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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Laurens County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case No. 2014-001106

THE STATE,

Respondent,

v.

RICKY DALE PACE,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly admitted the forensic interview video pursuant to S.C. Code Ann. §17-23-175 (Supp. 2014).

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In August 2011, the Laurens County Grand Jury indicted Appellant Ricky Dale Pace on five counts of lewd act upon a child, arising from incidents involving the ten year old daughter and thirteen year old niece of Appellant's wife. The case was called for a jury trial on May 13, 2014, before the Honorable Eugene C. Griffith, Circuit Court Judge.

Appellant moved pre-trial to exclude the video of a forensic interview with the ten year old victim on the grounds the statute allowing it as evidence was unconstitutional. After hearing arguments, viewing the video and reviewing applicable case law, the circuit court took the motion under advisement until the State offered the video as evidence during the trial. (Trial Transcript [TT], pp. 52-68; Record on Appeal [R.]. pp.8-24).

The older victim (Minor 1) testified Appellant's wife is her aunt, and she started living with them when she was approximately ten years old. When she was thirteen, Appellant started sticking his hands under her clothes, and touching her breasts and "private parts." She stated he did it on more than one occasion, but she did not report them at the time because she did not want to hurt her aunt. She finally told her aunt after her cousin (Minor 2) revealed Appellant molested her too. (TT, pp. 97-102; R., pp. 51-56).

Before Minor 2 testified, the circuit court denied Appellant's motion to exclude the video of her forensic interview. Addressing Appellant's arguments regarding when the video should be published, the court ruled the State could lay the evidentiary foundation through the interviewer, and publish the video during Minor 2's direct examination, which afforded Appellant full cross-examination about statements made during the interview as well as trial testimony. (TT, pp. 120-126; R., pp. 74-80).

Amy Boyer testified she was employed as an interviewer at Beyond Abuse, a sexual trauma center for children, and in that capacity she interviewed Minor 2 in early 2011. She then verified the authenticity of the interview video, which was entered in evidence as State's Exhibit 3. (TT, pp. 126-129, State's Exhibit 3; R., pp. 80-83).¹

Minor 2 testified Appellant started touching her in ways that made her uncomfortable when she was eight years old. She stated he touched her inside her pants, rubbed her and put "toys" that "vibrate" inside her. She eventually told Minor 1 about the abuse because she "couldn't hold it in any longer." (TT, pp. 129-138; R., pp. 83-92).

When the State attempted to publish the video, Appellant objected on the grounds the State failed to present sufficient evidence regarding the interviewer's training, and therefore, there were insufficient "particularized guarantees of trustworthiness" as required by the statute. The court overruled the objection, finding there were sufficient particularized guarantees of trustworthiness within the video itself, including the process used, and the type of questions asked, by the interviewer. (TT, pp. 138-143; R., pp. 92-97).

After the video was published to the jury, Appellant extensively cross-examined Minor 2. During cross-examination, Appellant asked: "And in the video that we watched just now you told Ms. Amy, the interviewer where the vibrator was located, didn't you?" After Minor 2 answered affirmatively, Appellant asked: "And you said it was located on the top shelf in an orange Nike box, is that right?" (TT, pp. 146-149; R., pp. 100-103).

¹ State's Exhibit No. 3 (DVD of Forensic Interview) is on file with the Court.

Appellant subsequently asked Minor 2: “Now, on the video you told Ms. Amy that you couldn’t draw it [the vibrator], right, but you ended up drawing it I believe for this lady right here, Ms. Childress, right?” He further asked: “And you stated on the video that we all just watched that he held you down by force, is that correct?” Minor 2 again answered affirmatively, and Appellant asked: “And he sat on top of you, is that right?” (TT, pp. 151-154; R., pp. 105-108).

Appellant testified Minor 1 and Minor 2 were lying, and he never molested them. He stated they were upset with him because he disciplined them. On cross-examination, he confirmed the existence of the vibrator described by Minor 2, as well as its location on a shelf in a shoe box. (TT, pp. 192-203, 208-216; R., pp. 142-153m 158-166).

The jury convicted Appellant on two lewd act charges as to Minor 2, and acquitted him on the remaining three lewd act charges as to Minor 1. The circuit court sentenced him to concurrent sentences of ten years incarceration on each conviction. (TT, pp. 261-262, 271; R., pp. 209-210, 219). This appeal followed.

ARGUMENT

The circuit court properly admitted the forensic interview video pursuant to S.C. Code Ann. §17-23-175 (Supp. 2014).

Appellant contends the circuit court erred in admitting the videotaped forensic interview because: 1) S.C. Code Ann. §17-23-175 (Supp. 2014) violates the Confrontation Clause as interpreted in Crawford v. Washington, 541 U.S. 36 (2004) and Maryland v. Craig, 497 U.S. 836 (1990); and 2) if constitutional, the statute should require the trial court to make specific findings regarding the necessity of admitting the evidence. This Court addressed the Confrontation Clause issues in State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), and the legislature addressed the necessity of this particular type of evidence in enacting the statute.

Section 17-23-175 provides:

A) In a general sessions court proceeding or a delinquency proceeding in family court, an out of court statement of a child is admissible 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.

S.C. Code Ann. § 17-23-175 (Supp. 2010) (emphasis added).

A. Confrontation Clause

In Anderson, the defendant argued §17-23-175 violated the Confrontation Clause because it did not afford him the opportunity to cross-examine the minor victim during

the forensic interview. Citing Crawford, this Court held there was no Confrontation Clause violation because the minor victim testified in open court and was subject to cross-examination (required by the statute itself), which satisfied the defendant's right to an opportunity for effective cross-examination. 776 S.E.2d at 78-79; *see also* State v. Hill, 394 S.C. 280, 715 S.E.2d 368, 375 (Ct. App. 2011) (the requirements of the Confrontation Clause are met when the declarant testifies and the defendant has the opportunity to cross-examine the declarant, and there is no constitutional restriction on the use of the declarant's prior statements).

The Court further found the defendant's reliance on Craig as requiring contemporaneous cross-examination during the forensic interview itself was "misplaced." The issue in Craig was whether a one-way procedure allowing the minor to testify **at trial** from a remote location via closed circuit television "violated the component of the Confrontation Clause that prefers a face-to-face encounter between the witness and the defendant during the testimony." Again, the Court held the minor victim's testimony under oath at trial, and the defendant's opportunity to cross-examine her, was "all the Confrontation Clause requires." Anderson, 776 S.E.2d at 78-79; *see also* Crawford, 541 U.S. at 59, n. 9 (Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.")

In short, this Court conclusively resolved Appellant's contentions regarding §17-23-175 and the Confrontation Clause in Anderson. It is undisputed Minor 2 testified under oath in open court, with Appellant present in the courtroom. The State published the forensic interview video at the conclusion of her direct testimony, and Appellant

specifically cross-examined her about statements she made during both the interview and her direct testimony.² (TT, pp. 146-154; R., pp. 100-108).

B. Trustworthiness

Appellant also contends the “particularized guarantees of trustworthiness” contained in §17-23-175 do not adequately protect the right of confrontation under Crawford. Again, Appellant ignores crucial facts in this case - Minor 2 actually testified under oath at trial, and Appellant fully cross-examined her about statements made in the video and on direct examination. As the Court held in Anderson, under those facts, there simply is no confrontation issue.

C. Necessity

Finally, citing Craig, Appellant argues §17-23-175 should be limited to cases where the trial court specifically finds admitting the forensic interview videotape in evidence is a “necessity.” As support for this argument, Appellant conflates the investigative interview video admissible under §17-23-175, with closed circuit testimony where the minor testifies at trial, but outside the courtroom and the defendant’s presence, to avoid traumatizing the minor. This conflation is readily apparent from the fact Appellant seeks to apply a “necessity” test.

As a threshold matter, the South Carolina Legislature already determined the type of video at issue is necessary to protect minor victims under the age of twelve at the time of the incident, and such videos are admissible as evidence if they meet the requirements of §17-23-175. The statute was enacted as part of the “Sex Offender Accountability and

²The timing of publishing a video admissible under §17-23-175 is irrelevant to the constitutional analysis, even if the defendant has to recall the minor victim as an adverse witness in order to cross-examine her about the statements made during the interview. Anderson, 776 S.E.2d at 79 (citing Hill).

Protection of Minors Act of 2006,” 2006 S.C. Act 342, Section 8, which clearly reveals the legislative intent to protect minor victims by allowing admission of investigative interview videos under specific guidelines expressly intended to provide “particularized guarantees of trustworthiness,” and the statute must be construed accordingly. *See State v. Elwell*, 403 S.C. 606, 743 S.E.2d 802, 806 (2013) (“The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature.”) (*quoting State v. Scott*, 351 S.C. 584, 571 S.E.2d 700, 702 [2002])).

In this case, the circuit court reviewed the video, and contrary to Appellant’s contentions, did make specific findings regarding its trustworthiness, including the type of questions used to elicit information from the minor victim, the detailed nature of the minor victim’s account of events, and the lack of evidence indicating anyone tampered with the videotape before trial. (TT, pp. 141-143; R., pp. 95-97).

Minor 2 testified at trial, the interview video was published prior to cross-examination, and Appellant had the “opportunity for effective cross-examination” regarding statements made during the interview and at trial. Thus, the Confrontation Clause restrictions imposed by Crawford are never reached, and admission of the evidence is left to statute, rule, judicial discretion, or the like. Section 17-23-175 establishes the requirements for admission of forensic interview videos, the circuit court did not abuse its discretion in admitting the video in this case, and its ruling should be affirmed. *See State v. Scott*, 405 S.C. 489, 748 S.E.2d 236, 241 (Ct. App. 2013) (appellate review is limited to determining whether the trial judge abused his or her discretion in admitting evidence, and appellate court will not disturb the trial judge’s rulings absent a prejudicial abuse of discretion).

CONCLUSION

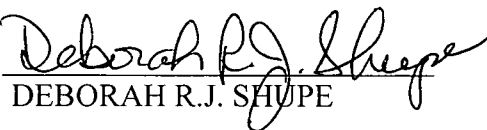
Based on the foregoing, Respondent submits Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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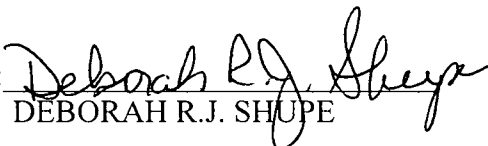
CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, Order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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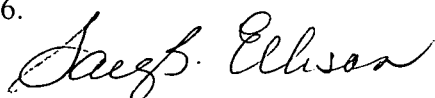
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

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I further certify all parties required by Rule to be served have been served.

This 15th day of January, 2016.



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