

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

R. Lawton McIntosh, Circuit Court Judge

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MAR 10 2016

SC Court of Appeals

Opinion No. 2015-UP-557 (S.C. Ct. App. filed 12/16/2015)

11-GS-04-1977 & 13-GS-04-569

THE STATE,

RESPONDENT,

V.

ANDREW ANTONIO CLEMONS,

PETITIONER

APPELLATE CASE NO. 2016-000309

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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INDEX

INDEX..... 1

CERTIFICATE OF COUNSEL..... 2

QUESTION PRESENTED 3

STATEMENT OF THE CASE..... 4

Procedural history 4

Trial testimony 5

Dr. Carter’s proffer 6

Jury in 8

Continued argument on the penetration issue 8

Court of Appeals..... 9

Rehearing 9

ARGUMENT

The Court of Appeals erred in finding the trial court did not abuse its discretion by allowing Dr. Sallie Carter to testify that the alleged victim’s injuries were consistent with penetration where the alleged victim testified no penetration occurred during the lewd acts since this opinion testimony was speculative, and any probative value it had was outweighed by its unduly prejudicial effect under Rule 403, SCRE 11

CONCLUSION 14

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 1/21/2016.

QUESTION PRESENTED

Whether the Court of Appeals erred in finding the trial court did not abuse its discretion by allowing Dr. Sallie Carter to testify that the alleged victim's injuries were consistent with penetration where the alleged victim testified no penetration occurred during the lewd acts since this opinion testimony was speculative, and any probative value it had was outweighed by its undue prejudicial effect under Rule 403, SCRE?

STATEMENT OF THE CASE

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 petitioner . R. p. 172, l. 6- 173, l. 21.

As will be seen infra, even though the alleged victim specifically denied that any vaginal or anal penetration occurred, Dr. Sallie Carter was allowed to testify over objection -- that her testimony was just speculation, and that it also had to be excluded pursuant to Rule 403, SCRE -- after watching the forensic interview of the alleged victim at the invitation of the trial judge, 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; r. 117, l. 2 – 122, l. 16; r. 155, l. 12 – 159, l. 12; r. 165, l. 10 – 169, l. 12.

Procedural history

Petitioner was indicted at the December 6, 2011 term of the Anderson County Grand Jury for the offense of criminal sexual conduct with a minor in the first degree. R. p. 242. On April 16, 2013, petitioner was also indicted by the Anderson County Grand Jury for the offense of committing or attempting a lewd act upon a minor. The alleged victim in both cases was the same stepdaughter. R. p. 244.

Petitioner 's case came on for trial on May 13, 2013 before the Honorable R. Lawton McIntosh, and the jury. Scott Thomason represented petitioner . Kristin Reeves and Lauren Price were the Assistant Solicitors. R. p. 1.

On May 15, 2013 the jury found petitioner guilty on both counts. R. p. 235, ll. 4-14. Since this was a trial in the absence, the sentence was sealed. On September 12, 2013 Judge McIntosh revealed his sentence of twenty-five years imprisonment for criminal sexual conduct with a minor, and fifteen years imprisonment for committing a lewd act upon a minor.

Petitioner's convictions were affirmed in State v. Andrew Antonio Clemons, 2015-UP-557 (filed December 16, 2015). App. 1-2 Petitioner filed for rehearing. App. 3-10 Rehearing was denied. App. 11.

Trial testimony

Telfia Johnson was the mother of the alleged victim, Johnashja W. (hereinafter "Jo"), and three other children. Petitioner was the father of the three younger children and the stepfather of Jo. Petitioner and Johnson had lived together "on-and-off." R. p. 11, l. 19 – 14, l. 10.

Johnson said that she first became aware of a potential incident with Jo when she heard her daughters arguing about something that had occurred between Jo and petitioner . R. p. 16, l. 3 – 17, l. 25. Johnson said Jo was reluctant to tell her anything but Johnson maintained the next day "she [Jo] gave me enough details to know that I needed to try and get her checked out, but she didn't really go deep into it." R. p. 18, ll. 19-23.

Johnson testified that their pediatrician told her "that she couldn't rule in or out anything, but that she did not think there was any penetration . . ." R. p. 19, ll. 19-22. Johnson believed a friend contacted DSS, and petitioner moved out of the house in August 2010. R. p. 20, l. 1 – 21, l. 2.

Johnson took Jo to the Foothills Alliances for a forensic interview, but she did not bring the allegation up to Jo again.¹ R. p. 21, ll. 3-19.

Jo testified at the time of trial she was in the fifth grade. She said petitioner touched her in a way she “didn’t like” on more than one occasion. R. p. 31, ll. 2-22. Jo stated that petitioner committed lewd acts with her, and showed her pornographic films involving sex acts. R. p. 32, l. 15 – 41, l. 9. She denied that there was any penetration involved in the lewd acts. R. p. 48, ll. 9-15.

Jo also testified that petitioner told her not to tell anyone or they would both get in “very big trouble,” and she maintained petitioner had her and her sister pray together for “forgiveness” for their sins. R. p. 45, l. 18 – 46, l. 3. Jo did claim at trial that petitioner had her perform oral sex on one occasion. R. p. 41, l. 15 – 42, l. 4. This belated allegation of oral sex was strongly attacked by defense counsel as “convenient” given the fact she never made an allegation of oral sex when repeatedly given the opportunity to do so, and the fact there was no evidence of penetration anywhere in the record. R. 205, l. 10 – 208, l. 6

Jo’s nine-year-old sister testified that she remembered seeing Jo run out of petitioner’s bedroom in her panties and shirt. Jo ran into their bedroom. R. p. 53, ll. 15-22. She told her mother about this incident “because I thought it was wrong.” R. p. 55, l. 5 – 56, l. 14.

Dr. Carter’s proffer

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.

¹ The defense and the solicitor were able to agree on redacting the forensic interview by muting portions of it. This was done, according to defense counsel, about a week before trial without the presence of a court reporter. R. p. 2-3.

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.

After watching the forensic interview at the invitation of the judge, the witness told the judge she did **not** “have an opinion to a reasonable degree of medical certainty that this event related by this child is most likely one of the causes of the lack of the hymen being present.” Instead, she admitted, “[t]here just wasn’t enough description to determine whether or not there was penetration. And that’s very hard for a child to, you know, know, you know, at what point the penis crosses the line to the vagina or the anus to really be able to tell us.” After a rambling response about pornographic material and “grooming,” the witness nonetheless offered that she considered her testimony was more than just speculation. App. 114, l. 21 - 117, l. 17.

Defense counsel Thomason continued to object about the speculative nature of this prejudicial opinion -- a 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, and defense counsel's heated objection to the admissibility of this opinion testimony. R. p. 119, l. 21 – 122, l. 11.

Jury in

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.

Continued argument on the penetration issue

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.

Court of Appeals

In a paragraph long summary opinion affirming petitioner's conviction, the Court of Appeals, citing State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009) and State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999), acknowledged the trial judge's "gatekeeping" function on ensuring proposed expert testimony was reliable, and also his duty to ensure that a properly qualified expert's opinion will assist the trier of fact to understand the evidence. The Court found no abuse of discretion in allowing the expert "penetration testimony" despite the trial judge's correct statement that this expert testimony and opinion on penetration appeared "speculative." The Court of Appeals also held a Rule 403, SCRE, ruling by a trial judge allowing testimony should only be reversed under "exceptional circumstances." State v. Andrew Antonio Clemons, 2015-UP-557 (filed December 16, 2015) at p. 2.

Rehearing

On rehearing, petitioner argued the Court of Appeals had overlooked the speculative highly prejudicial expert opinion on penetration which directly contradicted the alleged victim's claims on the forensic interview tape:

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’s 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).

App. 7-8.

ARGUMENT

The Court of Appeals erred in finding the trial court did not abuse its discretion by allowing Dr. Sallie Carter to testify that the alleged victim's injuries were consistent with penetration where the alleged victim testified no penetration occurred during the lewd acts since this opinion testimony was speculative, and any probative value it had was outweighed by its unduly prejudicial effect under Rule 403, SCRE

Whether or not penetration occurred in this case was the key to the verdict on criminal sexual conduct with a minor in the first degree count. The judge did charge the jury that any intrusion, however slight, of any part of the person's body was required for a sexual battery. R. p. 228, ll. 13-18. The jury believing that penetration occurred was the key to the CSC first conviction which carried the twenty-five year prison term.

Defense counsel persuasively urged that where the alleged victim did not reference any allegation of oral sex earlier that her later assertion regarding oral sex 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 was 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.

Again, as seen supra, the testimony of Dr. Carter here was speculative as defense counsel correctly argued. The judge agreed this testimony seemed “[r]ight now, it seems a bit of speculation.” R. 110, l. 13 – 114, l. 4.

Carter watched the forensic interview at the invitation of the judge, and she admitted to the judge she did **not** “have an opinion to a reasonable degree of medical certainty that this event related by this child is most likely one of the causes of the lack of the hymen being present.” Yet

again she tried to maintain some credibility with the trial judge: “[T]here just wasn’t enough description to determine whether or not there was penetration. And that’s very hard for a child to, you know, know, you know, at what point the penis crosses the line to the vagina or the anus to really be able to tell us.” After a rambling response about pornographic material and “grooming,” the witness nonetheless offered that she considered her testimony was more than just speculation. App. 114, l. 21 - 117, l. 17.

However, her opinions about pornography influencing why she thought the alleged victim had been penetrated were 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 apparently 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** – nonetheless highlights its speculative nature. She also reversed her earlier direct answer to the trial judge that she could not say penetration caused the “lack of a hymen” when it appeared her testimony was going to be excluded. App. 119, l. 21 – 121, l. 9.

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).

Dr. Carter’s testimony that she believed the alleged victim had been penetrated – “consistent with penetration” – was also highly prejudicial, and its prejudicial effect outweighed its probative value 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).

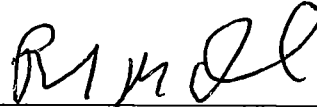
Dr. Carter's *speculative* testimony on the *critical element* of penetration on the criminal sexual conduct with a minor in the first degree count was undoubtedly prejudicial and confusing. Defense counsel correctly argued that any relevance this testimony had was outweighed by its unduly prejudicial effect under Rule 403, SCRE.

"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., 410 S.C. 403, 408, 764 S.E.2d 249, 251 (Ct.App.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), Petitioner was sentenced to twenty-five years imprisonment for this CSC with a minor offense, and Dr. Carter's speculative testimony on penetration was obviously extraordinarily prejudicial, and it is not too much to assert this CSC first conviction was impossible without it. Respectfully, a verdict based on speculation the alleged victim may have been penetrated where she denied she was penetrated should be deemed unacceptable.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on this issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 10th day of March, 2016

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IN THE SUPREME COURT

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R. Lawton McIntosh, Circuit Court Judge

SC Court of Appeals

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THE STATE,

RESPONDENT,

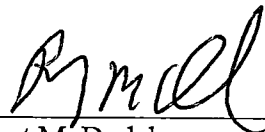
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CERTIFICATE OF SERVICE

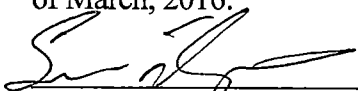
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Henry Gunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Andrew Antonio Clemons #266944, At Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, and the S.C. Court of Appeals, this 10th day of March, 2016.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day
of March, 2016.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.