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ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RAY C. WARREN,

APPELLANT

APPELLATE CASE NO. 2013-002251

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUE ON APPEAL3

STATEMENT OF THE CASE4

ARGUMENT5

CONCLUSION.....17

TABLE OF AUTHORITIES

Cases

State v. Bryant, 382 S.C. 505, 675 S.E.2d 816 (Ct. App. 2009)..... 14

State v. Russell, 383 S.C. 447, 679 S.E.2d 542 (Ct. App. 2009)..... 14

Statutes

S.C. Code Ann. § 17-23-175..... 3, 5, 7, 14

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting an audio and video recording of the complainant's forensic interview pursuant to South Carolina Code Section 17-23-175 since the statement did not possess particularized guarantees of trustworthiness, specifically the statement did not represent a detailed account of the alleged offense as required by the statute?

STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant at the August 27, 2013 term of General Sessions for criminal sexual conduct with a minor in the first degree and lewd act upon a child. R. *. His case was called to trial on October 7, 2013 before the Honorable Robin B. Stilwell, and a jury. Tr. 1. Assistant Solicitor Lisa Bentley represented the state, and Randall Lee Chambers represented Appellant. Tr. 1.

On October 9, 2013, the jury, after deliberating for nearly ten hours, acquitted Appellant of criminal sexual conduct with a minor in the first degree, but found him guilty of lewd act upon a child. Tr. 289, ll. 1-20. Judge Stilwell sentenced Appellant to fifteen years suspended upon the service of eleven years imprisonment and five years probation. Appellant was also required to register as a sex offender. Tr. 297, ll. 2-8.

This appeal follows.

ARGUMENT

The trial court erred in admitting an audio and video recording of the complainant's forensic interview pursuant to South Carolina Code Section 17-23-175 since the statement did not possess particularized guarantees of trustworthiness, specifically the statement did not represent a detailed account of the alleged offense as required by the statute.

Pretrial Hearing

Defense counsel moved pretrial to exclude the audio and video recording of Minor's forensic interview with Christine Carlberg pursuant to S.C. Code § 17-23-175.¹ In response to Appellant's motion, the state called Ms. Carlberg to the stand.

Carlberg testified she is employed by the Greenville Department of Mental Health, and is "contracted to do work at the Julie Valentine Center." Tr. 6, ll. 15-20. She said her primary duty is to conduct forensic interviews. She explained that a "forensic interview is a semi-structured non-meeting developmentally appropriate method of gathering information from the child." Tr. 7, ll. 1-6. Carlberg said she had been conducting forensic interviews for thirteen years and had conducted a total of 2,384 forensic interviews during her career. Tr. 7, ll. 10-11; Tr. 8, ll. 11-13. She also explained that she holds a Bachelor of Science Degree in Rehabilitation Services Education from Pennsylvania State University with a minor in psychology and a Master of Arts Degree in Marriage and Family Therapy from Preform Theological Center in Jackson, Mississippi. Tr. 7, ll. 15-21. Additionally, Carlberg stated she trained at Corner House, "which is a

¹ The name of the minor child is redacted pursuant to the April 15, 2014 order from our Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

nationally leading training facility for forensic interviews,” and Finding Words.² Tr. 7, ll. 11013.

Carlberg testified she uses the protocol called RATAAC when she conducts forensic interviews. She explained, “RATAAC is a five stage semi-structured protocol that stands for Rapport, Anatomy I.D., Touch inquiry, Abuse Scenario, and Closure. Tr. 7, l. 22 – 8, l. 4. Carlberg maintained that she uses “what’s called open-ended or non-leading types of questions as much as possible” because “[y]ou want the child or the person that you’re interviewing just to be able to tell as much as they can as freely and as openly and as much in their own words and language as they can.” Tr. 8, ll. 14-22. She also claimed she never uses leading questions, but she “might use a more focused question like, for example, tell me what happened in the living room.” Tr. 8, l. 23 – 9, l. 4.

Carlberg testified she interviewed Minor, who was eleven years old, on July 20, 2011 after Minor was referred to the Julie Valentine Center for a forensic interview. She said she used the RATAAC protocol and that the interview was audio and video recorded. Tr. 9, l. 10 – 10, l. 8. The state admitted this video into evidence for purposes of the pretrial hearing. Tr. 10, l. 22 – 11, l. 7.

On cross-examination, Carlberg admitted that before she interviewed Minor she knew the specific allegations made by Minor from speaking with a family member and from reviewing notes made by the doctor who examined Minor. However, she was uncertain whether she had spoken to or received any information from law enforcement. Tr. 12, l. 3 – 13, l. 16.

² This Court may take judicial notice that Finding Words is trademark of the American Prosecutors Research Institute, which is a non-profit affiliate of the National District Attorneys Association.

At the conclusion of Carlberg's testimony, the solicitor argued that the audio and video recording of Minor's forensic interview was admissible because, based on the testimony of Carlberg, the evidence met the requirements of S.C. Code Ann. § 17-23-175. She also noted Minor was under the age of twelve at the time she was interviewed and that Minor was expected to testify during the trial. Tr. 13, l. 22 – 14, l. 5.

Defense counsel objected to the admissibility of the recording stating, "I have concern[s] about after having reviewed the tape on several occasions, . . . that it doesn't represent a detailed account of the alleged offense. It seems to me that the girl's statement, as she was interviewed, she was very nebulous as to dates and times and the manner. And for that reason we would submit that it is inadmissible." Tr. 14, ll. 7-17.

The court ruled that the audio and video recording of Minor's forensic interview was admissible pursuant to § 17-23-175 because the court found the out-of-court statement met all the requirements under the statute. Specifically, the court stated, "With respect to the details, I find it was sufficiently detailed. Particularly, in light of the fact that she was an 11 year-old girl at the time of the interview . . . I think that there was sufficient detail in her testimony that would meet the requirements under the statute. I do find that the witness is qualified with the appropriate experience and education and training in the forensic interrogation. Therefore, I'm going to find that admissible." Tr. 14, l. 18 – 15, l. 9.

Facts at Trial

Deputy David Picone of the Greenville County Sheriff's Office testified that on April 23, 2011 he responded to a residence in Taylors concerning a complaint regarding an alleged "sexual assault." Tr. 53, l. 12 – 54, l. 22. The complaint was made by Minor's

mother, Victoria Johns. Picone testified that when he arrived at the residence, Johns, Minor, and several other family members were present at the home. He claimed that he immediately separated Johns and Minor and spoke to Johns “to find out what was going on.” Tr. 54, l. 23 – 55, l. 13.

After speaking with Johns, Picone said he spoke alone to Minor, who was eleven years old. According to Picone, Minor was crying, “very upset,” and “[o]bviously scared.” Picone claimed Minor ultimately disclosed sexual abuse to him and told him the abuse started when she was “around eight to nine years old” and that it occurred at two different residences in Taylors. Tr. 55, l. 23 – 57, l. 24.

Investigator Michael Robertson, who ultimately investigated the case, testified that he met with Minor and Johns at his office on May 3, 2011. Robertson explained that he introduced himself to Minor and spoke to Johns alone, but that he never questioned Minor about the allegations. Tr. 62, l. 4 – 64, l. 23. Instead, he referred Minor to the Julie Valentine Center for a forensic interview. Tr. 65, l. 25 – 10. Robertson testified that he attended the forensic interview and, based on his observations during the forensic interview, he “went and signed warrants on [Appellant].” He also claimed that he tried to contact Appellant, but “was unable to speak with [him].” Tr. 66, ll. 11-22. This was the extent of his investigation. Tr. 67, l. 6 - 68, l. 6.

During cross-examination, Robertson conceded there was no physical evidence or forensic evidence gathered in this case. He also admitted there were no eyewitnesses to the alleged sexual abuse. Tr. 68, ll. 7-15.

Lynn Rice, Minor’s grandmother and Appellant’s girlfriend of nearly eight years until these allegations surfaced, testified that Minor often lived with her, Appellant, and

several other family members and friends. Rice said that she and Appellant lived in five different residences during the course of their relationship. It appeared from her testimony that the family had a very unstable living environment, were constantly moving, and shared a residence with a large number of people. See Tr. 70, l. 12 – 76, l. 21; see also Tr. 84, l. 22 – 85, l. 3; see also Tr. 88, l. 2 – 89, l. 4.

Rice testified that Minor's mother, Victoria Johns, was addicted to methamphetamine, and that when she was using, she would leave Minor and Minor's siblings with Rice. Tr. 76, l. 22 – 78, l. 1. Rice maintained that when she was working, Appellant or someone else who lived at the house would watch Minor and the other children. Tr. 79, ll. 1-6. She testified Appellant would take the family children, including Minor, squirrel hunting, fishing, walk them to the park, and play football with them. She said Appellant got along well with all the children, except Minor's sister who was "a handful" because she was "very hyper" and "very outspoken." Tr. 79, l. 7 – 80, l. 18.

Rice testified that on the Saturday before Easter 2011, she was sitting in the living room of their home when her daughter, Victoria Johns, "came flying out, somewhere in the dining room area or hallway area and started yelling at Ray [Appellant], jumping on Ray, literally attacking him, going off." Tr. 81, l. 10 – 82, l. 3. She explained that after this confrontation, she and Appellant left the residence. Rice said when she first heard about these allegations she thought "they" were trying to force Appellant out of the house. Tr. 92, ll. 3-6.

Victoria Johns testified she first met Appellant when he came to visit his father who was living in the same residence as her, her mother, Lynn Rice, and Minor, along with several other family members and friends. Tr. 96, l. 10 – 97, l. 9. Johns explained

that Appellant eventually moved into the residence as well and began a romantic relationship with Johns' mother, Lynn Rice. Tr. 97, ll. 10-15; Tr. 98, ll. 7-9. Around this same time, Johns began using methamphetamine and would "be on it for weeks" at a time. Tr. 100, ll. 6-17. When she was using, she would leave her children with her mother.³

Johns testified that on the Saturday before Easter 2011, she went to find Minor who was playing games on the computer in her bedroom. When she walked in the room, she saw Minor sitting in the computer chair. Johns claimed, "She [Minor] had her legs up like this in a chair . . . And Ray [Appellant] was draped over her and he had his hands where I could not see them. And a light bulb just went off and I knew something did not appear right." Tr. 102, l. 17 – 105, l. 2. She maintained Appellant's "arms were over her [Minor's] shoulders and his hands were like where her feet or her vagina would be." However, Johns admitted that she could not see Appellant's hands. Tr. 105, ll. 13-23.

Johns testified that she immediately took Minor back to Johns' bedroom in the garage and asked her if Appellant "had ever touched her inappropriately." Tr. 105, l. 24 – 106, l. 14. According to Johns, Minor disclosed sexual abuse. Tr. 106, ll. 15-17. Because it was the Easter weekend, Johns said she did not call the Greenville County Sheriff's Office until the following Monday. She also called the Department of Social Services (DSS). Tr. 109, ll. 3-15. Deputy Picone eventually came to their home sometime that Monday. Tr. 110, ll. 8-15.

³ Johns was convicted of manufacturing methamphetamine and was released from prison about a week before trial. Tr. 99, l. 19 – 100, l. 5.

Christine Carlberg, who was contracted to do work at the Julie Valentine Center (JVC), testified that she conducted a forensic interview with Minor on July 20, 2011. Tr. 139, ll. 19-22; Tr. 144, ll. 1-2. Carlberg explained Minor was eleven years old at the time of the interview and had been referred to JVC by the Greenville County Sheriff's Office. Tr. 144, ll. 3-10. She claimed Minor was cooperative during the interview and ultimately disclosed sexual abuse. Tr. 146, l. 5 – 147, l. 1. Carlberg also explained that the forensic interview was audio and video recorded. Tr. 145, ll. 3-4. This recording was entered into evidence by the state and ultimately published to the jury. Tr. 145, ll. 20-25; Tr. 147, l. 13. Defense counsel objected when the recording was played for the jury. Tr. 147, ll. 5-13.

On cross-examination, Carlberg testified that before the forensic interview, Minor had spoken to her mother, law enforcement, and the medical doctor who examined her about the allegations. Carlberg admitted that at the time she interviewed Minor, she had been informed about the specific allegations Minor had made from these various sources. Tr. 150, l. 10 – 151, l. 1. Additionally, she had gathered background information about Minor, specifically that Minor had been raised in “extremely unstable circumstances,” that she had had no contact with her father since she was approximately four years old, and that her mother had ongoing problems with drug abuse and would leave Minor in other people's care for weeks at a time. Tr. 151, l. 5 – 152, l. 4.

Dr. Nancy Henderson, who was qualified as an expert in child abuse pediatrics, explained that she is employed by the Greenville Health System and contracted to do work at the Julie Valentine Center. She testified she examined Minor on May 16, 2011 after Minor was referred by the Greenville County Sheriff's Office “[b]ecause of

concerns of sexual abuse.” Tr. 163, l. 19 – 164, l. 8. Henderson claimed Minor disclosed sexual abuse to her and indicated the abuse occurred when she was eight or nine years old. Tr. 165, ll. 12-18. However, Minor did not indicate where the abuse allegedly occurred. Tr. 166, ll. 3-6.

Henderson testified Minor had a normal medical exam and that there was no trauma or injury to her hymen. Tr. 166, l. 10 – 167, l. 12. However, Henderson claimed the fact Minor had a normal medical exam did not “rule out the possibility of child sexual abuse.” Tr. 167, ll. 13-15.

Minor, who was thirteen years old at the time of trial, testified that she lived with her mother, Victoria Johns, and grandmother, Lynn Rice, “[p]retty much [her] whole life” until August 2011 when she moved in with her aunt and uncle. She claimed Appellant “molested” her and that he first started touching her when she at “least five or six years old.” Tr. 177, l. 11 – 178, l. 9. This was in contrast to Deputy Picone’s testimony and Dr. Henderson’s testimony who both stated that Minor told them the alleged abuse started when she was approximately eight or nine years old. See Tr. 55, l. 23 – 57, l. 24; see also Tr. 165, ll. 12-18.

Minor explained “[i]n the beginning it was like nothing major” and that “it started off with like tag” when Appellant would tag her “butt” or her chest. Tr. 178, l. 16 – 179, l. 21. She said it was “pretty much like groping.” Tr. 178, ll. 19-21. Minor alleged the touching “started progressing” “when [she] got older, like when [she] turned seven.” Tr. 181, ll. 3-11. She said she was sitting on the couch in her grandmother’s trailer when Appellant sat down next to her and put his hand on her leg and eventually put his finger inside her waistband. Tr. 182, l. 5 – 184, l. 6. Minor claimed that about two days after

this alleged incident, she was again sitting on the couch at her grandmother's house when Appellant put his hands inside her pants under her "panties" and "rub[ed] like the lip [of her vagina]." When asked by the solicitor whether Appellant went "inside [her] vagina that day," Minor said, "I think so." Tr. 184, l. 7 – 186, l. 1.

Minor claimed that at the end of that same week, Appellant again came into the living room at her grandmother's house and sat next to her on the couch. She said he put his hand inside her pants, in her underwear, and "was touching the lip and then he started rubbing the inside." Tr. 186, l. 2 – 188, l. 14. Minor testified that this happened "[a]t least a couple times a week" and did not always occur in the living room at her grandmother's house, but also occurred when she was in her grandmother's room on the computer. Tr. 189, ll. 17-23.

Minor also testified that Appellant touched her one time outside of the house. She said this happened when they were fishing at Cannon's Fishing Lake. She claimed only she and Appellant were at the lake sitting on a bench when Appellant put his hand inside her underwear and rubbed both the inside and outside of her vagina. Tr. 192, l. 21 – 197, l. 18.

Furthermore, Minor testified she saw Appellant's private parts on one occasion. She claimed that while she was sleeping over at her grandmother's house, Appellant again sat next to her on the couch, unzipped his pants, and took his penis out. Minor alleged Appellant "made [her] put [her] face on it," but she was "squirming and crying" so Appellant stopped and said, "I guess you're not ready yet." Tr. 202, l. 2 – 205, l. 1.

Minor admitted that it had been approximately one or two years since Appellant had allegedly touched her in a sexual way when she ultimately disclosed. See Tr. 206, ll. 16-20.

Discussion

The court erred in admitting the recording of Minor's forensic interview pursuant to S.C. Code Ann. §17-23-175 since the statement did not represent a detailed account of the alleged offense and therefore did not possess "particularized guarantees of trustworthiness" as required by the statute.

Under §17-23-175, before an out-of-court statement of a child is admissible in a general sessions court proceeding, the court must find, among other conditions, "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." The statute lists several factors the court may consider when determining whether a statement possesses particularized guarantees of trustworthiness including, (1) whether the statement was elicited by leading questions, (2) whether the interviewer has been trained in conducting investigative interviews of children, (3) whether the statement represents a detailed account of the alleged offense, (4) whether the statement has internal coherence, and (5) sworn testimony of any participant which may be determined necessary by the court. See S.C. Code Ann. § 17-23-175; see also State v. Bryant, 382 S.C. 505, 508-509, 675 S.E.2d 816, 818 (Ct. App. 2009); see also State v. Russell, 383 S.C. 447, 450-451, 679 S.E.2d 542, 543-544 (Ct. App. 2009).

Minor's account of the alleged sexual abuse given during her forensic interview with Christine Carlberg was very vague and far from detailed. It took her a long time to recall

specifics and she was very hesitant in her responses, especially when it came to how old she was when the incidents allegedly occurred, the dates of when they allegedly occurred, and where they allegedly occurred. She could not recall any specific dates or addresses, only referring to various rooms in Trailer 19 and Trailer 20 and Cannon's Fishing Lake. Her account of what allegedly occurred was also vague, especially compared to her trial testimony. During the interview she claimed she was "raped" and alleged, "He [Appellant] touched me down here, made me kiss him, and he made me put my face on his private part." State's Exhibit No. 5 (DVD of Forensic Interview). Minor also claimed Appellant rubbed her "woo-hoo" with his hand under her clothing. State's Exhibit No. 5 (DVD of Forensic Interview). This was the extent of the details Minor provided.

Surprisingly, during her trial testimony, Minor could remember specific incidences of when Appellant allegedly touched her, where these incidences allegedly occurred, and how old she was when they allegedly occurred. Her testimony was clearly more developed and detailed than her account given during the forensic interview. For example, during her testimony she claimed the alleged abuse started when she was five or six years old with tag and testified Appellant would tag her "butt" and chest area. She used the word "groping" to describe this touching. Tr. 177, l. 11 – 179, l. 24. Minor testified that the touching "started progressing" when she turned seven. Tr. 181, ll. 3-11. She also used words like the "lip" of her vagina and alleged Appellant would rub her vagina for two to three minutes. See Tr. 184, l. 7 – 185, l. 24; see also Tr. 188, ll. 3-16; see also Tr. 191, l. 4 – 192, l. 4.

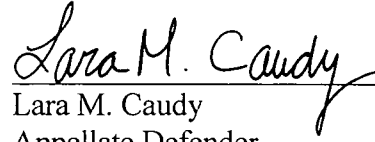
Under the totality of the circumstances, Minor's account of the alleged abuse during the forensic interview did not possess "particularized guarantees of trustworthiness" because her statements lacked a detailed account of the alleged offense. Due to the trial court's error

in admitting the audio and video recording of Minor's forensic interview Appellant's conviction should be reversed and his case remanded to the Greenville County Court of General Sessions for a new trial.

CONCLUSION

Appellant's conviction should be reversed and this case remanded to the Greenville County Court of General Sessions for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of July, 2014.