ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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FEB 10 2015
SC Court of Appeals

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RONALD LEE LEGG,

APPELLANT

APPELLATE CASE NO. 2014-000568

INITIAL BRIEF OF APPELLANT

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2.

Whether the court erred by allowing Dr. Carol Rahter to testify as an expert in medicine and "child sexual abuse" since her testimony was not relevant and it was highly prejudicial because of her medical testimony that the allegation here was consistent with that of "sex abuse" victims who generally do not disclose abuse immediately. Furthermore, her opinion that the jury should not draw essentially "rational" conclusions from a victim laughing or crying when disclosing abuse was extraordinarily irrelevant and misleading?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County Grand Jury for the offense of committing a lewd act on a minor. R.p. *. His case was called to trial on March 10, 2014 before the Honorable Edward B. Cottingham, and a jury. William Isaac Diggs represented appellant. Martin Spratlin was the assistant solicitor. Tr. 1.

On March 13, 2014 the jury found appellant guilty. Tr. 446, ll. 18-22. Judge Cottingham sentenced appellant to twelve years imprisonment, ordered that he be placed on the sexual offender registry, and subject to GPS monitoring. Tr. 456, l. 21 – 457, l. 12.

This appeal follows.

ARGUMENT

1.

The court erred by refusing to rule the South Carolina forensic interview statute unconstitutional because it was arbitrary in allowing the alleged victim's testimony to be heard twice by the jury, thereby bolstering the testimony of the alleged victim, where no other type of criminal case allows this procedure, and its arbitrary nature therefore deprived appellant of his due process right to a fair trial under the Fourteenth Amendment.

Defense counsel argued the forensic interview statute, S.C. Code §17-23-175, which allows for a prior videotaped interview with the alleged victim to be played for the jury was unconstitutional because it was arbitrary, and it denied the defendant a fair trial. Counsel noted the Supreme Court had touched on this in dicta in State v. Whitner, 399 S.C. 547, 558–59, 732 S.E.2d 861, 867 (2012). However, he stated the Supreme Court had not addressed the argument he was making. Tr. 112, ll. 7-25.

Counsel argued the statute allowed the state "two bites at the apple" because the minor witness was testifying live in court, and then a prior videotape of the same testimony was played for the jury. This unfairly bolstered the child's testimony. Counsel repeated that the statute was arbitrary and unconstitutional in this respect. Counsel disagreed with the trial judge that it was "legislatively appropriate." Tr. 111, l. 1 – 114, l. 12.

Counsel argued that while all parties would agree following State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), that the forensic interviewer could not testify he or she believed the child was telling the truth, that the underlying problem with the forensic interview videotaping statute was that it arbitrarily provided for the jury observing the testimony of key state's witness twice. There was no doubt this highlighted the significance

of the minor's testimony in a child sex case, and no other type of criminal trial had a similar provision favoring the alleged victim to the detriment of a defendant's right to a fair trial. Tr. 110, l. 7 – 115, l. 13.

Forensic interviewer

The state then proffered the testimony of Natalia Demaio. In June of 2011 she was "the bilingual forensic interviewer for the Children's Recovery Center." Tr. 115, l. 22 – 117, l. 9.

Demaio testified she used the RATAC protocol for her forensic interviews. Tr. 118, l. 24 – 121, l. 3. She said she tried, to the best of her ability, not to lead the child. The alleged victim in this case told her the appellant touched her in a sexual manner. She maintained the child did not contradict her during the forensic interview. Tr. 121, ll. 10-24.

On cross-examination, Demaio testified the child's "statements were compelling and concise." Tr. 128, ll. 10-18. She also asserted "every single interview is different. Not every single child is the same." Tr. 129, ll. 1-2.

Demaio claimed it was not her intention to convey that she believed the child during the interview. Tr. 130, l. 2 – 131, l. 12. Demaio specifically noted the child's statement that appellant allegedly threatened to take her to West Virginia. She found this statement significant as a threat. Tr. 133, ll. 5-22.

Demaio also noted that the child told her appellant "put his hands down my pants." However, Demaio admitted that the child's demonstration of what allegedly happened "made me feel that that was impossible in the way that she stated it happened, that it was impossible or that it was a red flag for me." Tr. 135, ll. 3-13. On redirect-examination,

Demaio testified that every forensic interview was different and every child was different. Tr. 136, ll. 5-22.

Defense counsel argued again following this proffer that statute allowing the forensic interview videotapes to be played for the jury was unconstitutional, and he moved that the forensic interview videotape not be admitted. The judge overruled defense counsel's objection. The judge reasoned that the statute permitted it, and that he would therefore would allow it. Defense counsel again argued the statute providing for the prior interview to be played for the jury was "arbitrary," and that he was not aware of any other statute allowing "duplicity" with the state's witnesses hearing the same testimony "again, and again . . ." Tr. 138, l. 8 – 141, l. 20.

The judge acknowledged that the statute allowed "doubling up with her testifying and then viewing the statement [videotape]," but the judge offered that the solicitor might not use the forensic interview videotape in this case. The solicitor quickly put an end to that resolution: "the State does anticipate using this evidence." The judge then ruled pursuant to the statue that he found the procedure "trustworthy," and that videotape met the requirements of the statute. Tr. 140, l. 5- 146, l. 12.

The solicitor then said he would turn the videotape off before the jury heard the forensic interviewer making the comment that she thought the child was telling the truth. Tr. 145, l. 10 – 146, l. 17. The tape of the forensic interview is on file with this Court. As will be seen infra during the jury deliberations the jury focused its critical attention on the forensic interview, and watched part of it yet again.

Other evidence

The child's mother, Dinita Whipple, testified that appellant lived in a next door mobile home with a man named "Bob" who was "mentally challenged." Tr. 169, l. 14 – 174, l. 7. Whipple said that her husband worked every day from seven in the morning until four in the afternoon, and she was going to school at the time of the alleged incident. In short, appellant was a convenient babysitter for her minor daughter. Tr. 174, l. 11 – 177, l. 4.

Whipple maintained that her ten-year-old daughter only stayed with appellant "two or three times a week." She maintained the child was told not to go inside appellant's mobile home. Tr. 177, l. 5 – 179, l. 12.

Whipple acknowledged that she allowed her daughter to ride to Wal-Mart with appellant if he "had to go down there for something." She admitted that appellant also took her daughter "to the mall, and swimming in the river." Tr. 179, l. 13 – 180, l. 21.

Whipple claimed at times that she observed appellant looking at her daughter "in places he shouldn't be looking at her." Tr. 179, l. 25 – 180, l. 21. Whipple testified that her daughter called her on the telephone one day and told her appellant had "been cussing at her and told her to shut the F up, and I said, well, you need to tell him don't talk to you like that and I'll take care of that when I get home." It was in this same conversation that her daughter claimed appellant had molested her. Tr. 183, l. 18 – 184, l. 8. The police were then called, and appellant was arrested. Tr. 184, ll. 9-12.

The thirteen-year-old daughter testified she was in the fourth grade when appellant allegedly improperly was touching her. She said she went to this mobile home about "three

times a week. She went inside appellant's home when she wished despite her mother's "rule" against it. Tr. 202, l. 16 – 207, l. 10.

The minor testified she had a little desk inside appellant's mobile home where she would sit and write and color. She also went swimming with appellant. Tr. 208, ll. 8-17. The minor said that appellant touched her on occasions and made her feel uncomfortable. On one occasion, she claimed, appellant was swimming in the river with her and "he pulled my bathing suit bottoms off, and he swam the opposite way and held them up and said ha, ha, ha." Tr. 209, l. 5 – 219, l. 23. The minor also said appellant called her "sexy and stuff," and at times made her feel "either uncomfortable or icky." Tr. 215, 6 – 216, l. 9.

The minor also said appellant one time told her "he was going to take me to West Virginia." She asserted appellant said this because "there's not a lot of people up there, or something like that." The minor offered that her mother was from West Virginia, and she remembered appellant making this statement. Tr. 220, ll. 4-23.

On cross-examination, the minor stated that she had a better memory occurred two or three years ago during the forensic interview than she did at the time of trial. Watching the forensic interview "helped her refresh her memory." Tr. 238, l. 4 – 239, l. 19.

Before the forensic interview videotape was played for the jury, defense counsel once again asked the judge to insure his opposition was on the record. Tr. 230, l. 6 – 231, l. 10.

The minor had also read the transcript of her forensic interview, and she acknowledged the first time she remembered appellant touching her was in his mobile home, and "when he was cooking, and then he touched my - - private part." Tr. 241, l. 21 – 242, l. 7. She recalled the forensic interviewer asking her about how a friend of her mother

had reacted when she saw or heard about appellant allegedly touching her. The minor said this friend of her mother: "Got really mad, really upset, but she never told my mom because she was scared that she would never believe her." Tr. 243, ll. 8-13.

The minor admitted she did get very angry when appellant told her to "shut the F up," and she admitted this made her "upset because, I mean, no one cusses at me like that, and so I went outside - - or I asked him could I use his phone to call my mom. He said it was in the glove box, so I got his phone out of the glove box and called my mom, and I told her, and I don't know, something was just - - was telling me to tell her everything." Tr. 255, l. 18 – 256, l. 4. When asked why she kept going back to appellant's home if he was touching her improperly, she replied, "I don't know" and admitted that at times she enjoyed going to his mobile home. Tr. 265, l. 19 – 266, l. 6.

The forensic interviewer, Natalia Demaio, then testified in the presence of the jury that she used "neutral questions and RATAC protocol." She said the minor in this case was able to give her a detailed account of appellant's "improper contact." Tr. 273, l. 22 – 277, l. 19.

She added that changes (redactions) had been made to the forensic interview, but she promised the jury they did not "alter in any way the substance of the interview." Tr. 277, ll. 5-19. The forensic interviewer disagreed that she asked leading questions, and she defended her "follow-up" questions as being "proper." Tr. 285, l. 7 – 287, l. 10.

As will be seen infra, the jury also heard from Doctor Carol Rahter as an expert in "both medicine and child sexual abuse," over appellant's relevancy objection. She testified that the minor had a normal medical examination but that was not probative of a lack of abuse. She also told the jurors that minors do not normally disclose abuse immediately, and

that it was rare for them to do so. She also opined that children do not disclose because they were afraid they could get in trouble or because they were being threatened in addition to "other reasons." Tr. 290, l. 8. – 293, l. 4.

During deliberations the jury asked to view **portions of the forensic interview again**. While that was being accomplished the jury asked to fast forward to the "questions about touching begin, the end of anatomy. Tr. 437, l. 15 – 446, l. 22.

Discussion

Defense counsel argued the forensic interviewer statute was unconstitutional because it arbitrarily allowed the state to present not only the testimony of the alleged victim, but a videotape of essentially that same testimony of the alleged victim. This bolstered the testimony of the alleged victim because the jury heard her testimony twice. Defense counsel argued this rule, applicable in child sex cases only, denied him his right to a fair trial because it was arbitrary.

In Chambers v. Mississippi, 410 U.S. 284, 302-303 (1973) the Supreme Court held that while state and federal lawmakers have broad latitude to establish rules regarding the admission of evidence in criminal cases, an arbitrary procedural rule that denies a defendant a fair trial is impermissible.

In Chambers v. Mississippi, a defendant on trial for murder called as a witness a man named McDonald, who had previously confessed to the murder. When McDonald repudiated his confession on the witness stand, the defendant was denied permission to examine McDonald as an adverse witness based on Mississippi's *"voucher rule"* which barred parties from impeaching their own witness.

The Supreme Court found this arbitrary rule could not stand. In Holmes v. South Carolina, 547 U.S. 319, 326 (2006), the Supreme Court noted that another arbitrary rule was held unconstitutional in Crane v. Kentucky, 476 U.S. 683 (1986).

In Crane v. Kentucky, the defendant was prevented from showing that his confession was unreliable because of the circumstances under which it was obtained, and neither the state's Supreme Court, nor the prosecution advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence.

In United States v. Scheffer, 523 U.S. 303 (1998), conversely the Court upheld the exclusion of polygraph evidence in federal courts because it did not constitute an arbitrary rule. The evidentiary rule did not abridge the right to present a defense because the rule served several legitimate interests in criminal trials. It was not arbitrary nor disproportionate in promoting those ends.

In Rock v. Arkansas, 483 U.S. 44 (1987), the Court held a rule prohibiting hypnotically refreshed testimony was unconstitutional because the wholesale inadmissibility of a defendant's testimony was an arbitrary restriction on the right to testify in the absence of clear evidence by the state repudiating the validity of all post-hypnotic testimony.

Finally, in Holmes v. South Carolina, 547 U.S. 319 (2006), the unanimous Supreme Court held the exclusion of third part guilt defenses denied the defendant his right to present a complete defense given our state's then existing precedent of State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001).

Here, defense counsel similarly argued that the procedural statute allowing for the alleged victim's forensic interview to be played after the alleged victim testified was an arbitrary rule that denied him his right to a fair trial. The jury was allowed to hear and watch

the alleged victim's prior consistent testimony twice where that procedure was not allowed in any other similar case. The bolstering effect of the forensic interview was unmistakable, and it was an arbitrary procedural rule favoring an alleged victim in a child sex case to the detriment of a defendant in that same class of cases.

The state's purported interest in fashioning this statute favoring a child sex victim by allowing a jury to observe the alleged victim testifying live, and to also watch that person's "prior consistent statement" from the videotaped forensic interview, which uniquely bolstered the testimony of that witness' testimony, was arbitrary. It was a procedural rule which denied appellant his right to a fair trial. As defense counsel argued, the statute is unconstitutional, and the trial court should have so ruled.

Defense counsel also pointed out that while the Supreme Court in State v. Whitner, 399 S.C. 547, 558-59, 732 S.E.2d 861, 867 (2012), had noted that the legislature made "specific allowances" for forensic tapes to be played in criminal sexual conduct cases, the specific argument, made in this case, had not been presented to the Supreme Court in Whitner.

The arbitrary statute in this case should be held unconstitutional. See Holmes v. South Carolina, 547 U.S. 319 (2006); Rock v. Arkansas, 483 U.S. 44 (1987); Crane v. Kentucky, 476 U.S. 683 (1986); Chambers v. Mississippi, 410 U.S. 284 (1973).

2.

The court erred by allowing Dr. Carol Rahter to testify as an expert in medicine and "child sexual abuse" since her testimony was not relevant and it was highly prejudicial because of her medical testimony that the allegation here was consistent with that of "sex abuse" victims who generally do not disclose abuse immediately. Furthermore, her opinion that the jury should not draw essentially "rational" conclusions from a victim laughing or crying when disclosing abuse was extraordinarily irrelevant and misleading.

Relevant Facts

Dr. Carol Rahter was an emergency room physician, and also the medical director at the Children's Recovery Center. Tr. 288, l. 11 – 289, l. 25. Dr. Rahter had worked at the Children's Recovery Center for eighteen years, and she said that she treated over fifteen hundred victims of sexual abuse The solicitor asked that she be qualified as an expert in both "medicine and child sexual abuse." Defense counsel Diggs objected that her testimony did not have any relevance in this case. he judge qualified her as an expert in "child abuse." Tr. 290, ll. 1–16.

Dr. Rahter did not see any abnormalities during the alleged victim's medical examination. She quickly added: "The majority of children that are sexually abused have completely normal exams . . . it heals very rapidly down in that area." Tr. 290, l. 21 – 291, l. 15.

Dr. Rahter opined it was "normal" for children to not immediately disclose abuse, and that "it's very rare that children disclose immediately and my experience has been in the last ten years we usually see around three hundred to three hundred and fifty children a year. One to two times a year I see a child that discloses immediately." Tr. 292, ll. 7-17.

Dr. Rahter also opined that children do not disclose because they are afraid of getting in trouble, because sometimes perpetrators threaten children, and sometimes the perpetrator has an advantage, financial or otherwise, over the family that makes children not come forward. Dr. Rahter further opined that when disclosing "Some children are giddy. They are nervous, and giddy, and laughing as they are telling what happened. Some children are very tearful. . . . Sometimes children are screamed at when they tell." Tr. 292, l. 7 – 293, l. 25. Dr. Rahter told the jury that the fact that a minor was not crying or upset during a forensic interview did not have any relevance to whether or not they were abused. Tr. 294, ll. 1-4.

As of the writing of this initial brief, our Supreme Court last addressed an expert in child abuse or "child abuse assessment" in State v. Chavis, Op. No. 27491 (filed February 4, 2015), which focused on the reliability element of State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), wherein it was held that the trial court had to perform a gatekeeping function for non-scientific, as well as scientific evidence. Undersigned appellate counsel argued in Chavis that the "child abuse assessment" and similar titles were simply ways of getting around the holdings of State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2009); State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct App. 2012) and State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011).

The Court in Chavis found that one "expert" witness should not have been qualified as an expert, and that the other "expert's" testimony that the child should not be allowed around Chavis anymore, for any reason, could only be interpreted as the "expert" believing the victim's claim that Chavis sexually abused her.

Defense counsel here correctly objected that Doctor Rahter's testimony in this case was not relevant. It is further very disturbing testimony because Doctor Rahter who treated the child as a medical doctor, opined the child's lack of symptoms of abuse was normal. She then opined on a broader scale that behaviors on all ends of the spectrum could be consistent with abuse, and that the failure to disclose the abuse when it occurred (as here), was perfectly normal.

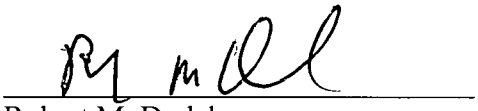
The only issue in this case was whether appellant sexually molested the alleged victim in this case. Dr. Rahter's testimony was not relevant to the jury making that determination, and it was highly prejudicial because it was calculated by the state to have Dr. Rahter, as the emergency room doctor, and "child abuse expert," signal to the jury that the child's symptoms were consistent with or not inconsistent with a sexually abused minor. Dr. Rahter's testimony that essentially all behavior is consistent with sexual abuse does not make the determination of some matter at issue more or less probable. Her testimony was consequently irrelevant, and it should have been excluded. See State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct.App. 2008).

See also State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). Again, not only was Dr. Rahter's testimony not relevant, it was confusing and therefore prejudicial given her combination of roles as a *treating* emergency room doctor, and a general "expert" in child abuse dynamitics.

CONCLUSION

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

Respectfully submitted,



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This 10th day of February, 2015.