

 ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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DEC 29 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ANDREW ANTONIO CLEMONS,

APPELLANT

APPELLATE CASE NO. 2013-001951

Appeal from Anderson County

R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2015-UP-557

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Petitioner Andrew Clemons respectfully petitions this Court for rehearing because this Court may have overlooked the fact that the trial judge abused his discretion in not properly performing his “gatekeeping function” on expert testimony in this case. Dr. Sallie Carter opining that the alleged victim’s injuries were consistent with penetration where the alleged victim testified **no penetration occurred** during the lewd acts was speculative at best, and any probative value it had was outweighed by its unduly prejudicial effect under Rule 403, SCRE.

The key issue in this case *was whether there was any penetration of the alleged victim which differentiated criminal sexual conduct with a minor in the first degree from a lewd act.* Defense counsel argued in closing that the critical element to CSC with a minor charge was penetration. He reminded the jury that the alleged victim had testified that there was no vaginal or anal penetration in this case. Defense counsel mocked the belated assertion that oral sex occurred, “and we’re just now hearing about oral sex six weeks before the trial [where it was not brought up during the forensic interview]” R. p. 211, ll. 2-9. Although the alleged victim denied making up the oral sex allegation for purposes of the trial, she had no explanation for her failure to reveal the alleged oral sex where she was previously repeatedly given the opportunity to add on other lewd or sexual acts to her allegations against appellant. R. p. 172, l. 6- 173, l. 21.

Even though the alleged victim specifically denied that any vaginal or anal penetration occurred, Dr. Sallie Carter was allowed to testify over objection, after watching the forensic interview of the alleged victim, that the alleged victim’s injuries were consistent with her being penetrated. Dr. Carter would interestingly cite to alleged pornography the alleged victim had watched as supporting her opinion that the alleged victim was penetrated despite her testimony to the contrary. R. p. 48, ll. 5-15; 117, l. 2 – 122, l. 16; 155, l. 12 – 159, l. 12; 165, l. 10 – 169, l. 12.

As this Court will recall, the testimony of Dr. Sallie Carter was proffered out of the presence of the jury. Dr. Carter was a physician at Anderson Oconee Pickens Child and Adolescent Mental Health Center. R. p. 88, ll. 1-19. Dr. Carter testified that “there were no abnormalities on the physical exam [of the alleged victim] except for the genital area where she had an absent posterior hymen.” R. p. 95, ll. 9-15. Dr. Carter said this was a significant finding. R. p. 96, ll. 3-10.

Out of the presence of the jury the judge questioned Dr. Carter about her proposed testimony regarding “some intrusion” causing the hymen not to be present. Dr. Carter said “that

would certainly be consistent with a penetrating type of injury.” R. 103, ll. 6-17. She said that other types of injuries could have caused the condition such as falling on a fence post or off a bicycle. However, Dr. Carter maintained that children the alleged victim’s age did not have the language skills to explain what probably happened during a lewd act. R. p. 102, l. 20 – 105, l. 19.

Defense counsel Thomason noted that there was **no testimony** about the injury being caused by some other mishap, and the alleged victim made it clear that the petitioner “**never penetrated her.**” She had testified that the petitioner had rubbed up against her with his penis but he had never penetrated her. R. p. 106, ll. 3-23. (emphasis added).

Dr. Carter maintained that 95% of sexual abuse exams were normal and since the alleged victim’s exam here was abnormal, that was significant, and she continued to question what occurred. R. p. 112, l. 2 – 113, l. 7. The judge then asked Dr. Carter to watch the forensic interview of the alleged victim. The judge observed that Dr. Carter’s testimony seemed to be “**like a bit of speculation.**” R. p. 113, l. 1 – 114, l. 8. (emphasis added).

After Dr. Carter viewed the forensic interview she stated it was very hard for a child to convey what really happened during a lewd situation. She cited the alleged victim watching pornographic films during whatever occurred as influencing her opinion about what may have happened. Dr. Carter testified that this case involved an adult taking “sexual liberties with a child. You have a child that’s really unable to articulate the full, the full --- unable to describe the extent of events.” R. p. 114, l. 24 – 117, l. 16.

Defense counsel Thomason again objected that the alleged victim specifically said she was not penetrated, and he argued that under Rule 403, SCRE whatever probative value this evidence had was outweighed by its unduly prejudicial effect. R. p. 117, l. 2 – 119, l. 18. The judge then

ruled that he was going to allow Dr. Carter to opine about penetration despite the testimony of the alleged victim to the contrary. R. p. 119, l. 21 – 122, l. 11.

Dr. Carter then testified in the presence of the jury that the posterior portion of the alleged victim's hymen was absent. That was the abnormal finding in the exam. R. p. 149, ll. 11-14.

Dr. Carter said after reviewing the pertinent items that **it was her expert opinion that the injuries to the alleged victim were “consistent with a penetrating injury.”** R. p. 159, ll. 7-24.

Dr. Carter also testified that she was concerned after watching the forensic interview because it appeared to her that the child had been “groomed” for sexual acts, and there was also pornography involved. She offered that children have to learn the language of “sexual activity.” Dr. Carter said it would be difficult for the alleged victim to explain what really happened, and she again opined that the alleged victim's abnormality was “consistent with penetration.” R. p. 160, l. 16 – 169, l. 12.

In making his directed verdict motion defense counsel Thomason continued to argue there was not a proper foundation for Dr. Carter's speculation that the alleged victim had been penetrated during a sex act, and that it invited a verdict on that basis. R. p. 181, l. 7 – 182, l. 19.

The solicitor argued to the jury that the alleged victim's testimony in a sexual assault case did not need to be corroborated. R. p. 194, l. 18 – 195, l. 6. The solicitor also argued that petitioner had put his penis against the alleged victim and “there could have been penetration, and again, the law reads, however slight. She may not know. It may not have hurt.” R. p. 201, ll. 12-16.

Defense counsel Thomason noted to the jury the inconsistencies in the testimony that led to a reasonable doubt. He argued the alleged victim did not mention any oral sex on the video when it was fresher in her mind, and she then mentioned it only before the trial much later. R. p. 207, l. 16 – 208, l. 6.

Defense counsel urged the jury to focus on the fact that Dr. Carter's testimony was "a lot of speculation. We don't use speculation. We use facts." R. p. 208, ll. 2-6. Defense counsel argued that first-degree criminal sexual conduct "requires some form of penetration. That's the key to the whole thing is penetration." R. p. 211, ll. 2-5.

In its summary opinion, this Court noted the judge's gatekeeping function, and wrote that "a trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion [when] the ruling is manifestly arbitrary, unreasonable or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003). At a minimum the expert testimony in this case was unfair.

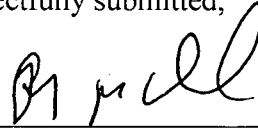
Defense counsel persuasively urged that where the alleged victim did not reference any allegation of oral sex earlier and that her later assertion of it was not credible. The judge even allowed the alleged victim to be recalled for re-cross examination where she still had no explanation for why her allegation of oral sex only made shortly before trial. The alleged victim acknowledged she was given every opportunity to tell the forensic interviewer that she had performed oral sex, and she did not. Although she naturally denied that she was lying about it at trial she had no explanation for this omission from her other detailed allegations. R. p. 172, l. 6 – 173, l. 21.

The testimony of Dr. Carter here was speculative as defense counsel correctly argued. Her opinions about pornography influencing why she thought the alleged victim had been penetrated seemed objectively unusual. (Defense counsel had tried to keep the jury from hearing any allegation regarding pornography but the judge ruled it could not be separated out from what allegedly occurred here). Dr. Carter was also clearly influenced by watching the alleged victim on the forensic interview tape. Her opinion that the alleged victim suffered penetration in this case – despite the alleged victim's **direct denial of penetration** – reveals its speculative nature.

Expert opinions can be excluded when they are not helpful to the factfinder. Generally, an opinion is not helpful if it is speculative or conjectural. Collins, South Carolina Evidence §8.3 at pp. 220-221 (2000 ed.). To the extent Dr. Carter's testimony in this regard was relevant it nonetheless should have been excluded because of its speculative nature which made it unduly prejudicial under Rule 403, SCRE. See State v. Alexander, 303 S.C. 377, 401 S.E.2d 191 (1991). Petitioner understands that "judicial restraint is desirable" when reviewing a Rule 403, SCRE ruling but this case reveals an abuse of discretion where Dr. Carter testified that she believed the alleged victim had been penetrated given the alleged victim's firsthand testimony of what actually occurred to the contrary. See State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986). Not only may evidence that is speculative in nature be excluded, See State v. Compton, 366 S.C. 671, 681-682, 623 S.E. 2d 661, 666-667 (Ct. App. 2005), but, evidence such as that in this case, is also incompetent where it is confusing. It invited the jury to speculate that the alleged victim had been penetrated even though she had testified she had not. See State v. Saltz, 346 S.C. 114, 127-128, 551 S.E.2d 240, 247-248 (2001) (even if evidence of school attendance records was relevant, it was unfairly prejudicial, confused the issues and had a tendency to mislead the jury and invite speculation about the significance of the evidence). "The admission of incompetent evidence having some probative value upon a material issue of fact in the case is ordinarily presumed to be prejudicial." Fowler v. Nationwide Mutual Fire Ins. Co., Op. No. 5256, Shearouse's Adv. Sh. #31 at 87 (August 6, 2014). quoting Mali v. Odom, 295 S.C. 78, 367 S.E.2d 166 (Ct. App. 1988)). See, also, South Carolina State Highway Department v. Graydon, 246 S.C. 509, 144 S.E.2d 485 (1965),

Rehearing should be granted in this case: A verdict based on speculation the alleged victim may have been penetrated where she denied she was penetrated was unacceptable.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 29th day of December, 2015.

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CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 29th day of December, 2015.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 29th day
of December, 2015.

 (L.S.)

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