STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

John C. Hayes, III, Circuit Court Judge

Opinion No. 5257 (S.C. Ct. App. filed 8/6/2014)

09-GS-42-04016

THE STATE,

RESPONDENT,

V.

JEFFERSON PERRY,

PETITIONER.

APPELLATE CASE NO. 2014-002519

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on October 23, 2014.

QUESTIONS PRESENTED

1.

Whether the majority of the Court of Appeals erred by holding it was not error to instruct the jury that "time is not a material element of the offense of criminal sexual conduct with a minor" since the instruction was gratuitous and prejudicial especially since the defense had concentrated on the time factor in challenging the allegation, and it impermissibly charged the jury that the time of the allegation was not important in a child sex case?

2.

Whether the Court of Appeals erred by holding the trial court properly admitted the DVD of the forensic interview since this repetition of the minor making the same allegation on a prior occasion impermissibly bolstered her testimony?

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted by the Spartanburg County Grand Jury for the offense of committing a lewd act on a minor on either December 29, 2007 or December 30, 2007. R. 184. The allegation arose from a specific night, petitioner's defense was that the child was confused, and that he never touched her. His case was called to trial on April 10, 2012 before the Honorable John C. Hayes and a jury. Robert Hall represented petitioner. Abel Gray was the assistant solicitor. R. 1.

On April 12, 2012, the jury found petitioner guilty of committing a lewd act on a minor. R. 178, ll. 4-8. Judge Hayes sentenced petitioner to five years imprisonment, suspended on the service of three years. Although petitioner was not given any prison time, he was ordered to register as a sex offender with "electronic monitoring." R. 182, l. 20 – 183, l. 6.

The Court of Appeals affirmed petitioner's conviction in State v. Perry, 410 S.C. 191, 763 S.E.2d 603 (2014). Chief Judge Few dissented in part. App. 1-21. Petitioner sought rehearing. App. 22-29. Rehearing was denied. App. 30-31.

This petition for a writ of certiorari follows.

ARGUMENT

1.

The majority of the Court of Appeals erred by holding it was not error to instruct the jury that "time is not a material element of the offense of criminal sexual conduct with a minor" since the instruction was gratuitous and prejudicial especially since the defense had concentrated on the time factor in challenging the allegation, and it impermissibly charged the jury that the time of the allegation was not important in a child sex case.

Relevant trial facts

Wiley Garrett was the "forensic evaluator" in this case. An in camera hearing was held on his testimony. Garrett worked at the Children's Advocacy Center in Spartanburg. R. 5, l. 10 – 7, l. 22. He had a Master's degree in social work from the University of South Carolina. R. 6, ll. 1-2.

Garrett said the alleged victim in this case "made a disclosure on both of those dates [February 7, 2008 and February 14, 2008]." R. 8, l. 10 – 10, l. 6. "She made a disclosure of sexual touching which, which, in which she felt uncomfortable." R. 12, ll. 18-20.

On cross-examination the defense specifically asked Garrett about the video bolstering the child's testimony which she was also going to present live that day in court for the jury. Garrett admitted: "*It may bolster*, as you say, or it may cause questions. But, again, that's part of the greater process of which we're here today." However, Garrett reasoned: "It would be an advantage to the court to be able to look *at what the child said four years ago to look at what the child said today.*" R. 16, ll. 9-18. (emphasis added).

After Garrett's in camera testimony, defense counsel objected to the admission of the tape on the grounds it would simply bolster the child's testimony. "I think it's just the same thing the child said on purposes [a prior occasion]. I think it's to bolster what testimony she's going to give

in the trial, Your Honor, and we would oppose it." The judge ruled the tape was admissible under S.C. Code § 17-23-175, stating that the child would be subject to cross-examination when she testified. R. 21, ll. 5-14.

The evidence against petitioner in this case was very slim. While that likely explains petitioner not receiving any prison time, he is still branded for life. He must register as a sex offender, and pay the electronic monitoring hefty fee.

The alleged victim was thirteen-years-old at the time of trial, and she was nine-years old at the time of the alleged incident on December 29, 2007. R. 26, l. 10 – 27, l. 2. The minor said the alleged lewd act occurred "a day or two before my real Dad's birthday." She offered that her "real Dad's" birthday was on December 31, 2007, and she confirmed to the solicitor that is how she remembered it so clearly. R. 26, l. 24 – 27, l. 2.

That night the minor remembered several people were over at the mobile home where she was staying. "It was my Nana, him, my Dad, his girlfriend, and my Uncle Bryan's girlfriend, and this dude named Paul that he knew." R. 27, ll. 10-13.

There was evidence petitioner had come over that night to help Bryan, who was the boyfriend of his cousin Liz, with yard work the next morning. The minor said she was asleep on the living room floor when petitioner walked into the room with her Uncle Bryan. This was apparently about 10:00 or 11:00 at night after petitioner was picked-up to spend the night. The minor said the television was off at the time. That fact would be disputed, which tested her allegedly clear memory of the "incident." R. 29, ll. 5-25.

Her allegation was "I was asleep, and whenever his [petitioner Jefferson Perry's] hand up or, up my pants, I felt his hand and I woke up and I moved." She maintained: "I woke up and I moved to the couch." She claimed petitioner followed her to the couch and "he sat down on the couch and

asked me if he could lay his head in my lap." The minor said she was scared and did not say anything to petitioner. She acknowledged petitioner did not threaten her or her family. R. 31, l. 4 – 33, l. 5. As will be seen infra, the minor was inconsistent on whether the "head in her lap" portion of her allegation actually occurred.

The minor's allegation was that petitioner reached his hand up the legs of her pants "to my private." R. 33, l. 2 – 34, l. 7. The defense sought to show the jury that this was a very implausible allegation. The minor admitted she stayed the rest of the week at the home of her father's family, but she did not tell anybody what allegedly happened. R. 35, l. 4 – 36, l. 6. She supposedly told her mother "it think it was after New Years. I don't remember." The solicitor asked if it was "after your father's birthday?" and the minor answered: "Yes." She did not tell her mother immediately because: "I was still scared something else was gonna happen." The minor admitted petitioner "wasn't nowhere around, but she did not make the allegation to her mother until the middle of January, 2008, "maybe." R. 35, l. 13 – 38, l. 20.

On cross-examination the minor said "once we fell asleep I turned off the TV and I went in my Dad's bedroom." R. 45, ll. 13-15. The minor also said she was wearing brown capris when petitioner allegedly put his hand up her pants. She said petitioner's hand was "smooth." She said she did not remember saying his hand was smooth on the video. R. 47, l. 2 – 48, l. 23. The significance of this was that petitioner worked as a laborer cutting down trees daily, and his hands were not soft or smooth.

The minor's mother testified that she had stayed at her uncle's house the week of Christmas, 2007. The minor did not tell her about the alleged touching until January 29, 2008. The mother claimed she had seen behavioral changes in the minor after the allegation, including the child

wanting to be alone. However, she admitted the minor did not have any current behavioral problems. R. 50, l. 11 – 54, l. 6.

The minor's stepfather testified that he did not remember the alleged victim ever saying anything about petitioner putting his head in her lap. "She didn't tell me until well after that that he actually laid his head in her lap there." The stepfather said this allegation only came up after the solicitor mentioned it to him. "But we didn't know all that until afterwards." R. 61, l. 13 – 62, l. 5.

Wiley Garrett was the interviewer in this case. When the solicitor moved the February, 2008 interview into evidence, defense counsel Hall announced: "No additional objections."[1] The DVD of the interview was then published for the jury. On cross-examination, Garrett confirmed that the alleged victim that a hand was put down her pants and that his hand was "smooth." She told Garrett her pants were brown and new and that she was also wearing a short-sleeved shirt. She did not allege to Garrett that petitioner put his head in her lap. R. 75, l. 16 – 79, l. 8.

Petitioner took the stand in his own defense. He was not married and he had two children. He had a son, age 20, and a daughter, age 18, who lived with him. Petitioner denied doing anything improper to the alleged victim that night. He was merely there to help his cousin and her boyfriend with the yard work the next morning. They picked him up about ten or eleven that night, and he remembered two children sleeping on the floor. He did not remember the minor well since he really did not pay much to the children sleeping on the floor. "I had never met them before." R. 81, l. 2 – 88, l. 20; R. 111, ll. 9-14.

Petitioner testified that he got up once about two in the morning to use the bathroom. Brittany Fowler was still awake with her colicky baby. Brittany would later testify her son had

colic, and she did not sleep at all that night. Brittany could see straight out into the living room from her bed, and she did not see petitioner touch the alleged victim or go anywhere near her that night. R. 89, l. 1 – 97, l. 25; R. 130, l. 2 – 141, l. 5.

Petitioner also testified the television set was on all night, that he saw Brittany awake that night. He was also not sure which of the two girls actually was on the couch in the morning when he awoke. Petitioner told the solicitor on cross-examination: "I know what I didn't do." R. 101, l. 6 – 112, l. 1.

Petitioner added he was not drunk by any estimation and that he could have driven the car when he was picked up that evening and brought to the home of his friends where the alleged victim also spent the night. R. 113, ll. 2-21.

Request to Charge

The solicitor told the judge he wanted a jury instruction that "time was not a material element" in the case, and that the testimony of the victim need not be corroborated. Defense counsel objected to an instruction on time not being a material factor, noting:

> [W]e have a specific date alleged. They presented it several times. The child testified, if I'm not mistaken, that it occurred the weekend before my daddy's birthday. Daddy's birthday was December 31st. Very specific and I think to do that is giving, carving out another special consideration for a child victim that cuts in the rights of my client.
>
> So, Your Honor, I would oppose that.
>
> The Court: I will charge it, but you know the other interesting wrinkle about this particular issue is that the mother, Mrs. Gregory,

[1] The court reporter wrote that Hall said "no addition or objections, Your Honor." That assertion is inconsistent with the defense objection in this case, and defense counsel states as an officer of the court in affidavit form that he has no additional objection. R. 69, l. 21 – 70, l. 5.

testified that she picked the child up, [minor], on New Years Day. So - - .

Mr. Hall: That - - picked [minor] up, yes, sir.

The Court: Right. Which is before Brittany had her baby.

Mr. Hall: This - - yes, sir, that's another thing that I believe, on my side, is physically impossible for it to have happened beforehand, yes, sir.

The Court: Well, that's your argument to the jury.

R. 148, ll. 7-25.

Defense counsel argued to the jury:

> We've got two mothers, a grandmother, two women testifying where the people were. Consistent. I don't know what happened with the investigation of this, why the people weren't talked to, why it took so long. But what we have here is a change in story by the victim that the State is asking you believe some version that it happened in December or January or whatever in 2007, 2008, that the hand went down the pants, didn't move, but did move, went up the pants, didn't move, but did move. That, that's a laborer.
>
> His hands are smooth?
>
> When you consider all this, what [has] the State proven beyond a reasonable doubt, and apply it to the law, they're gonna come up short. There's not credible evidence that you can determine the State has proved, beyond a reasonable doubt, sufficient to convict Jeff Perry and live with that.
>
> I ask you to consider all these things, the inconsistencies, the changes in the stories, who was there, who was not there, when did it happen, how it happened. Consider those things, apply it to the law, do the right thing, come back with a verdict of not guilty.

R. 159, l. 22 – 160, l. 16.

The judge charged the jury that time was not a material element of the offense of criminal sexual conduct with a minor. He also charged the jury that the testimony of "the victim need not be corroborated." R. 172, ll. 13-16.

Court of Appeals

The majority of the Court held that it was not convinced "the trial court's charge in the in the instant matter was prejudicial to [petitioner's] strategy of highlighting inconsistencies in Victim's statements concerning the time of the alleged incident." App. 12. The majority found that counsel "ably argued this inconsistencies to the jury." The majority cited State v. Schumpert, 312 S.C. 502, 508, 435 S.E.2d 859, 863 (1993) in support of its holding. App. 12.

Chief Judge Few in dissent wrote that: "In my opinion, the importance of the victim's credibility also made it improper for the trial court to charge the jury as it did. Although it is true "time is not a material element" of the crime of lewd act on a minor, the fact that it is a correct point of law does not make it proper for the trial court to charge it to the jury. *Compare* State v. Rayfield, 369 S.C. 106, 117, 631 S.E.2d 244, 250 (2006) ('It is not always necessary, of course, to charge [a particular point of law]'), *with* 369 S.C. at 119, 631 S.E.2d at 251 (Pleicones, J., dissenting) ('Some principles of law, however, are not to be charged to a jury.')." App. 17-18.

The dissent also noted that in State v. Schumpert, 312 S.C. 502, 508, 435 S.E.2d 859, 863 (1993), this Court chose not to address whether giving the charge was error, "but only whether the charge caused prejudice." App. 19. Further, "trial courts do not normally charge the jury as to what is *not* an element of the crime." App. 20 (court's emphasis). The dissent noted that in some instances, such as in State v. Foust, 3125 S.C. 12, 15, 479 S.E.2d 50, 51 (1996), an instruction on what is not an element of a crime can be proper. In Foust the instruction was that the state only had to prove a general criminal intent, not a specific intent to kill. "There are no

circumstances in this case that justify the trial court's instruction to the jury that time is not an element of lewd act on a minor. In fact, he circumstances of this case made the instruction improper. Perry built his entire presentation to the jury around what he claimed were the striking inconsistencies in the victim's testimony as to when the crime occurred." App. 20.

Discussion

This Court should grant certiorari based on the well reasoned dissent in the Court of Appeals on this issue. The jury charge on time not being an element of the crime in this case was gratuitous. Petitioner's defense centered on attacking the inconsistencies regarding the Christmas alleged incident, and when it was reported, and who was allegedly around.

In State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), the defense focused its reasonable doubt argument around the State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991), jury instruction that "a reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act." Id. at 417, 409 S.E.2d at 375.

Not liking the defense strategy of this effective closing argument emphasizing the "hesitate to act" language, the solicitor was successful in having the judge remove this language from his reasonable doubt charge. This Court found this was fundamentally unfair, and prejudicial to the defense.

Here, the defense was anchored in the minor's inconsistencies, and the alleged time when the offense occurred. The solicitor requested this jury instruction to negatively impact on petitioner's defense in the same manner as in State v. Jones. The fact that a time period of when the sex abuse occurred in an indictment can be broad does not mean that the jury instruction that time is not a material element should be given. That is particularly true where the jury instruction is gratuitous and unfairly prejudices the defendant as it did here. See State v. Jones, supra. The

majority of the Court here only held that it found petitioner was not prejudiced by the jury instruction. Petitioner and the dissent both agree that the prejudice from this jury charge, particularly in the context of this case, just in Jones, should be apparent.

The majority noted that counsel ably argue the inconsistencies in the alleged victim's testimony to the jury. However, petitioner was charged right out of a defense when the trial court instructed that those inconsistencies did not matter because "time was not a material element of the offense of criminal sexual conduct with a minor." Certiorari should respectfully be granted.

2.

The Court of Appeals erred by holding the trial court properly admitted the DVD of the forensic interview since repetition of the minor making the same allegation on a prior occasion impermissibly bolstered her testimony.

Relevant facts

Defense counsel correctly here objected that playing the DVD of the minor's statement to the jury was essentially a prior consistent statement that unfairly bolstered her credibility and testimony. Further, as seen, on cross-examination during the in camera hearing the defense specifically asked Garrett about the video bolstering the child's testimony which she was also going to present live that day for the jury.

Garrett admitted: "*It may bolster*, as you say, or it may cause questions. But, again, that's part of the greater process of which we're here today." However, Garrett reasoned: "It would be an advantage to the court to be able to look *at what the child said four years ago to look at what the child said today.*" R. 16, ll. 9-18. (emphasis added).

Garrett ironically captured the whole problem with the DVD here. The jury would conclude she said the same thing, or roughly the same thing, years ago so it must be true. hat was the basis of trial counsel's objection to the admission of the tape on the grounds it would simply bolster the child's testimony. "I think it's just the same thing the child said on purposes [a prior occasion]. I think it's to bolster what testimony she's going to give in the trial, Your Honor, and we would oppose it."

Court of Appeals

The Court of Appeals held that the "legislature has made `special allowances' for the admission of out-of-court statements by child victims in criminal sexual conduct cases when the

requirements of Section 17-23-175 are satisfied. State v. Whitner, 399 S.C. 547, 558, 59, 732 S.E.2d 861, 867 (2012)." App. 13. The Chief Judge concurred on this issue, and he wrote that there were only two instances where it can be argued testimony improperly bolsters other evidence. The first is where a witness offers an opinion regarding the credibility of others. State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). The second circumstance is a prior consistent statement where the party has not been properly impeached. Therefore, the concurrence concluded the only proper bolstering objections would be pursuant to Rule 608 (a), SCRE, or Rule 802, SCRE. The concurrence also noted that "Conceivably, a trial court could exclude evidence for its bolstering effect under Rule 403, SCRE . . . for considerations listed in the rule." App. 16. "Other than these rules, however, there is no provision under modern evidence law to exclude relevant evidence on the basis of improper bolstering." App. 17.

Rehearing

Petitioner argued on rehearing that:

> While bolstering in these types of cases often revolves around the forensic interviewer giving the jury the impression he or she believes the child is telling the truth, that is by no means the only form of impermissible bolstering. See Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010); Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001).
>
> The playing the DVD of the minor's statement to the jury was essentially **a prior consistent statement that unfairly bolstered her credibility and testimony. Further, as seen, on cross-examination during the in camera hearing the defense specifically asked Garrett about the video bolstering the child's testimony which she was also going to present live that day in court for the jury. Garrett admitted: "It may bolster,** as you say, or it may cause questions. But, again, that's part of the greater process of which we're here today." R. 16, ll. 9-18. (emphasis added).

> Garrett ironically captured the whole problem with the DVD here. The jury would conclude she said the same thing, or roughly the same thing, years ago so it must be true. That was the basis of trial counsel's objection to the admission of the tape on the grounds it would simply bolster the child's testimony. "I think it's just the same thing the child said on purposes [a prior occasion]. I think it's to bolster what testimony she's going to give in the trial, Your Honor, and we would oppose it."
>
> Moreover, merely because the statute in question is obviously a legislative creation *it still must be considered against the evil of bolstering because our Supreme Court has held the cumulative effect of the prior consistent statement with the present testimony enhances the devastating impact of improper corroboration.* Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994). Defense counsel correctly objected to this improper bolstering testimony.
>
> This Court's opinion on this subject will be exploited and misunderstood.

App. 27-28. (emphasis in Rehearing petition).

Discussion

This Court should grant rehearing because the opinion of the Court of Appeals on this issue will be misunderstood. It apparently holds that there is not any viable objection to a statement during a forensic interview being an inadmissible prior consistent statement that impermissibly bolsters the child's testimony if the four elements of S.C. Code §17-23-175 are satisfied. The concurrence states that it is the "policy" of the General Assembly to "enhance the credibility of a child sexual assault victim's trial testimony – bolster – if it meets the criteria of the statute . . . Thus, Perry's objection to the forensic interviews on the basis of improper bolstering and his similar arguments on appeal are invalid." App. 17.

Consequently, the opinion of the Court of Appeals holds that no objections, other than one pursuant to State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013), and seemingly State v.

Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) and State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (2012). that the forensic interviewer is signaling that he or she believes the child is telling the truth are proper. These "invalid" objections would seemingly include a Rule 403, SCRE, objection that the probative value is substantially outweighed by its unduly prejudicial effect, that the evidence had a tendency to confuse the jury. Further, given the concurrence, an objection that the child's statements during the forensic interview are impermissible prior consistent statements would surely not be a valid objection.

In State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012) this Court stated S.C. § 17-23-175 was a valid legislative enactment, petitioner submits is still impermissible to offer testimony bolstering that of the alleged victim, and invading the province of the jury.

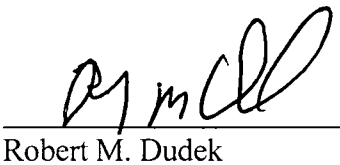
While bolstering in these types of cases often revolves around the forensic interviewer giving the jury the impression he or she believes the child is telling the truth, that is by no means the only form of impermissible bolstering. See Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010); Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001).

Moreover, merely because the statute in question is obviously a legislative creation it still must be considered against the evil of bolstering because this Court has held the cumulative effect of the prior consistent statement with the present testimony enhances the devastating impact of improper corroboration. Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994). The only clear reading of the opinion of the Court of Appeals in this case is that "the devastating impact of improper corroboration" that Jolly abhorred has no application to a forensic interview where the four very basic procedural statutory elements are met. This Court, as the highest Court, should grant certiorari and give guidance to the bench and bar if Jolly is dead letter law as the opinion of the Court of Appeals states.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should issue to allow full briefing on these issues.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 4th day of December, 2014

STATE OF SOUTH CAROLINA
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THE STATE,

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PETITIONER.

APPELLATE CASE NO. 2014-002519

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 4th day of December, 2014.

RMD

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of December, 2014.

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