

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Chester County

APR 06 2016

R. Knox McMahon, Circuit Court Judge

SU Court of Appeals

THE STATE,

RESPONDENT,

V.

JOHN HENRY LOWERY II,

APPELLANT

APPELLATE CASE NO. 2014-002653

FINAL REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... 1

TABLE OF AUTHORITIES ..... 2

ARGUMENT IN REPLY ..... 3

CONCLUSION ..... 8

**TABLE OF AUTHORITIES**

**Cases**

*Dawkins v. State*, 346 S.C 151, 551 S.E.2d 260 (2001) ..... 6

*Smith v. State*, 386 S.C. 562, 689 S.E.2d 562 (2010)..... 4, 5

*State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011)..... 5

*State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011)..... 6, 7

**Rules**

Rule 801(D)(1)(D), SCRE ..... 4

Rule 17, SCRCrimP ..... 4

## ARGUMENT IN REPLY

**The issue of whether the trial court reversibly erred by admitting into evidence a report completed by Dr. Shaunese Singleton after she interviewed Minor 1 is preserved for appellate review.**

In its brief, the State has employed a shotgun style approach to argue that any objection to the admission of Dr. Singletary's report was unpreserved for appellate review. First, the State claimed that Appellant never objected to the report being admitted into evidence, but rather only asked for the opportunity to redact the contents of the report. Resp't Br. p.10 - 11. Second, the State contended that Appellant waived any objections to the content of the report by agreeing to participate in its redaction following the court ruling the report admissible. Resp't Br. p.12 - 13 Neither argument is availing. This issue is preserved for appellate review.

**Whether the trial court erred in admitting the report is preserved for appellate review.**

The State avers that Appellant "had not preserved any issue regarding the admission of the report because he indicated without objection and got the modification he sought for admission." Resp't Br. p. 10 - 11. This statement ignores the on-the-record objection lodged by Appellant prior to the report being published to the jury:

I understand you are letting them in under that hearsay exception, Your Honor. I am just saying that I think that they still should be kept out [as hearsay]. I just want that objection on the record, Your Honor. . . . ***I am not saying that I agree that these should come in. These are coming in over my objection due to your ruling on the 803 hearsay exception.***

R. 218, ll. 14-24 (*emphasis added*).

Next, the State contends that "Appellant never maintained the reports contained impermissible vouching or bolstering." Resp't Br. p. 11. Where the State's first argument ignores

the existence of Appellant's objection, this second argument ignores the content of Appellant's objection.

Defense counsel objected to the admission of the report on the grounds that it constituted inadmissible hearsay that was improperly corroborative of the victim's testimony. R. 216, l. 25 - 217, l. 10; *see* Rule 17, SCRCrimP. Counsel noted that the report exceeded the time and place corroboration exemption provided by Rule 801(D)(1)(D). In support, Appellant cited to *Smith v. State*, 386 S.C. 562, 689 S.E.2d 562 (2010). *Id.*

In *Smith*, the Supreme Court held that trial counsel was ineffective for failing to object to the testimony of a forensic interviewer who "interjected, impermissible hearsay into the trial, which impermissibly bolstered the victim's testimony." 386 S.C., 689 at 564-565, S.E.2d at 630-631. *Smith* is factually very similar to the present case. Smith was convicted of criminal sexual conduct with a minor and the State was heavily reliant on the testimony of the twelve year old complainant. *Id.*

The State bolstered her testimony by calling a forensic interviewer who testified, without objection, that she found the victim to be believable and that the victim had "no reason 'not to be truthful.'" *Id.* Counsel's failure to object to this testimony constituted ineffective assistance of counsel. Citing to Rule 801(D)(1)(D), SCRE, the Court held that "the forensic interviewer's testimony substantially exceeded the limitations of time and place." *Id.* at 566-567, 689 S.E.2d at 632.

In Appellant's case, the trial court agreed that the report was hearsay, but ruled that the statements made for the purpose of medical treatment exception to the hearsay rule made the report admissible. R. 217, l. 14 - 218, l. 13. Defense counsel then reiterated her hearsay objection and again stated that the report exceeded the limited, non-hearsay corroborative testimony exemption

allowed in criminal sexual conduct cases. *Id.* Only after the court ruled that the hearsay contained in Dr. Singletary's report was admissible, did defense counsel then address redactions. *Id.*

In sum, Appellant objected to the entire report on the grounds that it, like the forensic interviewer's testimony in *Smith*, was inadmissible hearsay not fitting within any exception or non-hearsay exemption. *State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011) (defense counsel's challenge to the evidence was presented with sufficient specificity to inform the court of "the point being urged as objectionable").

The court agreed that the report was hearsay, but ruled that portions of the report were admissible under the medical records exception to the hearsay rule. Therefore, the issue of whether or not the report constituted impermissible hearsay evidence is preserved for review.

**Defense counsel did not waive her prior hearsay objections to the report by agreeing to redact portions of the report prior to it being published to the jury.**

The State next argued that Appellant waived any objection to the admissibility of the report by participating in the report's redaction. Resp't Br. p. 12 - 13. The State cites to defense counsel's statement that the parties had agreed to the redactions required by the court's ruling. *Id.* Tellingly, the State omitted the context of defense counsel's statement, which - as detailed above - reveals that the report was being admitted into evidence over Appellant's objection. R. 218, ll. 14-24; *see* Rule 103(a)(1), SCRE (stating for alleged errors in evidentiary rulings to be preserved, "a timely objection or motion to strike" must appear in the record "stating the specific ground of objection, if the specific ground was not apparent from the context.").

That defense counsel may have failed to redact every possible statement that exceeded the narrow Rule 803(4), SCRE, exception does not mean that Appellant waived his hearsay objection to the report being admitted into evidence. The trial court's error was in admitting the report into

evidence at all. The vast majority of the report consisted of statements not made by Minor 1, but rather conclusions reached by Dr. Singletary or the forensic interviewer calculated to bolster Minor 1's credibility.

For example, the forensic interviewer's conclusions were included in the report under a section titled "***Child Maltreatment Protocol***" where it was noted, in a bolded section titled "***Outcome of Forensic Interview,***" that Minor 1 had made a "***[c]lear disclosure of abuse.***" R. 396 (*emphasis added*); see also *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (portions of forensic interviewer's report were inadmissible as expert testimony on the veracity of a child's accusations is improper). In addition, large portions of the section titled "Child's Statement" recounted statements and observations made by Dr. Singletary, not Minor 1, "I spoke with [Minor 1] to build a rapport . . . . I then asked her to tell me what happened. She was tentative and hesitant. Her affect was apprehensive and sad appearing." *Id.* at p. 4.

To the extent these can be considered statements of Minor 1, they are totally irrelevant to a medical diagnosis and fail to corroborate the time and place of the alleged abuse. *Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001) (corroborative witness testimony is limited to time and place of the alleged assault, it cannot include "details or particulars" regarding the assault). Similarly, Dr. Singletary's "Diagnosis and Conclusion" provided that:

[Minor 1] is a 12 year old pubertal female who ***provided a history of genital-vaginal contact with [Appellant]***. She provided a history of genital discomfort during and after the alleged incident. ***The result of her genital exam reveal . . . no current signs of genital injury.*** Based on her history this could represent interval healing of an incurred genital injury. ***This finding is consistent with her history provided based on evidence based medical literature. A normal exam does not confirm nor does it discredit her history.***

R. 404 (*emphasis added*); *see also Jennings*, 394 S.C. at 480, 716 S.E.2d at 94-95.

This was not a medical diagnosis. This was a credibility assessment by an advocate masquerading as a treating physician. Thus, contrary to the State's claim, Appellant's requested relief was that the report be ruled inadmissible. Resp't Br. p. 10; 12-13. Appellant did not receive that relief.

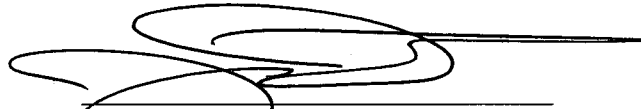
The State appears to believe that Appellant, when faced with the imminent publication of the report to the jury, was required to make a kind of Faustian bargain whereby to preserve his hearsay objection, Appellant had to allow the report into evidence un-redacted. To the contrary, any argument that Appellant waived his hearsay objection by imperfectly redacting the report is without merit.

Appellant did not induce or contribute to the trial court's error and did not waive his hearsay objection by participating in the redacting of the report. Defense counsel's duty was to preserve her hearsay objection to the entire report - which she did - and, then to mitigate the damage. Accordingly, whether the trial court erred reversibly by admitting the report into evidence is preserved for appellate review.

**CONCLUSION**

By reason of the foregoing additional argument, Appellant's conviction should be reversed and this case remanded to the Chester County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

John H. Strom  
Appellate Defender

ATTORNEY FOR APPELLANT.

This 6th day of April, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon William M. Blicht, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of April, 2016.

  
John H. Strom  
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me  
this 6th day of April, 2016.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina

My Commission Expires: May 12, 2025.