the child testifies at trial subject to cross examination. See Coronado v. State, 351 S.W.3d 315, 324 n.52 (Tex. Crim. App. 2011)(cases cited therein); State v. Arnold, 126 Ohio St. 3d 290, 296, 933 N.E.2d 775, 780–81 (Ohio 2010)(cases cited therein). The testimonial nature of this interview was freely admitted by Heather Smith when she testified repeatedly that forensic interviews were for fact-finding and investigative purposes. Cf. Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 2274 (2006)("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."). The statements made by the child during the forensic interview were made in response to Smith's interrogation for

determining the existence of sexual abuse. Smith testified to this process at length. Supra at Arguments 1 & 2 and citations therein. The child's testimony in this regard was unsworn and not subject to cross-examination. Moreover, when they were presented at trial, through Smith, the child was again not subject to cross examination. Because this testimony was presented without Anderson having the right to contemporaneously cross-examine the child, Anderson was denied his Sixth Amendment rights. This was prejudicial error requiring reversal.

Conclusion

For the foregoing reasons this Court should order a new trial.

July 17, 2014



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