

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

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J.C. Nicholson, Jr., Circuit Court Judge

SC Court of Appeals

Opinion No. 2015-UP-262 (S.C. Ct. App. filed May 20, 2015)

Appellate Case No. 2013-000694

THE STATE,RESPONDENT

v.

ERICK ARROYO,APPELLANT.

PETITION FOR REHEARING

On May 20, 2015, this Court issued an unpublished opinion that reversed Appellant Erick Arroyo’s convictions for two counts of criminal sexual conduct with a minor in the second degree and one count of committing a lewd act upon a child. State v. Arroyo, Op. No. 2015-UP-262 (S.C. Ct. App. filed May 20, 2015). Respondent (the State) respectfully petitions the Court for rehearing pursuant to Rule 221(a), SCACR. The State hereby seeks rehearing on the grounds that the Court may have misapprehended, overlooked, or failed to address several crucial points raised by the parties which bear directly upon this Court’s ultimate conclusion that “the circuit court

erred in admitting unredacted portions of a forensic interviewer's report." Specifically, the State submits that, without even addressing the error preservation issues of the defendant opening the door to admission of the written report during cross-examination of the forensic interviewer and then agreeing to admission of the entire unredacted report, this Court then concluded admission of the scant remaining unredacted portions of the written report was reversible error without any substantive analysis whatsoever regarding those portions of the report and why the Court believes they constitute a comment on the victim's believability. For these reasons, the State respectfully asks this Court to grant this petition for rehearing and issue an opinion affirming Appellant's convictions.

Statement of the Case

Erick A. Arroyo (Appellant) was indicted at the January 2010 term of the grand jury for Charleston County for one count of second degree criminal sexual conduct (CSC) with a minor (2010-GS-10-522) and one count of lewd act upon a child (2010-GS-10-529). He was subsequently indicted at the July 2011 term of the grand jury for a second count of second degree CSC with a minor (2011-GS-10-4790). He was represented by Andrew J. Savage, Esquire, of the Charleston County Bar. The State was represented by Assistant Solicitor Elizabeth Gordon of the Ninth Circuit Solicitor's Office. On July 9-13, 2012, Appellant proceeded to trial by jury before the Honorable J.C. "Buddy" Nicholson, Jr., pursuant to which he was found guilty as indicted. Following the verdict, the trial judge deferred sentencing until Appellant could be given an evaluation by a forensic psychiatrist. (R.p.835, line 18). On February 26, 2013, Appellant filed a motion for a new trial. (R.p.875-p.890). On March 4, 2013, the trial court reconvened for a sentencing hearing but again deferred imposing sentence until

further review of the psychiatrist's report. (R.p.841-p.874). On March 12, 2013, the trial court sentenced Appellant to fifteen (15) years' concurrent imprisonment on the two counts of second degree CSC with a minor, and fifteen (15) years' consecutive imprisonment suspended upon the service of five (5) years' probation on the lewd act charge. The court ordered to "toll probation until the defendant can complete a sexual abuse program." (R.p.946-948). On March 22, 2013, the trial court issued an order denying Appellant's motion for a new trial. (R.p.891). Appellant timely filed a notice of intent to appeal his convictions and sentence and the parties submitted briefs addressing five issues raised by Appellant on appeal. On May 20, 2015, this Court issued an unpublished opinion that reversed Appellant's convictions. State v. Arroyo, Op. No. 2015-UP-262 (S.C. Ct. App. filed May 20, 2015). This Petition for rehearing follows.

Statement of Facts

The statement of facts recited in the Final Brief of Respondent is hereby incorporated by reference. During pretrial arguments, Appellant advised the court he would be objecting during trial to any analysis by any forensic interviewer that would bolster the credibility of the victim. He argued: "Any opinion of a so-called expert as to truthfulness, believability, symptoms of post-traumatic stress syndrome, symptoms of child abuse, it's all impermissible under the current case law in South Carolina." (R.p.51, line 24-p.52, line 25).

At trial, the victim gave detailed testimony about the sexual abuse committed by Appellant when she was twelve and thirteen years old. She explained how he started by rubbing her back and slowly progressed to rubbing her front through her clothes, including the front of her pants near her zipper. Appellant later started touching the

victim inside her underwear and putting his hands inside her “privacies.” Eventually, Appellant progressed to putting his penis in the victim’s vagina and using his tongue and mouth to perform oral sex on her on multiple occasions. Appellant told the victim he was doing these things so she would not experiment with other boys and he said that he loved her. (R.p.67, line 23-p.81, line 23).

In regard to the emotional impact and how it affected her disclosure, the victim testified the sexual abuse made her feel like she was “a nothing” and that she avoided telling anybody because she thought people were going to judge her and not believe her. (R.p.79, lines 1-13). She testified that during the sexual abuse she felt like something was “wrong” with her and that she “just froze.” (R.p.79, lines 24-25; p.81, lines 14-18). The victim testified that even after her Aunt Joyce “caught” Appellant trying to do things to her in the garage, she did not tell what happened because she was afraid her aunt would not believe her and would not say anything to help. (R.p.81, line 24-p.84, line 6). The victim admitted that sometimes the sexual contact felt good but testified she thought she was “disgusting for feeling that way” and that she was “sinning.” She said it caused her to stop praying and going to church. She became mean and bitter, but she did not show it to people. The victim acted nice and smiled all the time, but her mother still noticed something was wrong. (R.p.86, line 14-p.87, line 9). The victim testified she knew Appellant’s penis was inside her vagina during the abuse because she could feel it moving as he started slowly and then would start going faster. She said it hurt physically the first time his penis was inside her, and that it hurt emotionally every time she was raped. (R.p.88, lines 6-20).

Next, the State called Melina Arroyo (Melina) to the stand. She explained the victim is her daughter and Appellant is her older brother. Melina described her relationship with Appellant, her relationship with Appellant's estranged wife Joyce Arroyo (Joyce), and the events that led her to report the sexual abuse of the victim to the Mount Pleasant Police Department. (R.p.148, line 3-p.153, line 25). In particular she described an incident when Appellant called her at work to tell her Joyce had "left him" and was accusing him of molesting the victim. Melina testified that when she called the victim to ask if Appellant had touched her, the victim was "very jumpy" but denied anything inappropriate happened. (R.p.154, line 1-p.156, line 8). Next, she described an incident on September 20, 2009, where she had fallen asleep in Appellant's living room while watching football on TV. She awoke to discover Appellant leaning over the victim with his face on her chest and breasts. She gathered up the victim and her younger siblings and drove directly to the Mount Pleasant Police Department. (R.p.157, line 8-p.163, line 7). Melina testified the victim was "in shock" during the car ride, but insisted "nothing happened." She begged the victim to tell her the truth and although the victim was "scared," "crying," and "frozen," she eventually acknowledged Appellant had been touching her breasts. After arriving at the police department, Melina told the victim to tell her more or she would ask the police to put her through a lie detector test. Melina reminded the victim she was her mother, and if the victim thought her own mother could not help and protect her she would not get through this. The victim then started telling Melina "a bunch of stuff," which Melina relayed to the police. (R.p.163, line 8-p.166, line 1). Melina testified her relationship with the victim suffered as a result of the sexual abuse and that it had been a hard road because the victim was no longer a sweet, innocent

child. (R.p.168, lines 20-24). She testified that when she woke up and saw Appellant molesting the victim, the victim was “panicked,” had “big eyes,” and looked “very frightened.” (R.p.169, lines 15-21).

The State later called Joyce to the stand. She explained she was married to Appellant and they have three biological daughters together. Joyce testified the victim is the daughter of Appellant’s stepsister, Melina Arroyo. She explained how Melina and her children moved in with Appellant and the unusually close relationship Appellant developed with the victim. Joyce described an occasion when she was looking for a television remote control when she discovered a bottle of massage oil in the couch. She asked Appellant why it was there and he turned pale and said not to tell the victim. Joyce also described a particular incident when she got up late at night and found Appellant and the victim standing face-to-face together in the dark garage. They quickly moved apart and she saw the victim zipping up her pants. When Joyce asked Appellant why the victim’s pants were unzipped, he said he did not know. She also asked what they were doing together in the garage so late at night and he said nothing was going on and that he was tutoring the victim. Joyce testified: “I told him that this wasn’t the first time that I had caught him in the middle of the night with a child and that it doesn’t look good and that I’m not going to put up with it and that I wanted him to leave.” She said he started crying and said he should not have put himself in that position, but maintained she has a dirty mind and that nothing was going on. Appellant did not object to this testimony. (R.p.554, line 13-p.562, line 7). Joyce then answered questions about her plans to leave Appellant. She said Appellant insisted they work on the marriage and told her not to tell anybody about the incident. He told her if she did

no one would believe her because of “who he was.” Joyce said the thought of working on their marriage “was very hard for me because of his past record with me.”

(R.p.562, line 21-p.564, line 4).

The State subsequently announced it planned to call Dr. Don Elsey to the stand. The jury was sent out and the trial court heard arguments regarding Appellant’s motion to restrict Dr. Elsey’s testimony. Appellant said he had no issue with Dr. Elsey’s expertise and that his challenge was solely to the nature of the testimony being offered. The solicitor explained Dr. Elsey is a licensed professional counselor and conducted a forensic interview of the victim after the sexual abuse was reported to the police. She said the State intended to elicit testimony about the time and place of the sexual assaults as disclosed by the victim, and expert testimony about delayed disclosure, grooming, and why children do not tell about the abuse. The solicitor said Dr. Elsey would not give any opinion on whether he believed the victim was telling the truth. Appellant continued to object on two grounds. First, he argued the testimony would be cumulative to testimony already elicited from Dr. Steenkamp and Dr. Amaya about PTSD and the effects of child abuse and delayed disclosure. Second, he argued the testimony sought would be improper vouching and equivalent to Dr. Elsey saying he believed the victim. The trial court deferred ruling on whether the testimony was cumulative until the witness took the stand but held Dr. Elsey would not be allowed to testify he reached a conclusion that the victim was telling the truth. The judge agreed with Appellant that any such conclusion, as well as any testimony that the disclosure was compelling, detailed, or consistent with sexual abuse was improper and would not be allowed. (R.p.611, line 5-p.620, line 23).

The State then called Dr. Elsey to the stand. He was admitted as an expert in child abuse and forensic interviewing, without objection. Dr. Elsey interviewed the victim on September 22, 2009, two days after the police were contacted by the victim's mother. During that interview she told him she had been sexually abused more than one time over the past year, and the abuse happened in her uncle's house. Over Appellant's continuing objections, Dr. Elsey gave detailed testimony about delayed disclosure, tentative disclosure, accidental disclosure, and grooming. He also noted that a primary attribute of PTSD is avoidance, which can contribute to a child not wanting to talk about abuse. (R.p.623, line 8-p.629, line 21).

On cross-examination, **Appellant asked Dr. Elsey if he ever wrote a report** concerning the observations he made and the information he gathered from the victim and her mother. Dr. Elsey produced a copy of his written report and showed it to Appellant's counsel. (R.p.634, lines 4-23) (emphasis added). Appellant then questioned Dr. Elsey extensively about the interviews and the written report, asking whether the process he used during the interviews was "to identify whether or not this child had experienced abuse." Appellant asked Dr. Elsey whether "the role of the Lowcountry Children's Center was to assist the police in identifying criminal conduct." He also asked: "But part of that is also to have your resources used to engage in scientific hardcore evidence **to verify the credibility and believability of the child?**" Dr. Elsey answered: "Well, the credibility and believability is usually left up to the court to decide. We certainly do ask questions. Can the child really know what tell the truth means? Can they give us accurate information about things we do know? Where they go to school, who lives in their house, those type of things." (R.p.634, line 24-p.636, line 12)

(emphasis added). Appellant then **specifically asked Dr. Elsey to refer to the written report** before answering whether the victim and her mother denied the victim had been exposed to pornography from someone other than Appellant. (R.p.638, line 9-p.639, line 22).

On re-direct examination, the solicitor had the written report marked for identification as State's Exhibit Number 9. Dr. Elsey identified the report as one he prepared regarding his interview with the victim and testified it was a fair and accurate representation of the interview. The State moved to place the report into evidence and, after Appellant asked for confirmation it was the same report Dr. Elsey testified about on cross-examination, **Appellant stated: "I don't have any objection." The entire written report was then admitted into evidence.** (R.p.645, line 6-p.646, line 10) (emphasis added).

During a subsequent discussion regarding whether the videotape of the interview should be admissible, Appellant acknowledged he had questioned Dr. Elsey about the report, but he never mentioned the video. The solicitor argued the video should be admitted as the "complete statement" because the report was merely a summary of the interview. She, however, noted the report contained information about a "prior bad act" the court had previously ruled inadmissible. Appellant asked that the prior bad act information be redacted and the trial judge agreed to the request. (R.p.651, line 23-p.659, line 18).

After the State rested, Appellant moved to strike the entire testimony of Dr. Elsey on grounds that it violated Rule 403, SCRE, and that it improperly inferred the victim was telling the truth. He made no mention of the written report that had been admitted

into evidence. The motion was denied. (R.p.664, line 18-p.666, line 3). Before breaking for the day, the trial judge reminded the solicitor to take State's Exhibit Number 9 and redact the information referencing the prior bad act. (R.p.674, lines 2-25). **The following morning, counsel for Appellant went on record to note he had failed to object to Dr. Elsey's report when it was offered by the State.** He said he could not give an explanation for this because he had consistently objected to that type of evidence throughout the trial. Counsel argued his "non-objection" was clearly erroneous and would be reversed if challenged in a post-conviction hearing. Despite the earlier failure to object, the trial judge allowed Appellant to make any objections he had to the report because the jury had not yet seen it. The judge also suggested redacting any objectionable material rather than excluding the entire report, and asked the parties to see if they could reach an agreement before the end of the trial. (R.p.678, line 14-p.681, line 20).

After Appellant presented a defense and the State presented evidence in reply, Appellant moved to exclude Dr. Elsey's written report in its entirety. He argued it was not possible to redact the report sufficiently to exclude the things that would be in violation of Jennings, and argued it was inevitable the case would be reversed on appeal or post-conviction relief if he was not allowed to remedy his earlier failure to object. The court repeated the decision to allow Appellant to ask that the report be excluded despite the fact it had already been admitted without objection. The State argued the complete report (minus the redaction of any reference to the prior bad act) was admissible under Rule 106, SCRE, and as a prior consistent statement under Rule 801, SCRE. Appellant responded that even if Rule 106 applied, it would not trump Jennings and the supreme

court's decision that hearsay statements from the victim are inadmissible.¹ The trial judge denied Appellant's request to remove the entire report from evidence and instead elected to redact the particular questions from the interview that concerned the interviewer's opinion regarding the truthfulness of the victim. The court then asked Appellant if he believed any additional portions should be redacted. Appellant requested a host of additional redactions, most of which were granted by the trial court. The solicitor argued Appellant had opened the door to introduction of the report, including the portions touching on credibility, because he asked questions about it during his cross-examination of Dr. Eelsey. The court acknowledged the solicitor's argument but nevertheless decided to redact the portions of the report the judge determined might constitute vouching. The trial judge also agreed to redact additional portions of the report at Appellant's request, but eventually denied any further redactions and held the heavily redacted version would be substituted as State's Exhibit Number 9 when the report went to the jury. (R.p.743, line 25-p.758, line 25). Appellant said he was still concerned about the redactions not going far enough. (R.p.761, lines 8-24).

After presentation of all evidence, closing arguments, and the jury charge, the trial court asked the parties to review the exhibits that would be sent to the jury, including State's Exhibit Number 9, the redacted copy of Dr. Eelsey's written report. The original exhibit was replaced with a redacted copy, marked, and admitted into evidence.

Appellant continued to object to the type of redaction the Court had proposed. The trial

¹ This was the first time Appellant made an argument that any portion of Dr. Eelsey's report was inadmissible on grounds that it included hearsay. His pretrial argument and the argument articulated throughout the trial was that portions of the report would constitute improper vouching for the victim's credibility.

judge noted he had redacted everything Appellant requested, except the things he previously refused to redact as described in the record. (R.p.825, line 5-p.827, line 3). At the conclusion of trial, the jury convicted Appellant as indicted. On February 26, 2013, Appellant filed a motion for a new trial. He argued the admission into evidence of Dr. Elsey's report constituted error because it contained inadmissible hearsay bolstering the trial testimony of the victim and improperly gave the forensic interviewer's expert opinion on the veracity of the child. (R.p.875-p.890). On March 22, 2013, the trial court issued an order denying Appellant's motion for a new trial. (R.p.891).

Argument

In its unpublished opinion, this Court reversed and remanded Appellant's convictions for a new trial pursuant to Rule 220(b), SCACR, and a brief list of authorities. The Court found the circuit court erred in admitting unredacted portions of a forensic interview's written report "because those portions improperly commented on the victim's believability," yet it failed to identify what those portions of the report actually stated, and then failed to explain how that language constitutes a comment on the victim's believability. The State respectfully submits this is likely because such an explanation would be nearly impossible and would make it more difficult to achieve the Court's desired result.

This Court included parenthetical conclusions from the three authorities cited; however, it failed to include any analysis or explanation of how those parenthetical conclusions apply to the very different procedural posture and facts presented by Appellant's case. The State submits that without providing the relevant context that would have been supplied by a reasoned analysis of the procedural posture and facts, the

parenthetical conclusions are misleading in regard to the Court's ultimate decision. /
Indeed, when those parenthetical conclusions are actually considered in the context of
Appellant's case, their tenuous connection to the Court's decision becomes apparent.

First, this Court cites State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), for
its conclusions that (1) it is improper for a witness to testify as to his or her opinion about
the credibility of a child victim in a sexual abuse matter and (2) it is improper for a
forensic interviewer at trial to offer any statement that indirectly vouches for the child
victim's believability or indicates the interviewer believes the child victim's allegations
in the matter. Yet here, on direct examination, Dr. Elsey did not testify as to his opinion
about the credibility of the victim, did not offer any statement that indirectly vouched for
the victim's believability, did not indicate he believed the victim's allegations, and never
mentioned his written report. Indeed, the written report was first referenced on cross-
examination in questions raised by Appellant's counsel. (R.p.634, lines 4-23). Using the
report, counsel then actively attempted to bait Dr. Elsey into offering an opinion on the
victim's credibility. Instead of taking the bait, Dr. Elsey answered: "Well, the credibility
and believability is usually left up to the court to decide." (R.p.634, line 24-p.636, line
12). Thus, though the conclusions from Kromah are accurate, they do not apply to the
circumstances of Appellant's trial.

Next, this Court cites State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), for
its conclusion that "the circuit court abused its discretion in allowing the State to
introduce a forensic interviewer's reports because the reports improperly vouched for the
child victims' veracity, **as the only way to interpret the language used in the reports
was the forensic interviewer believed the child victims were being truthful.**"

(emphasis added). Similarly, this Court cites State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012), for its conclusion that “the **only interpretation** of the language of the testimony was the forensic interviewer believed the child victim was being truthful.” (emphasis added). Yet in Jennings, the two problematic comments from the interviewer were (1) “that during the interviews, each child had ‘provided a compelling disclosure of abuse by [appellant]’” and (2) her conclusion “that each of the children provided details consistent with the background information received from their mother, the police report, and the other children.” In McKerley, the problematic comments were more numerous than in Jennings and ranged from the forensic interviewer’s “opinion as to whether [she thinks] something happened,” to testimony that she “found [both interviews with the victim] to be compelling for sexual abuse,” to her comments that she was “looking for accuracy of information” given by the victim and that she was “looking at . . . are there other possible reasons, are there other possible explanations.”

As explained in greater detail below, the three allegedly objectionable portions of the “language” in Dr. Elsey’s report are simply not equivalent to the improper comments from Jennings and McKerley. Instead, not only do they NOT lend themselves to a singular interpretation that Dr. Elsey believed the victim, they actually say nothing about Dr. Elsey’s opinion of the victim’s credibility. Furthermore, when considered in the context of Dr. Elsey’s trial testimony that “credibility and believability is usually left up to the court to decide,” any support for finding that “the only way to interpret the language used in the reports was [Dr. Elsey] believed the victim [was] being truthful,” is significantly diminished. Where, as here, a jury’s determination of guilt is being

overturned by an appellate court, the State submits the parties and the victim deserve a thorough analysis of these distinctions, even if this Court ultimately reaches the same conclusion after rehearing.

This Court also cites Jennings in regard to rejecting the possibility that any error regarding admission of the report was harmless. In Jennings our supreme court noted that: “The only evidence presented by the State was the children’s accounts of what occurred and other hearsay evidence of the children’s accounts.” In Appellant’s case, there was more evidence than just the victim’s testimony, which itself was strong. Instead, there were two eyewitnesses who “caught” Appellant in compromising positions with the victim during the time frame of the alleged sexual abuse. One witness testified she saw Appellant’s face on the victim’s breasts and the other witness testified she saw the victim zipping up her pants after she was discovered standing face-to-face with Appellant in a dark garage. Thus, the extent of the evidence alone deserves further analysis for harmless error.

In this appeal, Appellant argued the trial court erred in admitting the written report of forensic interviewer Dr. Don Elsey even though the report was partially redacted, because the unredacted portions constituted an improper bolstering of the victim’s credibility. The State disagreed and argued Appellant’s claim was entirely without merit for several reasons, both procedural and substantive. First, Appellant opened the door to introduction of the entire report by asking extensive questions about Dr. Elsey’s forensic interview during cross-examination. Second, Appellant effectively waived any right to complain where the entire unredacted report was first admitted into evidence without objection and was subsequently redacted by the trial court in an effort

to remove any comments on the victim's veracity. Third, the remaining unredacted comments do not constitute direct opinions on the victim's veracity and are sufficiently vague so as not to constitute indirect vouching for the victim's believability. Fourth, any error in the admission of the remaining unredacted comments was harmless beyond a reasonable doubt.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Jennings, 394 S.C. 473, 477, 716 S.E.2d 91, 93 (2011). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Id. at 477-78, 716 S.E.2d at 93. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." State v. Singleton, 395 S.C. 6, 13-14, 716 S.E.2d 332, 335-36 (Ct. App. 2011) (quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

The trial court properly admitted Dr. Elsey's written report because Appellant opened the door to that report by asking extensive questions about the forensic interview and the report itself during cross-examination. State v. White, 361 S.C. 407, 415-16, 605 S.E.2d 540, 544 (2004) (ruling expert in post-traumatic stress disorder and assessment

and treatment of sexual abuse could testify that she believed the victim in this case because defendant opened the door by cross-examining expert about other cases in which she did not believe victim); State v. Taylor, 333 S.C. 159, 175, 508 S.E.2d 870, 878 (1998) (“[B]ecause appellant opened the door about his relationship with his wife, the solicitor was entitled to cross-examine him regarding the relationship, even if the responses brought out appellant’s prior criminal domestic violence conviction.”); State v. Page, 378 S.C. 476, 482-83, 663 S.E.2d 357, 360 (Ct. App. 2008) (“It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence.”). The trial court likewise committed no error in admitting a heavily redacted copy of the written report where the entire unredacted report was first admitted into evidence without objection from Appellant. It was subsequently redacted by the trial court solely as an effort to help remedy Appellant’s initial failure to object by attempting to remove all potentially prejudicial parts which would arguably vouch for the victim’s veracity. Even if the trial court’s efforts fell short in some regard, Appellant should be precluded from now claiming error where the circumstances leading to that alleged error were a product of Appellant’s own actions. He should not benefit from his own wrongdoing. See, e.g., Delahoussaye v. State, 369 S.C. 522, 633 S.E.2d 158 (2006) (holding that when a prisoner escapes from prison, he should not be given credit against his South Carolina sentence for time served in another jurisdiction on a subsequent crime); State v. Hackett, 363 S.C. 177, 609 S.E.2d 553 (Ct. App. 2005) (holding that where a probationer absconds from supervision, the probationary period is tolled until he is once more placed under probationary supervision).

The trial court also properly exercised its discretion in admitting the heavily redacted copy of Dr. Elsey's written report where the remaining unredacted comments do not constitute direct opinions on the victim's veracity and are sufficiently vague so as not to constitute indirect vouching for the victim's believability. Appellant complains that a box on the report is marked "Yes" in response to the question: "Did the child present as an accurate reporter regarding verifiable information?" This question does not suggest the sexual abuse itself was "verifiable information." Indeed, it gives no indication of what "verifiable information" was used to find the victim presented as "an accurate reporter." As a consequence, it says nothing to the jury about Dr. Elsey's opinion of the victim's credibility in regard to the sexual abuse allegations themselves. At most the question and answer merely imply the child was telling the truth about something, but they imply nothing about whether Dr. Elsey believed the victim was telling the truth about the abuse.

Next, Appellant complains that a second box on the report is marked "Yes" in response to the question: "Was the child able to respond to trauma specific questions?" Again, this question and answer do not in any way, shape, or form constitute an opinion from Dr. Elsey that he believes the child is telling the truth about the abuse. Knowing the victim was able to respond to trauma specific questions does not tell the jury what questions were asked or what responses were given, and it certainly does not tell the jury whether Dr. Elsey believed the allegations of abuse.

Finally, Appellant complains that a third box on the report is marked "Yes" in response to the question: "Did the child present as being impacted by external factors?" He particularly complains because the sub-boxes for "Family response" and "Injunctions

not to tell” are checked while the sub-box for “Coaching” is not checked. As with the other boxes, the question and answer do not constitute a direct or indirect opinion as to a child’s veracity or tendency to tell the truth. Also, because no testimony was offered at trial about coaching, it is pure speculation on Appellant’s part to attach any significance to the absence of a check mark in the “Coaching” sub-box. Even if the three portions of the report identified by Appellant do somehow suggest Dr. Elsey believed the victim was telling the truth about the sexual abuse, any such suggestion was disabused by Dr. Elsey himself when he testified that credibility and believability are matters left up to the court to decide, not the forensic interviewer. (R.p.634, line 24-p.636, line 12). Thus, the trial court committed no error in refusing to redact any remaining portions of the written report.

Finally, any error in the admission of the remaining unredacted portions of Dr. Elsey’s written report was harmless beyond a reasonable doubt given the overwhelming evidence of Appellant’s guilt. See State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). As noted above, and unlike the case in Jennings, the evidence against Appellant consisted of more than simply the victim’s account of what occurred.

Conclusion

For all of these reasons, the State submits this Court may have misapprehended, overlooked, or failed to address several crucial points raised by the parties which bear directly upon this Court’s ultimate conclusion that “the circuit court erred in admitting unredacted portions of a forensic interviewer’s report.” The State respectfully asks this

Court to address the error preservation issues and the unique facts of Appellant's case in rehearing this matter and affirming Appellant's convictions.

WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court grant this petition for rehearing, reconsider and rehear this matter, and issue an order affirming Appellant's convictions and sentence.


Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

SCARLETTE A. WILSON
Solicitor, Ninth Judicial Circuit

BY:



J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
June 1, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

J.C. Nicholson, Jr., Circuit Court Judge

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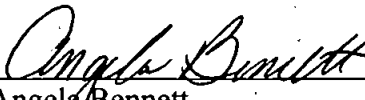
ERICK ARROYO,APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Petition for Rehearing*, dated June 1, 2015, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

David Alexander, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served.
This 1st day of June, 2015.



Angela Bennett
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727



RECEIVED

JUN 01 2015

SC Court of Appeals

June 1, 2015

ALAN WILSON
ATTORNEY GENERAL

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

State v. Erick Arroyo
Appellate Case No. 2013-000694

Dear Mr. Alexander:

I am enclosing one (1) copy of the Petition for Rehearing in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)
Victim Services