

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal from Anderson County

R. Lawton McIntosh, Circuit Court Judge

---

**RECEIVED**  
DEC 31 2014  
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ANDREW ANTONIO CLEMONS,

APPELLANT

APPELLATE CASE NO. 2013-001951

---

AMENDED INITIAL BRIEF OF APPELLANT

---

ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS ..... 1

TABLE OF AUTHORITIES ..... 2

STATEMENT OF ISSUE ON APPEAL..... 3

STATEMENT OF THE CASE..... 4

ARGUMENT

The court erred by allowing Dr. Sallie Carter to testify that the alleged victim’s injuries were consistent with penetration where the alleged victim testified no penetration occurred during the alleged lewd act since this testimony was speculative, and any probative value it had was outweighed by its unduly prejudicial effect under Rule 403, SCRE..... 5

Introduction ..... 5

Trial Testimony ..... 6

Dr. Carter..... 7

Discussion ..... 9

CONCLUSION ..... 12

TABLE OF AUTHORITIES

**Cases**

Fowler v. Nationwide Mutual Fire Ins. Co., Op. No. 5256, Shearouse's Adv. Sh. #31 at 87  
(August 6, 2014 ..... 11

Mali v. Odom, 295 S.C. 78, 367 S.E.2d 166 (Ct. App. 1988)..... 11

South Carolina State Highway Department v. Graydon, 246 S.C. 509, 144 S.E.2d 485 (1965)..... 11

State v. Alexander, 303 S.C. 377, 401 S.E.2d 191 (19991) ..... 10

State v. Compton, 366 S.C. 671, 623 S.E. 2d 661 (Ct. App. 2005)..... 10

State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986) ..... 10

State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001)..... 10

**Rules**

Rule 403, SCRE..... 3, 5, 8, 10

South Carolina Evidence §8.3 at pp. 220-21 (2000 ed.)..... 10

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing Dr. Sallie Carter to testify that the alleged victim's injuries were consistent with penetration where the alleged victim testified no penetration occurred during the lewd acts since this opinion testimony was speculative, and any probative value it had was outweighed by its unduly prejudicial effect under Rule 403, SCRE?

## STATEMENT OF THE CASE

Appellant was indicted at the December 6, 2011 term of the Anderson County Grand Jury for the offense of criminal sexual conduct with a minor in the first degree. R. p. \*. On April 16, 2013 appellant was also indicted by the Anderson County Grand Jury for the offense of committing or attempting a lewd act upon a minor. The alleged victim in both cases was the same stepdaughter. R. p. \*.

Appellant's case was called to trial on May 13, 2013 before the Honorable R. Lawton McIntosh, and the jury. Scott Thomason represented appellant. Kristin Reeves and Lauren Price were the Assistant Solicitors. Tr. 1.

On May 15, 2013 the jury found appellant guilty on both counts. Tr. 291, ll. 4-14. Since this was a trial in the absence, the sentence was sealed.

On September 12, 2013 Judge McIntosh revealed his sentence of twenty-five years imprisonment for criminal sexual conduct with a minor, and fifteen years imprisonment for committing a lewd act upon a minor.

This appeal follows.

## ARGUMENT

The court erred by allowing Dr. Sallie Carter to testify that the alleged victim's injuries were consistent with penetration where the alleged victim testified no penetration occurred during the lewd acts since this opinion testimony was speculative, and any probative value it had was outweighed by its unduly prejudicial effect under Rule 403, SCRE.

### **Introduction**

The key issue in this case was whether there was any penetration of the alleged victim which differentiated criminal sexual conduct with a minor in the first degree from a lewd act. Defense counsel argued in closing that the critical element to CSC with a minor charge was penetration. He reminded the jury that the alleged victim had testified that there was no vaginal or anal penetration in this case. Defense counsel mocked the belated assertion of oral sex occurred, "and we're just now hearing about oral sex six weeks before the trial [where it was not brought up during the forensic interview]" Tr. 267, ll. 2-9. Although the alleged victim denied making up the oral sex allegation for purposes of the trial, she had no explanation for her failure to reveal the alleged oral sex where she was previously repeatedly given the opportunity to add on other lewd or sexual acts to her allegations against appellant. Tr. 217, l. 6- 218, l. 21.

As will be seen infra, even though the alleged victim specifically denied that any vaginal or anal penetration occurred, Dr. Sallie Carter was allowed to testify over objection, after watching the forensic interview of the alleged victim, that the alleged victim's injuries were consistent with her being penetrated. Dr. Carter would interestingly cite to alleged pornography the alleged victim had watched as supporting her opinion that the alleged victim was penetrated despite her testimony to the contrary. Tr. 93, ll. 5-15; 162, l. 2 – 167, l. 16; 200, l. 12 – 204, l. 12; 210, l. 10 – 214, l. 12.

## **Trial testimony**

Telfia Johnson was the mother of the alleged victim (Minor) and three other children. Appellant was the father of the three younger children and the stepfather of Minor. Appellant and Johnson had lived together “on-and-off.” Tr. 56, l. 19 – 59, l. 10.

Johnson said that she first became aware of a potential incident with Minor when she heard her daughters arguing about something that had occurred between Minor and appellant. Tr. 61, l. 3 – 62, l. 25. Johnson said Minor was reluctant to tell her anything but Johnson maintained the next day “she [Minor] gave me enough details to know that I needed to try and get her checked out, but she didn’t really go deep into it.” Tr. 63, ll. 19-23.

Johnson testified that their pediatrician told her “that she couldn’t rule in or out anything, but that she did not think there was any penetration...” Tr. 64, ll. 19-22. Johnson believed a friend contacted DSS, and appellant moved out of the house in August 2010. Tr. 65, l. 1 – 66, l. 2. Johnson took Minor to the Foothills Alliances for a forensic interview, but she did not bring the allegation up to Minor again.<sup>1</sup> Tr. 66, ll. 3-19.

Minor testified at the time of trial she was in the fifth grade. She said appellant touched her in a way she “didn’t like” on more than one occasion. Tr. 76, ll. 2-22. Minor stated that appellant committed lewd acts with her, and showed her pornographic films involving sex acts. Tr. 77, l. 15 – 86, l. 9. She denied that there was any penetration involved in the lewd acts. Tr. 93, ll. 9-15.

Minor also testified that appellant told her not to tell anyone or they would both get in “very big trouble,” and she maintained appellant had her and her sister pray together for “forgiveness” for their sins. Tr. 90, l. 18 – 91, l. 3. Minor did claim at trial that appellant had her perform oral sex on

---

<sup>1</sup> The defense and the solicitor were able to agree on redacting the forensic interview by muting portions of it. This was done, according to defense counsel, about a week before trial without the presence of a court reporter. Tr. 28-29.

one occasion. Tr. 86, l. 15 – 87, l. 4. This belated allegation of oral sex was strongly attacked by defense counsel as “convenient” given the fact she never made of oral sex when repeatedly given the opportunity to do so, and the fact there was no evidence of penetration anywhere in the record.

Minor’s nine-year-old sister testified that she remembered seeing Minor run out of appellant’s bedroom in her panties and shirt. Minor ran into their bedroom. Tr. 98, ll. 15-22. She told her mother about this incident “because I thought it was wrong.” Tr. 100, l. 5 – 101, l. 14.

**Dr. Carter**

The testimony of Dr. Sallie Carter was proffered out of the presence of the jury. Dr. Carter was a physician at Anderson Oconee Pickens Child and Adolescent Mental Health Center. Tr. 133, ll. 1-19. Dr. Carter testified that “there were no abnormalities on the physical exam [of the alleged victim] except for the genital area where she had an absent posterior hymen.” Tr. 140, ll. 9-15. Dr. Carter said this was a significant finding. Tr. 141, ll. 3-10.

Out of the presence of the jury the judge questioned Dr. Carter about her proposed testimony regarding “some intrusion” causing the hymen not to be present. Dr. Carter said “that would certainly be consistent with a penetrating type of injury.” Tr. 148, ll. 6-17. She said that other types of injuries could have caused the condition such as falling on a fence post or off a bicycle. However, Dr. Carter maintained that children the alleged victim’s age did not have the language skills to explain what probably happened during a lewd act. Tr. 147, l. 20 – 150, l. 19.

Defense counsel Thomason noted that there was **no testimony** about the injury being caused by some other mishap, and the alleged victim made it clear that the appellant “**never penetrated her.**” She had testified that the appellant had rubbed up against her with his penis but he had never penetrated her. Tr. 151, ll. 3-23. (emphasis added).

Dr. Carter maintained that 95% of sexual abuse exams were normal and since the alleged victim's exam here was abnormal, that was significant, and she continued to question what occurred. Tr. 157, l. 2 – 158, l. 7. The judge then asked Dr. Carter to watch the forensic interview of the alleged victim. The judge observed that Dr. Carter's testimony seemed to be "like a bit of speculation." Tr. 158, l. 1 – 159, l. 8.

After Dr. Carter viewed the forensic interview she stated it was very hard for a child to convey what really happened during a lewd situation. She cited the alleged victim watching pornographic films during whatever occurred as influencing her opinion about what may have happened. Dr. Carter testified that this case involved an adult taking "sexual liberties with a child. You have a child that's really unable to articulate the full, the full --- unable to describe the extent of events." Tr. 159, l. 24 – 162, l. 16.

Defense counsel Thomason again objected that the alleged victim specifically said she was not penetrated, and he argued that under Rule 403, SCRE whatever probative value this evidence had was outweighed by its unduly prejudicial effect. Tr. 162, l. 2 – 164, l. 18. The judge then ruled that he was going to allow Dr. Carter to opine about penetration despite the testimony of the alleged victim to the contrary. Tr. 164, l. 21 – 167, l. 11.

Dr. Carter then testified in the presence of the jury that the posterior portion of the alleged victim's hymen was absent. That was the abnormal finding in the exam. Tr. 194, ll. 11-14.

Dr. Carter said after reviewing the pertinent items that it was her expert opinion that the injuries to the alleged victim were "consistent with a penetrating injury." Tr. 204, ll. 7-24. Dr. Carter also testified that she was concerned after watching the forensic interview because it appeared to her that the child had been "groomed" for sexual acts, and there was also pornography involved. She offered that children have to learn the language of "sexual activity." Dr. Carter said

it would be difficult for the alleged victim to explain what really happened, and she again opined that the alleged victim's abnormality was "consistent with penetration." Tr. 205, l. 16 – 214, l. 12.

In making his directed verdict motion defense counsel Thomason continued to argue there was not a proper foundation for Dr. Carter's speculation that the alleged victim had been penetrated during a sex act, and that it invited a verdict on that basis. Tr. 226, l. 7 – 227, l. 19.

The solicitor argued to the jury that the alleged victim's testimony in a sexual assault case did not need to be corroborated. Tr. 250, l. 18 – 251, l. 6. The solicitor also argued that appellant had put his penis against the alleged victim and "there could have been penetration, and again, the law reads, however slight. She may not know. It may not have hurt." Tr. 257, ll. 12-16.

Defense counsel Thomason noted to the jury the inconsistencies in the testimony that led to a reasonable doubt. He argued the alleged victim did not mention any oral sex on the video when it was fresher in her mind, and she then mentioned it only before the trial much later. Tr. 263, l. 16 – 264, l. 6.

Defense counsel urged the jury to focus on the fact that Dr. Carter's testimony was "a lot of speculation. We don't use speculation. We use facts." Tr. 264, ll. 2-6. Defense counsel argued that first-degree criminal sexual conduct "requires some form of penetration. That's the key to the whole thing is penetration." Tr. 267, ll. 2-5.

## **Discussion**

Whether or not penetration occurred in this case was the key to the verdict on criminal sexual conduct with a minor in the first degree. The judge did charge the jury that any intrusion, however slight, of any part of the person's body was required for a sexual battery. Tr. 284, ll. 13-18.

Defense counsel persuasively urged that where the alleged victim did not reference any allegation of oral sex earlier and that her later assertion of it was not credible. The judge even allowed the alleged victim to be recalled for re-cross examination where she still had no explanation for why her allegation of oral sex only made shortly before trial. The alleged victim acknowledged she was given every opportunity to tell the forensic interviewer that she had performed oral sex, and she did not. Although she naturally denied that she was lying about it at trial she had no explanation for this omission from her other detailed allegations. Tr. 217, l. 6 – 218, l. 21.

The testimony of Dr. Carter here was speculative as defense counsel correctly argued. Her opinions about pornography influencing why she thought the alleged victim had been penetrated seemed objectively unusual. (Defense counsel had tried to keep the jury from hearing any allegation regarding pornography but the judge ruled it could not be separated out from what allegedly occurred here). Dr. Carter was also clearly influenced by watching the alleged victim on the forensic interview tape. Her opinion that the alleged victim suffered penetration in this case – despite the alleged victim’s **direct denial of penetration** – reveals its speculative nature.

Expert opinions can be excluded when they are not helpful to the factfinder. Generally, an opinion is not helpful if it is speculative or conjectural. Collins, South Carolina Evidence §8.3 at pp. 220-221 (2000 ed.). To the extent Dr. Carter’s testimony in this regard was relevant it nonetheless should have been excluded because of its speculative nature which made it unduly prejudicial under Rule 403, SCRE .See State v. Alexander, 303 S.C. 377, 401 S.E.2d 191 (19991).

Dr. Carter’s testimony that she believed the alleged victim had been penetrated – “consistent with penetration” – was also highly prejudicial, and its prejudicial effect outweighed its probative value given the alleged victim’s firsthand testimony of what actually occurred to the contrary. See State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986).

Not only may evidence that is speculative in nature be excluded, See State v. Compton, 366 S.C. 671, 681-682, 623 S.E. 2d 661, 666-667 (Ct. App. 2005), but, evidence such as that in this case, is also incompetent where it is confusing. It invited the jury to speculate that the alleged victim had been penetrated even though she had testified she had not. See State v. Saltz, 346 S.C. 114, 127-128, 551 S.E.2d 240, 247-248 (2001) (even if evidence of school attendance records was relevant, it was unfairly prejudicial, confused the issues and had a tendency to mislead the jury and invite speculation about the significance of the evidence).

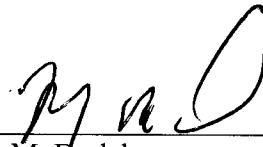
Dr. Carter's speculative testimony on the *critical element* of penetration on the criminal sexual conduct with a minor in the first degree count was undoubtedly prejudicial and confusing. Defense counsel correctly argued that any relevance this testimony had was outweighed by its unduly prejudicial effect under Rule 403, SCRE. "The admission of incompetent evidence having some probative value upon a material issue of fact in the case is ordinarily presumed to be prejudicial." Fowler v. Nationwide Mutual Fire Ins. Co., Op. No. 5256, Shearouse's Adv. Sh. #31 at 87 (August 6, 2014). *quoting* Mali v. Odom, 295 S.C. 78, 367 S.E.2d 166 (Ct. App. 1988)). See, also, South Carolina State Highway Department v. Graydon, 246 S.C. 509, 144 S.E.2d 485 (1965),

Appellant was sentenced to twenty-five years imprisonment for this CSC with a minor offense, and Dr. Carter's speculative testimony on penetration was obviously extraordinarily prejudicial in that respect as well. A verdict based speculation the alleged victim may have been penetrated where she denied she was penetrated was unacceptable.

CONCLUSION

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

Respectfully submitted,



---

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of December, 2014.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Anderson County  
R. Lawton McIntosh, Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**  
DEC 31 2014  
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ANDREW ANTONIO CLEMONS,

APPELLANT

APPELLATE CASE NO. 2013-001951

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 31st day of December, 2014.



\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 31st day of December, 2014.

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