ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Charleston County

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

THE STATE,

RESPONDENT,

V.

ERICK ARROYO,

Petitioner

APPELLATE CASE NO. 2013-000694

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

STATE'S QUESTION PRESENTED

Did the Court of Appeals improperly conclude "the circuit court erred in admitting unredacted portions of a forensic interviewer's report" and err in reversing Respondent's conviction where it failed to address critical error preservation issues and conducted no substantive analysis whatsoever in support of why it concluded those portions of the report constituted a comment on the victim's believability?

COUNTER QUESTION PRESENTED

Did the Court of Appeals properly reverse Respondent's conviction because the trial court admitted, over an objection deemed timely and ruled on by the trial judge, a forensic interviewer's report that, among other objectionable portions, described the complainant as an "accurate reporter regarding verifiable information," and indicated that the forensic interviewer believed the complainant had not been coached?

STATEMENT OF THE CASE

Respondent was indicted in Charleston County for two counts of second degree criminal sexual conduct with a minor and one count of lewd act on a minor. On July 9 – 13, 2012, respondent was tried before the Honorable J.C. Nicholson and a jury. App. 6. Elizabeth Gordon represented the State. App. 6. Andrew Savage represented respondent. App. 6. The jury convicted respondent on all three counts. App. 838, ll. 3 – 21. The court deferred sentencing. App. 842, l. 24 – 847, l. 13. On February 26, 2013, respondent filed a motion for a new trial. App. 884. On March 4, 2013, a sentencing hearing was held before Judge Nicholson. App. 850. The trial court again deferred sentencing and the defendant waived his presence. App. 881, l. 8 – 882, l. 12.

On March 12, 2013, Judge Nicholson signed the sentencing sheets. App. 955 - 957. He sentenced respondent to concurrent terms of fifteen years' imprisonment on the criminal sexual conduct charges and a consecutive fifteen year sentence on the lewd act charge which was suspended upon the service of five years' probation. App. 955 – 957. Judge Nicholson wrote on the sentencing sheets that respondent's probation would be tolled until he completed a sexual abuse program. App. 955 – 957. On March 22, 2013, the trial court denied respondent's motion for a new trial. App. 900. This appeal followed.

Respondent raised five issues on appeal. App. 963. On April 14, 2015, a panel of the Court of Appeals consisting of Judges Thomas, Konduros, and Geathers heard oral argument. App. 1061. On May 20, 2015, the court issued an unpublished decision reversing respondent's conviction on one of the five grounds raised. App. 1061-62. The court declined to address respondent's remaining issues pursuant to Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999). On June 22, 2015, the State's petition for rehearing was denied and this petition now follows. App. 1084.

ARGUMENT

The Court of Appeals properly reversed Respondent's conviction because the trial court admitted, over an objection deemed timely and ruled on by the trial judge, a forensic interviewer's report that, among other objectionable portions, described the complainant as an "accurate reporter regarding verifiable information," and indicated that the forensic interviewer believed the complainant had not been coached.

Reasons Why the Writ Should Not be Granted

No reasons governing the review of cases from the Court of Appeals exist. Rule 242(b), SCACR. The State does not contend that a novel issue of law exists. Rule 242(b)(1), SCACR. The Court of Appeals' decision contained no dissent; its decision was unpublished and *per curiam*. Rule 242(b)(2), SCACR. The State does not contend that a substantial constitutional question is involved or that the decision conflicts with a decision of the United States Supreme Court. Rule 242(b)(4) and (5), SCACR.

The sole reason relied upon by the State to contend this case is worthy of a grant of certiorari is that it is in conflict with a prior decision of this Court.[1] Rule 242(b)(3). The State also attempts to manufacture a preservation issue where none exists. The Court of Appeals conducted a straightforward application of this Court's jurisprudence to reverse respondent's conviction. In this case, a forensic interviewer's report was admitted into evidence. The report indicated that the

[1] Also complaining about the summary nature of the opinion below, the State contends that certiorari should be granted "because the parties and the victim deserve a thorough analysis . . . **even if this Court ultimately reaches the same conclusion as the Court of Appeals.**" State's Pet. Cert. at 15 (emphasis added). This is no reason to grant certiorari and shows the weakness of the State's petition. If this Court is going to reach the same decision, then additional analysis is not warranted when the Court of Appeals' decision is unpublished. During the time it takes for this "thorough analysis" that will make no difference in this case or in the development of the law, Arroyo will be waiting on his new trial in prison.

forensic interviewer believed the complainant. Respondent objected to the specific portions of the report and the trial judge overruled the objection. App. 768, l. 1 – 777, l. 3. App. 767, l. 6 – 768, l. 1. App. 946. App. 884. App. 900. Reversal was the uncontroversial result of the application of this Court's decisions in State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) and State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). This Court's more recent decisions in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) and State v. Isaac Antonio Anderson, Op. No. 27588, Shearouse Adv. Sheet No. 30 (Aug. 5, 2015) confirm that the Court of Appeals' decision was correct. The Court should deny the State's petition.

Furthermore, the court could have reversed on any of the other four substantial grounds raised by respondent. App. 963. Because the issue on which the court reversed is so manifestly clear, respondent will not address these other issues in this Return; however, should the Court grant certiorari, it will either need to address respondent's other issues or remand to the Court of Appeals for consideration. State v. Grovenstein, 335 S.C. 347, 354 n.6, 517 S.E.2d 216, 219 n.6 (1999).

The State's Preservation Red Herring

No preservation issue exists in this case. The State repeatedly tries to manufacture a preservation problem in an attempt to kick this case down the road to post-conviction relief. This Court should not be fooled. The trial lawyers raised the issue to the court and the trial judge ruled.

The State's assertion that the issue is unpreserved rests on the fact that when the forensic interviewer's report was first offered for admission, respondent's attorney failed to object. App. 654, l. 8 – 655, l. 10. Originally, Arroyo did not object to the entry of the report. App. 655, ll. 7 – 10. However, trial counsel admitted the failure to object was a mistake and Judge Nicholson allowed him to make an objection to the admission of the report. App. 666, ll. 3 – 16. App. 687, l. 18 – 690, l. 24. The following colloquy demonstrates that the issue is preserved for appeal:

THE COURT: So you want to reconsider your—you want to object now?

MR. SAVAGE: Yes.

THE COURT: **I'll allow you to do that. What's your objection?** Now, I believe that's the one I said had to be redacted.

MR. SAVAGE: Yes, sir.

THE COURT: Has it been redacted?

App. 688, ll. 1 – 8 (emphasis added). Judge Nicholson then engaged in a discussion with the parties about the admissibility of the forensic interviewer's report, what should be redacted, and attempted to get the parties to agree on the redactions. App. 688, l. 9 – 690, l. 20. The trial judge said if the parties could not agree on redactions, "I'll sit here and look at it and make a determination on his motion." App. 690, ll. 2 – 6.

The parties did not agree. App. 752, l. 21 – 758, l. 21. The trial judge again emphasized that he was allowing argument despite trial counsel's initial oversight in not objecting, stating, "I'm allowing you to ask the Court to remove it even though it's already been admitted without objection. So that mistake is corrected in this Court's opinion." App. 754, ll. 15 – 18. Citing Jennings, Arroyo first objected to the admission of the report in its entirety on the ground that it commented on Minor's veracity. App. 752, l. 21 – 758, l. 21. Judge Nicholson then ruled he would redact the report to remove any comment on Minor's veracity. App. 758, ll. 5 – 15. Arroyo then made specific objections to portions of the report that remained that still referred to Minor's veracity. App. 759, l. 1 – 768, l. 3. The trial court ultimately overruled a number of these objections and admitted a redacted version of the forensic interviewer's report into evidence. App. 767, l. 6 – 768, l. 1. App. 946.

Arroyo filed a written motion for a new trial regarding the admission of Elsey's report. App. 884. Judge Nicholson did not hear oral argument on the motion and denied it in a written order. App. 900. The issue before the Court of Appeals was the same as the one presented with specificity to the trial judge below. State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (1999). This issue is preserved and the Court should ignore the State's attempts to confuse the issue with its arguments on procedural bar.

The State's Harmless Error Red Herring

While not mentioned in its Question Presented, the State alludes to harmless error in its petition. State's Pet. Cert. at 16-17, 20. Harmless error cannot apply in this case. "The determination whether a bolstering error is harmless depends on whether the case turns on the credibility of the victim." Chavis at 110-11, 771 S.E.2d at 341. No physical evidence of abuse existed in this case. Arroyo, a decorated retired Naval officer, testified in his own defense and unequivocally denied abusing the complainant. App. 720, l. 15 – 721, l. 15. The case was a contest between Arroyo's credibility and the State's witnesses; therefore the error cannot be harmless.[2]

The State's petition asserts that Arroyo was "caught" by two "eyewitnesses." State's Pet. Cert. 16. Both of these witnesses also had serious credibility problems and their existence does not somehow transform this swearing match into a harmless error case. The first of these "eyewitnesses" was Minor's mother, Melina Arroyo ("Melina") who had been previously hospitalized for a psychiatric illness, had two of her boyfriends arrested, and had social services

[2] One of appellant's issues not reached below was the court's refusal to give a charge that a defendant's good character can create reasonable doubt. State v. Harrison, 343 S.C. 165, 175, 539 S.E.2d 71, 76 (Ct. App. 2000) ("A defendant is entitled to a jury instruction regarding evidence of good character and reputation when this type of evidence is presented and the defendant requests the charge.")

involvement regarding Minor. App. 599, ll. 1 – 2. App. 217, ll. 7 – 14. App. 235, l. 21 – 237, l. 4. App. 239, ll. 9 – 16. App. 215, ll. 12 – 20. App. 256, l. 23 – 357, l. 9.

The second of these "eyewitnesses" was Arroyo's wife, Joyce Arroyo ("Joyce") who was suing him for divorce. Joyce originally wrote a letter on Arroyo's behalf to help him obtain a bond. App. 596, ll. 9 – 19. Joyce wrote that they were separated due to problems "with my husband's sister, Melina, who fled to South Carolina from Florida threatening to commit suicide due to an abusive relationship with a man she left, the husband [sic] of her two children." App. 618, ll. 3 – 11. Joyce stated in the letter that she was sad that their dream of retiring in Mount Pleasant "would not come true due to a person that we took into our home and cared for even when others warned us against it." App. 618, ll. 12 – 18.

When Arroyo's relationship with Joyce later soured, he successfully contested jurisdiction over the divorce proceedings Joyce filed in Texas. App. 581, l. 11 – 589, ll. 6. App. 905. The Texas action was dismissed and Joyce had to file for divorce in South Carolina. App. 581, l. 11 – 589, ll. 6. App. 905. Joyce left Arroyo a voicemail stating:

> You got your jurisdiction over there in South Carolina, at least temporarily because I will appeal because I have the right to fight you here in Texas. But if you want to fight there in South Carolina, that is going to be the worst thing that you could have done for your case because I will make everything and blow it up so badly over there in South Carolina that you are going to wish that you never, never crossed paths with me.

App. 905. On April 15, 2011, Joyce sent Arroyo an email stating:

> I'll contact the Newspaper there in Charleston tomorrow to discuss with them doing a story on preditors in your own backyard..... I think this jurisdiction thing needs some light shined on it

App. 905. On May 26, 2011, Joyce sent Arroyo another email stating:

> Funny how when I sent you the below email you responded quickly. But when I sent you an email recently requesting the agreement you are quiet. That's okay... You will have a surprise waiting for you very soon. What is the saying "don't bend over to get the soap" just stay dirty.... it will be safer than having to watch your backside. This will be my last correspondence till you receive the divorce papers when you are in prison, unless the judge will sign off on them at your trial? See you in August at the trial... At least that is what the solicitor is stating?

App. 905. The trial judge refused to allow Arroyo to impeach Joyce with these statements, which was another issue raised below and not reached by the Court of Appeals.

Both Joyce and Melina's accounts of what they saw differed significantly from what Minor claimed happened. Compare App. 113, ll. 7 – 21 and App. 127, l. 22 – 231, ll. 6 *(Minor's descriptions)* with App. 220, l. 19 – 321, l. 14 *(Melina's description)* and App. 601, l. 14 – 607, ll. 7 *(Joyce's description)*. Melina's description of the alleged abuse is particularly noteworthy. Melina and her children had moved out of Arroyo's house, but returned to watch an evening football game. App. 162, ll. 3 – 23. Melina had two alcoholic beverages and then fell asleep on a couch in the living room after dinner. App. 163, l. 9 – 165, l. 15. Melina described what happened next:

> The next thing I remember after falling asleep on the couch, I felt very cold, freezing, but my body was sweaty. I remember **something touching me** and telling me, wake up, wake up. You need to wake up now.
>
> Q. Like somebody physically touching you to wake up?
>
> A. I don't know. **Like God, like some big hands on my body** like telling me, you need to wake up. And then I woke up and opened my eyes. When I open my eyes, I see my brother leaning on my daughter like with his face on her chest and her boobs and her head. I saw him, I saw him.

App. 166, ll. 6 – 16 (emphasis added). Her two younger children were also in the room. App. 223, ll. 15 – 17. Minor was laying on her back. App. 223, ll. 5 – 6. Arroyo was lying on top of Minor.

App. 224, ll. 19 – 20. Arroyo "rolled over the couch" and appeared to be looking for something. App. 224, ll. 2 – 4.

At trial, Minor described this incident quite differently. Minor said she was laying on the couch covered by a blanket. App. 128, ll. 10 – 13. Arroyo was standing over her. App. 128, l. 20 – 129, l. 10. Minor said that Arroyo was "[s]tanding totally straight up." App. 129, l. 13. Minor's clothes were on, but Arroyo's pants were unzipped. App. 130, ll. 8 – 9. Minor said Arroyo "was trying to make me touch his penis." App. 129, ll. 21 – 22. Harmless error cannot exist in a case where the defendant takes the stand and denies all wrongdoing, the complainant says the defendant was standing up with his penis exposed, and a witness says the defendant was clothed and lying down on top of the complainant.

Minor and Joyce's versions also differed significantly. According to Minor, she and Arroyo were in his garage at night. App. 111, l. 23 – 113, l. 6. Minor said Arroyo "had his pants down and his penis out." App. 113, ll. 7 – 10. Arroyo's pants were down to "just below his waist." App. 138, ll. 23 – 25. The lights were on. App. 110, ll. 18 – 25. Minor's pants were not all the way down, but Arroyo was trying to take them off. App. 113, ll. 7 – 21. Her zipper was undone. App. 138, ll. 12 – 15. She was standing. App. 113, l. 17 – 18. Arroyo was trying to penetrate her with his penis. App. 113, ll. 19 – 21. At this point Joyce walked into the garage. App. 139, ll. 1 – 8. She started zipping up her pants and Arroyo walked to the freezer. App. 139, ll. 1 – 16.

Contrast Minor's version with Joyce's, in which the "lights were not on" and Arroyo did not have his pants "unbuttoned in any way or in any fashion." R. 592, ll. 14 – 16. R. 593, ll. 14 – 16. Joyce affirmed that she was "sure of that." R. 593, ll. 17 – 18. Joyce did not turn on the light. R. 596, ll. 2 – 6. Joyce had a clear view of Arroyo. R. 598, ll. 1 – 7. Joyce claimed that she could see through a crack of the refrigerator door and saw Minor zip up her pants. R. 560, ll. 14 – 21. Again,

harmless error cannot exist in a case with these contradictions and where the defendant testified and denied all allegations of abuse.

The Court of Appeals' Straightforward Application of Supreme Court Jurisprudence

The Court of Appeals correctly applied this Court's jurisprudence in analyzing Elsey's report. In addition to multiple sentences violating the time and place restriction of Rule 801(d)(1), the redacted Elsey report still contains information vouching for Minor's credibility. It states, "Did the child present as **an accurate reporter regarding verifiable information**?" with a box indicating Elsey's answer of "Yes." App. 946 (emphasis added). It asks, "Was the child able to respond to trauma specific questions?" and shows Elsey's answer of "Yes." App. 946.

It asks whether the child presented "as being impacted by external factors?" with the box checked "Yes." App. 946. This question has several sub-boxes. App. 946. Two were checked: "Injunctions not to tell" and "Family response." App. 946. More significant was the box left unchecked, "**Coaching**." App. 946 (emphasis added). The remainder of the unredacted report repeats the hearsay allegations made by Minor during the interview. App. 946.

Admission of the report was clearly error under Jennings, Kromah, and Rule 801(d)(1). Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010). Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001) (granting a new trial in a PCR case because defense counsel failed to object to hearsay testimony about details of a sexual assault); Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994) (granting a new trial in a PCR case because defense counsel failed to object to hearsay testimony about details of a sexual assault). The statements concerning Minor being an "accurate reporter" violates the dictate of Kromah that forensic interviewers cannot offer opinions on the credibility of others. Kromah at 357, n.5, 737 S.E.2d at 357, n.5.

The State claims that Dr. Elsey's answer of "yes" to whether the child was an "accurate reporter" was vague. The State also claims that this answer betrays nothing about Dr. Elsey's opinion of Minor's credibility. If this response was indeed vague and conveyed nothing about Minor's credibility, then for what purpose was it relevant? Both at the Court of Appeals and in its petition to this Court, the State completely failed to distinguish the unredacted portions of Dr. Elsey's report from the opinions held inadmissible in Kromah and Jennings.

This Court's most recent decisions on forensic interviewers confirms the decision below. In Chavis, this Court reiterated its decision in Kromah that "bolstering, especially when made by a witness imbued with the imprimatur of an expert witness, improperly invades the province of the jury." Chavis at 109, 771 S.E.2d at 340. Anderson again clearly expresses the limitation of forensic interviewers to the admission of a video and not allowing them to offer evidence as a "'human lie-detector.'" Anderson at 7. Anderson clarified "the appropriate scope of the testimony of a forensic interviewer." Anderson at 7. This Court stated:

> The sole purpose of [the forensic interviewer's] jury testimony is to lay the foundation for the introduction of the videotape, and the questioning must be limited to that subject. There is to be no testimony to such things as techniques, of the instruction to the interview subject of the importance of telling the truth, or that the purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted.

Anderson at 8.

The statements in Elsey's report concerning whether Minor had been coached, could respond to trauma specific questions, and had been an "accurate reporter of verifiable information" violate all of the rules listed in Anderson.

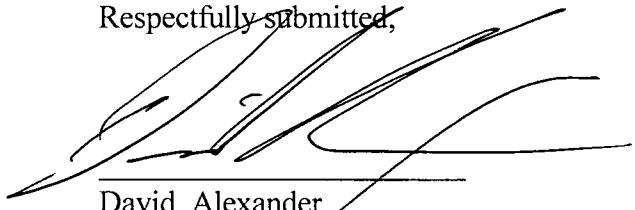
Elsey was improperly qualified as an expert witness, which increases the prejudicial impact of the report. Id. Jennings at 482-83, 716 S.E.2d at 95-96. The Court of Appeals

recognized that Minor's credibility was the central issue and that Elsey's report crossed the boundaries set by this Court for forensic interviewers. Far from conflicting with a decision of this Court, the opinion below reflects an easy application of Jennings, Kromah, Chavis, and Anderson. Anderson, as a published opinion, definitively and clearly sets out the law with respect to this issue. This Court does not need respondent's case to address the same issue again. Certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the State's petition. In the event the Court grants the State's petition, it should address respondent's remaining issues as additional sustaining grounds or remand to the Court of Appeals for these issues to be addressed.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 14th day of August, 2015

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Erick Arroyo #354743, at Macdougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 14th day of August, 2015.

David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 14th day
of August, 2015.

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