

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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AUG 20 2015

SC Court of Appeals

Appeal from Newberry County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMMY EUGENE RICE, JR.,

APPELLANT

APPELLATE CASE NO. 2014-001753

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred by admitting the video recorded statement given by Minor during a forensic interview where there were no particularized guarantees of trustworthiness as required by S.C. Code Ann. Section § 17-23-175 (A), since Minor's statement was elicited by suggestive and leading questions from the forensic interviewer, the statement did not represent a detailed account of the alleged criminal sexual conduct, and the solicitor referenced the statement in closing argument, which prejudiced Appellant?

STATEMENT OF THE CASE

On November 8, 2013, a Newberry County Grand Jury indicted Appellant Timmy Eugene Rice, Jr. for first degree criminal sexual conduct. R. 443. On July 7, 2014, Appellant's case proceeded to a jury trial before the Honorable Eugene C. Griffith, Jr. Appellant was represented by Charles Verner. David Stumbo and Taylor Daniel represented the State. R. 1, July 7, 2014. Judge Griffith declared a mistrial. R. 5, July 7, 2014.

On August 4, 2014, Appellant's case proceeded to a second jury trial before the Honorable Eugene C. Griffith, Jr. R. 1, Aug. 4, 2014. Appellant was found guilty of the lesser-included offense of third degree criminal sexual conduct with a minor. R. 436, Aug. 4, 2014. Judge Griffith sentenced Appellant to twelve years imprisonment suspended upon the service of six years, with forty-eight months of probation and 200 hours of public service. R. 441, Aug. 4, 2014.

Appellant appealed his conviction and sentence. This brief follows.

ARGUMENT

The trial judge erred by admitting the video recorded statement given by Minor during a forensic interview where there were no particularized guarantees of trustworthiness as required by S.C. Code Ann. Section § 17-23-175, since Minor's statement was elicited by suggestive and leading questions from the forensic interviewer, the statement did not represent a detailed account of the alleged criminal sexual conduct, and the solicitor referenced the statement in closing argument, which prejudiced Appellant.

Relevant Facts

This case involved allegations of criminal sexual conduct with a minor.

On July 15, 2013, Willie Mae Wright reported to the Whitmire Police Department, in Newberry County, that Appellant improperly touched her six-year-old daughter, Minor. R. 177 – 178. According to Wright, Minor told her that Appellant put his finger inside her. R. 134, lines 1 – 6. Appellant walked Minor to and from the school bus each day and looked after Minor while Wright worked at Sterilite in Newberry.¹

Wright maintained that immediately after Minor told her what happened, she went to Appellant's house to confront him. R. 134, lines 11 – 13. Once there, Minor told Appellant's mother, Rose Rice, that Appellant improperly touched her. R. 134, lines 18 – 21. Wright claimed that after she left Appellant's house, she went directly to the police station to file a report. R. 134, lines 18 – 24.

Later that day, Appellant voluntarily walked to the police station and gave a statement that if he improperly touched Minor, it was done while they were playing and

¹ Appellant's mother and Wright were best friends. Wright needed a babysitter when she and Minor moved from North Carolina to Newberry County.

while he was “tickling her.” Appellant denied putting his finger inside of Minor. R. 182, lines 1 – 18; R. 278, lines 8 – 13. There were no physical findings that Minor had been sexually abused. R. 206, line 24 – R. 207, line 6.

Pre-trial Motion to Exclude Minor’s Recorded Statement

Prior to trial, defense counsel moved to exclude Minor’s video recorded statement. R. 94-95, Aug. 4, 2014. Counsel argued that Minor did not narrate answers. Instead, Minor responded to the forensic interviewer’s “leading type questions where if she stopped he would prompt her and then she would catch on to his prompt and . . . complete the answer.” R. 133, lines 16 – 25. Counsel explained that Minor “responded entirely to questions of stimuli.” R. 134, line 2. She did not “narrate the allegations of the abuse.” R. 134, line 1.

The trial judge denied defense counsel’s motion and admitted the recorded statement that Minor gave during the forensic interview. The judge opined that the interviewer “was very open-ended and non-suggestive.” R. 133, line 5 – 6. The judge found inherent trustworthiness in Minor’s response to the forensic interviewer’s questioning. R. 133, lines 12 – 13. The judge concluded that the recorded interview “was found to be within the parameters of” S.C. Code Ann. Section § 17-23-175(A) (2003). R. 94, lines 20 – 22, Aug. 4, 2014.²

Discussion

The trial judge erred by admitting the video recorded statement given by Minor during a forensic interview. There were no particularized guarantees of trustworthiness as required by S.C. Code Ann. Section § 17-23-175. Minor’s statement was elicited by

²The trial judge ruled the issue was preserved for appellate review. When the State requested the court’s permission to publish the video, the trial judge admitted the video “[s]ubject to [defense] objections already previously noted.” R. 121, lines 4 – 5.

suggestive and leading questions from the forensic interviewer, and did not represent a detailed account of the alleged criminal sexual conduct of Appellant. Because the solicitor argued in closing that the inadmissible statement was evidence of Appellant's guilt, Appellant was denied a fair trial.

Under S.C. Code Ann. Section § 17- 23- 175 (A), an out-of-court statement of a child under the age of twelve is admissible in a General Sessions court proceeding if:

- “(1) the statement was given in response to questioning conducted during an investigative interview of the child;
- (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
- (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
- (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.”

In determining “whether a statement possesses particularized guarantees of trustworthiness,” the trial judge may consider, but is not limited to:

- “(1) whether the statement was elicited by **leading questions**;
- (2) whether the interviewer has been trained in conducting investigative interviews of children;
- (3) whether the statement represents a **detailed account** of the alleged offense;
- (4) whether the statement has internal coherence; and
- (5) sworn testimony of any participant which may be determined as necessary by the court.” (emphasis added)

S.C. Code Ann. § 17-23-175 (B)(2003). A leading question is one which suggests the answer desired. State v. Tyner, 273 S.C. 646, 653, 258 S.E.2d 559, 563 (1979) (citing State v. Cook, 204 S.C. 295, 28 S.E.2d 842 (1944)).

See State v. Russell, 383 S.C. 447, 679 S.E.2d 542 (Ct. App. 2009) (finding that the child's out-of-court statement was admissible under section 17-23-175 (A) where statement was given in response to questioning conducted during investigative interview of child, statement was recorded, child testified and was subject to cross-examination on elements of offense and making of out-of-court statement, and trial court found, in hearing conducted outside presence of jury, that totality of circumstances surrounding making of statement provided particularized guarantee of trustworthiness).

Here, the video recorded statement that Minor gave during the forensic interview did not possess particularized guarantees of trustworthiness as required by section 17-23-175 (A). Minor could not describe how Appellant allegedly improperly touched her without being prompted by the interviewer. Minor could not provide details on her own about how Appellant allegedly touched her "private spot."

At one point in the videotape, the interviewer, leading, asked Minor:

"When Junior put his hand in your private spot, where were you? **Which house** were you at?"

However, Minor had not told the interviewer that Appellant touched her private spot at a house. In fact, Minor had not given a location of where Appellant alleged conduct happened prior to the interviewer asking the question.

The solicitor made use of the recorded statement in his closing argument to refute the fact that there were no physical findings of sexual abuse, which was a crucial part of Appellant's defense. See R. 407, lines 9 – 15; R. 408, lines 18 – 19. Specifically, the solicitor argued:

"You have got a six-year-old child that makes an accusation to the mother that no one disputes. They went and confronted [Appellant] about those allegations that no one

disputes who went to a forensic interview and made the same allegations.”

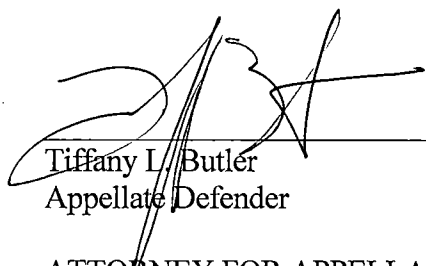
R. 404, lines 20 – 24.

The video recorded statement that Minor gave during the interview was given in response to prompting and leading by the forensic interviewer and was not a detailed account of Appellant’s alleged criminal sexual conduct. The statement did not possess a particularized guarantee of trustworthiness and was, therefore, inadmissible. Because the trial judge allowed the State to utilize the inadmissible recorded statement as evidence of Appellant’s guilt, when there was **absolutely no** physical evidence of sexual abuse, Appellant was unfairly prejudiced and denied a fair trial. See Chaffee v. State, 294 S.C. 88, 362 S.E.2d 875 (1987) (finding error not harmless where prosecutor argued inadmissible evidence at closing).

CONCLUSION

For the grounds argued, Appellant Timmy Eugene Rice, Jr. respectfully requests this Court to reverse his conviction and sentence and remand to the lower court for a new trial with an order to exclude Minor's video recorded statement.

Respectfully submitted,



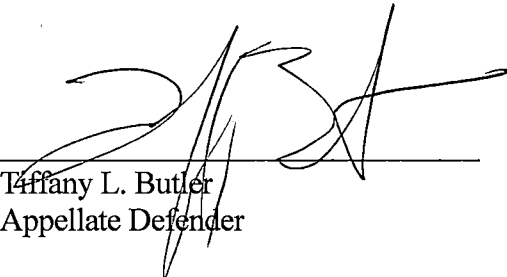
Tiffany L. Butler
Appellate Defender
ATTORNEY FOR APPELLANT

This 20th day of August, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

August 20, 2015



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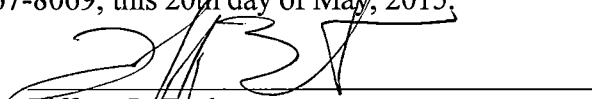
V.

TIMMY EUGENE RICE, JR.,

APPELLANT


CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Susannah R. Cole, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Timmy Eugene Rice, Jr. #360990, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 20th day of May, 2015.


Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of August, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.