

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Michael G. Nettles, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

LEONARD EUGENE BROCKINGTON,

APPELLANT

APPELLATE CASE NO. 2014-000989

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the admission of the video of the complainant's forensic interview violated appellant's Sixth Amendment right to confront the witnesses against him?

STATEMENT OF THE CASE

On March 29, 2012, appellant was indicted by a Florence County grand jury for first degree criminal sexual conduct with a minor and lewd act on a minor child. R. 461. On April 21, 2014, appellant was tried before the Honorable Michael G. Nettles and a jury. R. 1. Patricia Singleton Parr and Robert N. Wells represented the State. R. 1. Henry M. Anderson, Jr. represented appellant. R. 1. The jury could not reach a verdict on the CSC charge. R. 388, ll. 2 – 16. The jury convicted appellant of lewd act. R. 388, ll. 8 – 9. Judge Nettles sentenced appellant to fifteen years' imprisonment. R. 393. This appeal follows.

ARGUMENT

The admission of the video of the complainant's forensic interview violated appellant's Sixth Amendment right to confront the witnesses against him.

Appellant filed a lengthy pre-trial motion seeking suppression of the video complainant's forensic interview. R. 398. Citing Crawford v. Washington, 541 U.S. 36 (2004) and Maryland v. Craig, 497 U.S. 836 (1990), appellant argued that the video was testimonial hearsay and its admission violated his Sixth Amendment right to confront the witnesses against him. R. 398. Appellant argued that S.C. Code § 17-23-175, which permits the introduction of such evidence, is unconstitutional. R. 398.

Appellant argued this motion before the trial began. R. 49, l. 16 – 54, l. 6. Judge Nettles viewed the video in-camera during the hearing. R. 60, ll. 7 – 10. After viewing the video, Judge Nettles heard further argument from the parties. R. 60, l. 11 – 69, l. 23. Judge Nettles ultimately ruled that the video would be allowed into evidence. R. 69, ll. 1 – 25. The State introduced the video at trial through the forensic interviewer and it was played for the jury. R. 226, ll. 17 – 25. R. 228, ll. 19 – 23.

The complainant was nine years old at the time of trial. R. 192, ll. 13 – 14. Her parents were divorced and she lived with her mother. R. 123, l. 20 – 124, l. 7. Complainant's father moved to Charlotte, North Carolina and remarried. R. 124, ll. 11 – 19. Complainant's father paid approximately \$1100 a month in child support and \$600 a month in alimony to complainant's mother. R. 135, ll. 6 – 14.

Appellant was complainant's mother's boyfriend. R. 125, ll. 4 – 11. One day in the fall of 2011, a friend of the complainant's was at her house. R. 96, ll. 2 – 15. The friend saw appellant and complainant get into an argument. R. 96, ll. 19 – 22. After the

argument, complainant told her friend that she had been sexually abused by appellant. R. 97, ll. 3 – 17. The friend reported complainant's allegations to her parents who called another neighbor who was closer friends with complainant's mother. R. 98, l. 11 – 99, l. 23.

When the neighbor told complainant's mother, the mother was "pretty nonchalant." R. 112, ll. 19 – 22. The mother told the neighbor that "she wasn't sure that [complainant] was telling the truth, and that she would look into it." R. 112, ll. 19 – 22. The mother also told the neighbor that complainant "has been known to tell lies." R. 113, ll. 11 – 18. The next weekend, complainant made a scheduled visitation trip to her father's house. R. 127, ll. 4 – 9. Complainant repeated her allegations about appellant to her father. R. 127, ll. 10 – 20. The father called the mother who begged him not to call the police. R. 128, ll. 9 – 18. The father called the police and DSS. R. 128, l. 19 – 129, l. 5.

A DSS caseworker and a police officer met with complainant and next Monday at complainant's elementary school. R. 169, l. 15 – 171, l. 11. Complainant told the caseworker and the police officer that appellant had touched "her front bottom" on the outside of her clothes and that she had been asked to touch appellant. R. 170, l. 12 – 171, l. 4. Complainant's mother arrived at the school and told the caseworker she thought complainant was "making up the allegations." R. 172, ll. 15 – 23. DSS removed the child from her mother's custody and gave custody to the father. R. 173, l. 14 – 174, l. 12. Shortly thereafter, the father was able to quit paying child support after a hearing in Family Court. R. 137, ll. 14 – 25.

During her forensic interview, which occurred several weeks later, complainant added an allegation that appellant made her perform oral sex on him. R. 175, ll. 19 – 25. R. 305, ll. 5 – 8. Complainant went to an independent counselor in North Carolina for approximately a year and never mentioned the abuse allegations. R. 139, ll. 11 – 22. Complainant was then referred to Heather Smith’s (“Smith”) private practice for further counseling and “court-preparation services.” R. 259, ll. 7 – 19. Smith is a forensic interview with the ARC in Columbia. R. 254, ll. 20 – 25. Part of complainant’s “treatment” with Smith involved multiple visits to the courtroom, meetings with the solicitor, and reviewing the videotape of her forensic interview. R. 272, l. 2 – 275, l. 21.

During its deliberations, the jury requested to see the video of the forensic interview twice. R. 377, ll. 11 – 19. R. 386, ll. 5 – 13. The jury could not reach a verdict on the CSC charge, but convicted appellant of lewd act. R. 388, ll. 2 – 16.

The Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. “The constitutional right to confront and cross-examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial.” State v. Hill, 394 S.C. 280, 291, 715 S.E.2d 368, 374 (Ct. App. 2011) (citing State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987)). 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 (1987) (quoting California v. Green, 399 U.S. 149, 158 (1970)).

“Generally, a prior consistent statement is not admissible unless the witness is charged with fabrication or improper motive or bias.” State v. Whitner, 399 S.C. 547, 558, 732 S.E.2d 861, 867 (2012) (citing Rule 801(d)(1)(B), SCRE). However, in 2006 our legislature enacted S.C. Code Ann. § 17-23-175 which allows the introduction of videotaped forensic interviews under certain circumstances. Id. This statute is in direct conflict with the provisions of Crawford v. Washington, 541 U.S. 36 (2004) and therefore violates the Confrontation Clause. In Crawford, the United States Supreme Court discussed the admissibility of out-of-court hearsay statements of a witness and concluded that the right of confrontation is violated by admission of such statements except in very limited circumstances. The limited circumstances for admission of such statements exists only when the witness is **unavailable**, the out-of-court statement is testimonial, and the defendant had a **prior** opportunity to cross-examine the witness. Id. at 68. Since the complainant was available to testify (and did testify), the Crawford test is not met and the admission of the videotaped forensic interview violated appellant’s Sixth Amendment rights. See also Maryland v. Craig, 497 U.S. 836 (1990).

CONCLUSION

For the foregoing reasons, appellant's conviction should be reversed and this case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of May, 2015.

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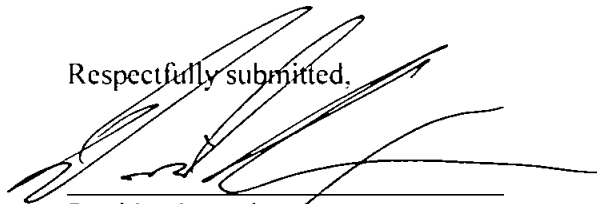
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Leonard Eugene Brockington states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Michael G. Nettles, which was held on April 24, 2014, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Leonard Eugene Brockington.

Respectfully submitted,


David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of May, 2015.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Trial transcript;
- (3) Motion for Disclosure of Victim's Records;
- (4) Motion for Admission of Out-of-Court Statement of Child;
- (5) Motion to Clear Courtroom of Spectators
- (6) Written Objection to Qualifying the Person Conducting the Interview of the Child as an Expert;
- (7) Defendant's Opposition to State's Motion for Admission of Out-of-Court Statements of Child

I certify that this designation contains no matter which is irrelevant to this appeal.

May 4th, 2015



David Alexander
Appellate Defender

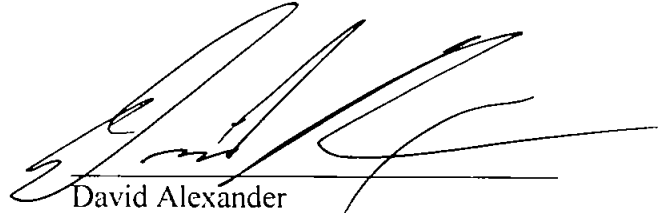
South Carolina Commission on Indigent Defense
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PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 4th, 2015



David Alexander
Appellate Defender

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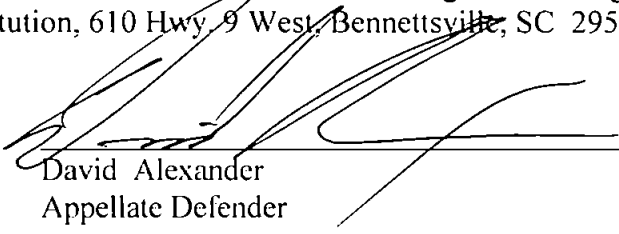
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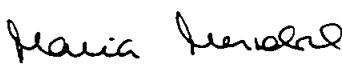
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Leonard Eugene Brockington, #359727 at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 4th day of May, 2015.


David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of May, 2015.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.