

ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2013-002251

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

RAY C. WARREN,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Appellant's issue regarding the admission of the forensic interview video is not preserved for appellate review where the video was admitted at trial "without objection" after defense counsel stated he had no objection to the video. However, assuming the issue was preserved, the trial judge properly admitted the forensic interview video under the totality of the circumstances pursuant to S.C. Code § 17-23-175, and Appellant's contention that the video did not represent a detailed account of the alleged offense is wholly without merit.

STATEMENT OF THE CASE

Appellant was indicted in Greenville County in August 2013 for criminal sexual conduct with a minor in the first degree and lewd act upon a minor. On October 7-9, 2013, Appellant was tried before the Honorable Robin B. Stilwell and a jury. The jury found Appellant guilty of lewd act upon a minor and not guilty of criminal sexual conduct with a minor, and Judge Stilwell sentenced Appellant to fifteen years suspended to eleven years of active time and five years of probation. He also ordered that Appellant was required to register as a sex offender. A timely notice of appeal was served and filed.

ARGUMENT

Appellant's issue regarding the admission of the forensic interview video is not preserved for appellate review where the video was admitted at trial "without objection" after defense counsel stated he had no objection to the video. However, assuming the issue was preserved, the trial judge properly admitted the forensic interview video under the totality of the circumstances pursuant to S.C. Code § 17-23-175, and Appellant's contention that the video did not represent a detailed account of the alleged offense is wholly without merit.

Issue Preservation

Prior to trial, a hearing was held regarding the admissibility of the forensic interview video. (See R. p. 5-15). At the conclusion of the hearing, defense counsel conceded the tape generally met the statutory requirements, but argued as follows:

The part that I have concern about after having reviewed the tape on several occasions, is 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. (R. p. 14, lines 7-17).

The trial judge ruled that the video met the requirements of S.C. Code § 17-23-175 and was "sufficiently detailed" especially considering that the victim was only eleven years old at the time of the forensic interview. (R. p. 14, line 18 – p. 15, line 7). Thus, the judge ruled that the video was admissible. (R. p. 15, line 8).

The State offered the forensic interview video for admission into evidence during the testimony of the forensic interviewer, who was the State's seventh witness at trial. (R. p. 119, lines 20-21). The trial judge asked if there were "any objections," and defense counsel stated "No, Your Honor." (R. p. 119, lines 22-23). The trial judge then stated, "[a]ll right, without objection. The same is admitted into evidence." (R. p. 119, lines 24-25). A few minutes later, when the State requested permission to publish the video to the jury, the judge asked if there were any objections. (R. p. 121, lines 5-8). At that point,

defense counsel stated: “Only subject to my prior objection, Your Honor.” (R. p. 121, lines 9-10). The judge responded, “I understand. Okay, you may publish it.” (R. p. 121, lines 11-12).

Generally, a motion *in limine* seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial evidence to the jury, and a ruling on such a motion is preliminary and subject to change based on developments during trial. State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999). A ruling on a motion *in limine* does not constitute a final ruling on the admissibility of evidence. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Therefore, an objection must be made at the time the evidence is introduced during trial in order to preserve the issue for appellate review. State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993). The only exception to this rule is where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence. State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001); see State v. Wiles, 383 S.C. 151, 156-157, 679 S.E.2d 172, 175 (2009).

Here, the forensic interview video was offered for admission during the seventh witness at trial. The video was admitted into evidence “without objection” after defense counsel stated he had no objection to admission of the video. (R. p. 119, lines 22-25). Accordingly, any issue Appellant had with respect to the video was expressly waived, and the issue raised on appeal regarding the admissibility of the video is not preserved for review. See State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (“Dicapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel

specifically stated he had ‘no objection.’ We find this amounted to a waiver of any issue Dicapua had with the videotape.”); Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) (“When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review.”); see also State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (“A party cannot complain of an error which his own conduct induced.”). Defense counsel’s attempt to resurrect his pre-trial objection to the video later, when the State sought to publish the video to the jury, was ineffectual where the video had already been admitted “without objection.” See generally State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) (“Failure to *contemporaneously* object to the question now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial. Any objection to the testimony was waived.”) (citations omitted) (emphasis added). Accordingly, this Court should dismiss the appeal on error preservation grounds.

Discussion Regarding the Merits

Assuming the issue was somehow preserved for appellate review, the trial judge did not abuse his discretion by admitting the forensic interview video pursuant to S.C. Code § 17-23-175. Subsection (A)(4) of S.C. Code § 17-23-175 states that an out-of-court statement of a child is admissible if “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.” (emphasis added).

Subsection (B) states as follows:

(B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court *may* consider, *but is not limited to*, the following factors:

- (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 as necessary by the court.

S.C. Code § 17-23-175 (B) (emphasis added).

The language of the statute makes it clear that, before admitting a prior out of court statement of a child, a trial court **must** consider the “totality of the circumstances” surrounding the making of the out of court statement, and that the trial court **may consider but is not limited to** the factors contained in subsection (B). Therefore, even if one of the factors is lacking or absent, an out-of-court statement can still be properly admitted. Critically, the fact that the “totality of the circumstances” must be considered gives the trial court flexibility to consider the out-of-court statement in full context and allows the court to consider the optional, non-exhaustive list of factors in subsection (B) in light of the age and abilities of the particular child in question.

Appellant argues that the trial judge erred in admitting the victim’s forensic interview video because the victim’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.”¹ (Brief of Appellant, p. 15).

¹ This argument is broader than the argument defense counsel made to the trial judge. Below, defense counsel only argued that the video “doesn’t represent a detailed account of the alleged offense” because the victim was “very nebulous as to dates and times and manner” and that the video was therefore inadmissible. (R. p. 119, lines 11-17). Defense counsel did not specifically argue that the lack of detail standing alone indicated the video statement did not possess particularized guarantees of trustworthiness.

Appellant's argument is wholly without merit. First, as discussed above, the fact that the statements made in the forensic interview were not as detailed as they could have been is not by itself a sufficient reason to rule that the tape was inadmissible. Instead, the judge was required to consider the "totality of the circumstances," including – if he deemed it appropriate – whether the statement represented a detailed account of the alleged offense. See S.C. Code § 17-23-175(B) (instructing that the trial judge "**may**" consider the five enumerated factors).

Regardless, the forensic interview statement did in fact represent a detailed account of the offense. In the video, when asked if she knew why she was there, the victim stated she was present for the interview because she had been "raped" by her grandmother's boyfriend, Ray Warren. (See State's Exhibit # 5, Forensic Interview DVD). When asked to elaborate, she stated that Appellant touched her "down here," kissed her, and made her put her face on his private part. She then explained that Appellant did these things to her more than one time and indicated the abuse first happened after her grandmother began dating Appellant. She indicated the last incident of abuse occurred when she was "maybe" eight years old. (See State's Exhibit # 5).

The victim subsequently stated that the abuse occurred mainly while she was living in "Trailer 19" in Greenville and that the abuse occurred at "Trailer 20" where Appellant and her grandmother lived. She explained that the touching incidents involved Appellant touching her "woo hoo" (which she indicated was her vaginal area) with his hand and rubbing it under her clothes on the inside. She stated these incidents usually happened in the living room, her room, or her grandmother's room and that they occurred

(R. p. 119, lines 7-17). See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

when her grandmother was gone and other people were not around. She stated she was usually sitting down in a chair at the time of the abuse and that she was sometimes watching television. She explained that her clothes and Appellant's clothes remained on during the touching incidents. She stated that after Appellant touched her, she would usually go cry somewhere. (See State's Exhibit # 5).

The victim then described an incident where Appellant made her put her face on his privates. She stated that this incident occurred at nighttime at her grandmother's house (Trailer 20) while her grandmother was gone to the store. She stated she was around age eight at the time of this incident. She stated that she had begged her grandmother not to go to the store, but her grandmother told her she would be right back. The victim's sister was asleep at Trailer 19 at the time. The victim stated she was watching television in the living room when Appellant entered the room and made her sit down on the sofa with him. He then pulled out his penis and pushed her head down such that her cheek was on his penis. The victim started crying and "freaking out," and Appellant stood up, zipped his pants up, and said, "Okay, okay." Appellant then went back to his room. (See State's Exhibit # 5).

The victim also indicated that Appellant touched her "boobs" one or two times when she was standing up in Trailer 20. She stated that Appellant put his hand up her shirt and started rubbing on her bare skin. She stated she knew he was not supposed to be doing this. The victim estimated she was around age seven when these incidents occurred. (See State's Exhibit # 5).

The victim also stated that Appellant kissed her on several occasions at "Kathy and grandma's house" and at Trailer 20. She indicated Appellant would grab her shoulders and then kiss her, and that she would tell him to "quit" and push him away.

Appellant then usually laughed. She stated Appellant put his tongue in her mouth at one point but not every time. She estimated she was around age nine when the kissing events occurred. (See State's Exhibit # 5). Finally, the victim described one incident of touching that occurred outside at Cannon's Fishing Lake. She stated that she and Appellant had gone fishing when the victim was around seven years old and that Appellant touched her "down there" while they were fishing. (See State's Exhibit # 5).

Appellant's contention that the forensic interview video is "very vague and far from detailed" is rebutted by a review of the video. The victim did indeed provide a detailed account of the alleged offenses where she described who was present at the time of the offenses, what happened, where it happened, and her approximate age at the time.² Appellant points out that the statements in the forensic interview video were not as detailed as the statements given during the victim's trial testimony. (Brief of Appellant, p. 14-15). This is irrelevant and a red herring. The trial judge cannot be faulted for failing to compare the forensic interview video with the victim's trial testimony because the trial testimony had not yet taken place. Further, the forensic interview took place on July 20, 2011, when the victim was only eleven years old, while the trial took place on October 7-9, 2013, when the victim was thirteen years old. (R. p. 118, lines 2-4; p. 145, lines 19-22). In that vein, at trial, the prosecutor asked pointed questions of the victim in an attempt to elicit as much information as possible so as to meet the required burden of proof; therefore, it is not surprising that more detail was elicited at trial. (See R. p. 145-87). For these reasons, Appellant's comparison of the victim's forensic interview video

² As discussed previously, the statute provided leeway for the trial judge to take into account the age of the victim at the time of the forensic interview, the fact that the victim had been abused over the course of a number of years at a young age, and the fact that there was a delay between the abuse and the disclosure of the abuse. As child abuse pediatrician Dr. Nancy Henderson explained at trial, it is not unusual for children to provide broad time frames regarding abuse, especially when the disclosure of the abuse was delayed. (R. p. 138, line 17 - p. 139, line 2; p. 140, lines 21-24).

with her trial testimony is misplaced and the fact that *additional* detail was elicited at trial does not mean that the forensic interview video was lacking in detail.

In conclusion, Appellant's argument on appeal - to the extent it is preserved for review - is wholly without merit and the trial judge properly admitted the forensic interview video at trial. Appellant's conviction for lewd act upon a minor should be affirmed.

CONCLUSION

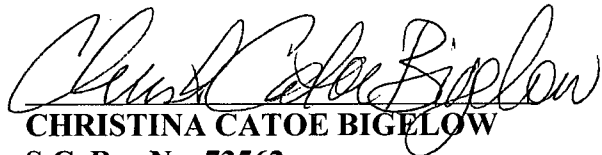
For the reasons discussed above, the State requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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