STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chester County
Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case Tracking No. 2014-002653

The State, Respondent,

vs.

John Henry Lowery, II, Appellant.

FINAL BRIEF OF RESPONDENT

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III. The trial court properly qualified the SANE nurse trainee as an expert.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On November, 3, 2013, the victim and her younger sister went to their aunt's house to have their hair done. At the time, the victim was twelve years old. (T.105-106; R. 62-63). The victim and her sister spent the night at her aunt's house and slept on the living room floor on pillow cushions. (T.108; R. 65). Appellant, the aunt's boyfriend, woke the victim up turning on a light. He then used his finger to try and guide his penis into the twelve-year-old victim's vagina. (T.112; 116; R.69; 73). He was unable to get it all the way in so he pushed it in as far as he could get it to go. (T.113; R. 70). After penetrating the twelve-year-old victim, Appellant asked her if she was going to tell anyone. She responded no, and he remained on the arm of the couch until she fell back asleep. (T.114; R. 71).

The next morning, the victim's younger sister told the victim she saw what Appellant did and saw him with no pants on. (T.116-117; R. 73-74). The twelve-year-old victim told her aunt what happened. (T.118; 147-148; R.75; 104-105). The aunt then brought the victim and her sister in to her bedroom to confront Appellant. The victim told what happened and when asked if it was true the younger sister started crying. (T.119; R. 76). Afterward, the victim's aunt took Appellant back to his mother's house and then took the victim and her sister home. (T.120; R. 77). After reporting the sexual assault to police, the victim ultimately was seen by Piedmont Medical Center and examined by a nurse. (T.121-122; R. 78-79).

Appellant originally denied anything happened with the twelve-year-old victim. (T.150; R. 107). However, he later told the victim's aunt that "when he came out of the shower [the victim] offered him fellatio and she tried to kiss him and he pushed her off of

him and he let her continue on, I guess. That's what he said. And he said he came. He ejaculated in her mouth and let her rub it around her private area." (T.151; R. 108). The victim's aunt took Appellant to the street where his mother, sister, and an aunt all live so he was away from her house. (T.158-159; R. 115-116).

At Piedmont Medical Center, the twelve-year-old victim saw Jennifer Propst, a register nurse, who at the time was training to become a sexual assault nurse examiner (SANE) nurse.[1] (T.175-176; R. 129-130). Nurse Propst obtained a history from the victim, conducted a physical exam of the victim, collected swabs for DNA testing as part of a sexual assault kit, and collected the victim's underwear. (T.180-183; R.134-137). The history she obtained included the twelve-year-old victim being digitally penetrated as well as having a "penis placed against her vagina in a forceable [sic] nature." (T.182; R. 136). Nurse Propst took another swab of the minor victim's thigh for suspected bodily fluids. (T.190; R. 144).

During the physical examination, Nurse Propst indicated the fossa navicularis, an area of tissue at the base of the vaginal canal, was red in comparison to the surrounding tissue and also tender to the touch. She also documented a small tear in the area. (T.192-193; R. 146-147). Nurse Propst indicated the injuries observed were consistent with someone digitally penetrating the vagina of the twelve-year-old victim or either attempting to put their penis in the vagina of the twelve-year-old victim. (T.193; R. 147).

Lieutenant Levister with the Chester Police Department investigated the incident. (T.200; R. 154). Lieutenant Levister obtained arrest warrants for Appellant. After enlisting the assistance of the sheriff's department, officers took over a week trying to

[1] At the time of testifying at trial, Nurse Propst had completed SANE training and had additional training specific to pediatric cases.

locate Appellant. They ultimately located Appellant hiding in the attic of his mother's residence. (T.207; 209-210; R.161; 163-164).

Ms. Gibson, an evidence technician in the DNA lab of SLED, testified she received a pair of underwear as part of the case. (T.279; 282; R. 224; 227). She examined the underwear under an alternate light source, which would cause bodily fluids to fluoresce. The areas are then tested with chemicals which change color when there is a possibility the stain may contain semen. (T.282; R. 227). Ms. Gibson took a cutting from the exterior left rear side of the victim's underwear after the area indicated the presence of semen. The item was then forward to the DNA section for analysis. (T.285; R. 230).

Ms. Herron, a forensic serologist with SLED, received a sexual assault kit and the cuttings from Ms. Gibson related to the twelve-year-old victim. (T.289; 291; R. 234; 236). She indicated she received a positive test for semen on the vaginal swabs performed on the victim. She also found semen indicated in the swab of the suspected bodily fluids taken from the victim's thigh. (T.294; R. 239). Finally, she found semen indicated in the cutting of the victim's underwear. (T.295; R. 240). All the evidence was then forwarded to the DNA section at SLED.

Mr. Steward, a SLED expert in DNA analysis, received the vaginal swab, the suspected bodily fluid swab, the underwear cutting, and the buccal swabs of both the victim and defendant to try and determine if any male DNA was present on the victim. (T.299-300; 304; R.244-245; 249). No male DNA was found on the vaginal swabs. (T.305; R. 250). In the suspected bodily fluid swab, a partial DNA profile was developed from the sperm portion of the fluid, but it was insufficient for reliable interpretation.

(T.305-306; R. 250-251). In the non-sperm portion of the fluid, he located a mixture of at least two individuals, but again the profile was insufficient for reliable interpretation. (T.306; R. 251). However, on the cutting for the underwear, semen was identified containing DNA matching the DNA profile of Appellant. (T.307; R. 252). He indicated the likelihood of randomly selecting an individual having the same DNA profile matching the semen was one in 720 trillion. (T.307; R. 252). As Mr. Stewart explained, the chance of finding someone else that matched the DNA on the underwear "[w]ithin a degree of scientific certainty . . . would be slim to none." (T.308; R. 253).

ARGUMENT

I. Even if the trial court erred in qualifying the forensic interviewer as an expert, the error is entirely harmless.

Appellant contends the trial court erred in admitting the testimony of the forensic interviewer, Ms. Dixon, as expert testimony. Even if the trial court erred in admitting Ms. Dixon as an expert in forensic interviewing of children, and allowing her to testify as an expert regarding the RATAC method, the error is entirely harmless in light of the evidence in the record.

The State acknowledges the South Carolina Supreme Court has found a person should not be qualified as an expert in forensic interviewing, does not recognize forensic interviewing as an area of expertise, and finds a forensic interviewer is restricted to testifying to facts. See State v. Kromah, 401 S.C. 340, 357 n.5, 737 S.E.2d 490, 499 n.5 (2013); State v. Anderson, 413 S.C. 212, 219, 776 S.E.2d 76, 79 (2015). However, the Court has recognized any error in admitting the testimony as an expert can be harmless. See Kromah, 401 S.C. at 360, 737 S.E.2d at 501(finding error in qualifying forensic interviewer entirely harmless beyond a reasonable doubt and stating: "An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result.").

> Most trial errors, even those which violate a defendant's constitutional rights, are subject to harmless-error analysis. Indeed, "the harmless-error doctrine is essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than the virtually inevitable presence of immaterial error.'"

State v. Rivera, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)). "Whether an error is harmless depends on the circumstances of the particular case." State v. Mitchell, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.'" Id. (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

In the instant case, the testimony presented by the forensic interviewer, **which Appellant's counsel admitted was not prejudicial to his client**, could not have affected the result of the trial. (T.240; R. 194). The testimony merely discussed the fact the child was interviewed by the forensic interviewer who offered no opinions or conclusions with her testimony.

Additionally, the State presented much more than just the testimony of the child, including DNA and physical evidence of penetration, so this case was not merely a credibility battle between the twelve-year-old victim and Appellant. As discussed above, Appellant's semen was found on the panties of the twelve-year-old victim. Semen was also found in a sample of bodily fluid taken from the victim's thigh, though this could not conclusively be linked to Appellant.[2] In addition, Nurse Propst testified to physical injuries sustained by the twelve-year-old victim, including redness to the vaginal wall and a microtear which would be consistent with penetration. (T.192-193; R.146-147). Additionally, Appellant was not found for several days, and, when he was finally located, he was hiding in his mother's attic. See State v. Burgess, 408 S.C. 421, 440, 759 S.E.2d

[2] A clear and logic inference can certainly be drawn from this evidence that the same donor provided the sperm found on the underwear as well as the leg of the twelve-year-old victim, especially in light of the fact there is absolutely no testimony regarding any other possible donor for the sample.

407, 417 (2014) (finding evidence of flight is admissible as indicating consciousness of guilt). Finally, the victim's aunt testified Appellant confessed to having the girl perform oral sex on him, which would satisfy the required sexual battery necessary for first degree CSC with a minor. See S.C. Code Ann. §§ 16-3-651(h) and 16-3-655(A)(2). Accordingly, it is readily apparent the testimony by the forensic interviewer, improperly admitted as expert testimony, could have no effect on the jury's ultimate conclusion of guilty.

II. Appellant cannot complain of improper content in the medical records when he was given the opportunity to redact the records and agreed to the redactions as completed. Further, any issue related to admission of the report is not preserved for review on appeal. Appellant's only objection was pursuant to hearsay under Rule 801, SCRE, and the redactions to which he agreed were intended to bring the report within the exception to hearsay for statements related to medical diagnosis under Rule 803(4), SCRE. Finally, even if admitted in error, the admission is entirely harmless.

Appellant maintains the trial court erred in admitting medical records, alleging they impermissibly bolstered the victim's testimony and went beyond the time and place exception of Rule 801(d)(1)(D), SCRE. First, the medical records of Dr. Singleton were admitted without objection by Appellant. In addition, the reports were admitted properly pursuant to the medical diagnosis exception to hearsay under Rule 803(4), SCRE. The Court ordered redaction of any information beyond that necessary for medical diagnosis, and the parties were given the opportunity to redact any improper content of the reports. Because Appellant agreed with the redactions performed he cannot now complain about any of the content of the reports. Finally, any error in the admission of the reports is entirely harmless because they could not have affected the result of the trial based on the evidence presented.

Preservation

The State sought to admit State's Exhibit 2 into evidence and indicated it did so "with the understanding that there might be some things we need to discuss about that later." Appellant's responded: "Without objection as long as it is not published to the jury until after we go through those modifications." (T.255-256; R. 209-210). The parties later redacted the report and agreed to the redactions. (T.271; R. 216). As a result, he

has not preserved any issue regarding the admission of the report because he indicated without objection and got the modifications he sought for admission. See State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (finding counsel's statement "no objection" when evidence admitted waived any issue regarding its admission).

Further, Appellant never maintained the reports contained impermissible vouching or bolstering. He merely argued they went beyond the time or place definition of non-hearsay found in Rule 801(d)(1)(D), SCRE. As a result, he cannot raise one ground at trial and another ground on appeal. See State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Admission under Rule 803(4), SCRE

At issue is the trial court's admission of State's Exhibit 2, reports generated by Dr. Singleton. Appellant objected to the admission of the reports as hearsay and alleged they went beyond the time or place exception found at Rule 801(d)(1)(D), SCRE. The trial court agreed, by specifically finding the reports were hearsay. (T.273; R. 218). However, all Rule 801(d)(1)(D) does is define a class of statement that is not hearsay. Anything outside of that class, while hearsay, can still be properly admitted pursuant to one of the exceptions found at Rule 803, SCRE.

The trial court found the reports, once redacted, met an exception to the hearsay rules. The reports were expressly entered into evidence by the trial court subject to the

medical diagnosis exception to hearsay found at Rule 803(4), SCRE. The court explained: "I would agree they are hearsay, but the exception of the hearsay rule is 803 (4); statement made for the purposes of medical diagnosis or treatment describing medical history or past or present symptoms. That's what I thought you all were redacting." (T.273; R. 218). The trial court continued his explanation that the parties were to redact whatever went beyond the medical diagnosis exception, in particular any statement regarding who committed the sexual assault because it is not necessary for diagnosis. (T.275; R. 220). As a result, Appellant received the relief he requested, which was that the report not be admitted in violation of the restriction to time or place found under Rule 801(d)(1)(D).

Instead, information beyond time or place was only admissible if it met the requirements of Rule 803(4) and the exception to the hearsay rule. The reports were supposed to be redacted by the parties to remove any information not meeting Rule 803(4). Pursuant to Rule 803(4) "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are admissible into evidence, even though hearsay. The records, which were supposed to be redacted by the parties agreement, were properly admitted pursuant to Rule 803(4).

Waiver

Appellant seems to complain that some of the material contained in the report from Dr. Singleton goes beyond that which is properly admitted pursuant to Rule 803(4). To the extent this is his argument, the issue has been waived. Appellant and counsel for

the State were tasked with redacting the improper statements, and the trial court made it clear the report would not be admitted until the parties agreed to what information not in support of a medical diagnosis or treatment should be redacted. After the State sought to admit the redacted documents and the trial court ascertained whether the parties agreed to the redaction, Appellant's counsel specifically indicated: "We redacted everything other than what is completely necessary for medical diagnosis. Under your ruling you are letting them in under that reason." (T.275; R. 220). As a result, he cannot now complain that any of the statements in the reports were improperly admitted as bolstering, vouching, or exceeding the Rule 803(4) hearsay exception, because he specifically agreed all necessary redactions were completed. See State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) ("Appellant can neither take advantage of an error he contributed to at trial nor preserve a vice and, upon learning of the outcome of trial, raise it on appeal."); State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct has induced."); Id. (further holding the Appellant could not complain when he "consented to the procedure proposed by the trial [court]").

Harmless Error

Finally, as discussed in the previous issue, any error in admitting the testimony is entirely harmless. Appellant maintains the cumulative nature of the testimony is the prejudice created and cites to Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994), for the *per se* rule. The South Carolina Supreme Court has repudiated the per se rule, and has reaffirmed the admission of testimony, even cumulative testimony, can be harmless. State v. Jennings, 394 S.C. 473, 478–79, 716 S.E.2d 91, 93–94 (2011) (Kittredge &

Hearn, JJ., concurring) (Toal, C.J., dissenting) (rejecting a per se rule of prejudice when corroboration testimony is cumulative to the victim's testimony); State v. Young, 378 S.C. 101, 107, 661 S.E.2d 387, 390 (2008) (requiring a showing of prejudice for an appellate court to reverse based on the erroneous admission of evidence). As a result, based on the DNA evidence, the fact Appellant's semen was located on the panties of the twelve-year-old victim as well as semen being found on her thigh, the physical findings of the Nurse Propst showing redness of the vaginal wall and other indications consistent with penetration, and the confession by Appellant to the victim's aunt regarding fellatio with the twelve-year-old victim, any error in the admission of the records is entirely harmless.

III. The trial court properly qualified the SANE nurse trainee as an expert.

Appellant contends the trial court erred in qualifying Nurse Propst as an expert witness. First, the issue is not preserved because Appellant made a general objection. Even if preserved, the trial court properly qualifies Nurse Propst as an expert based on her training, education, and experience. Additionally, Appellant's main contention on appeal is Nurse Propst had not completed her training as a SANE nurse and, therefore, was not sufficiently qualified to render her opinion. Nurse Propst was sufficiently qualified, and any question regarding the completion of SANE nurse training went to the weight and not the admissibility of her testimony as an expert.

Preservation

First, when the State offered Nurse Propst as an expert, Appellant responded by stating: "Your Honor, based on 702 objection we would object to this witness being qualified as an expert." (T.177-178; R. 131-132). He did not specify the grounds for the objection. He did not clarify if the objection was based on the area of expertise being recognized, the qualifications of the expert witness, or whether the testimony would assist the trier of fact. All were possible objections based on his general statement that the objection is pursuant to Rule 702, SCRE. As a result, the general objection did not preserve Appellant's specific issue on appeal that Nurse Propst's failure to complete her training as a SANE nurse rendered her unqualified to testify regarding the causation of the redness and other vaginal injuries the twelve-year-old victim suffered. See State v. Jennings, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) ("An objection must be made on a specific ground."); State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007) (finding a broad generic objection not sufficient to preserve issue for review on appeal); State v.

Varvil, 338 S.C. 335, 340, 526 S.E.2d 248, 251 (Ct. App. 2000) (finding [a] general objection is ordinarily insufficient to preserve an issue for appeal.).

Merits

On the merits, Nurse Propst was sufficiently qualified to render an opinion and the trial court did not err in admitting her testimony as an expert witness. "The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion." State v. Chavis, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015). "A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." Id.

Rule 702, SCRE, provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "To be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." Risher v. S. C. Dep't of Health & Envtl. Control, 393 S.C. 198, 205, 712 S.E.2d 428, 432 (2011).

Nurse Propst was a registered nurse. She began her training towards becoming a certified SANE nurse. She received additional training to become familiar with the sexual assault kit, become familiar with how to properly collect and avoid contamination of evidence, collect history from the patient by staying objective, complete a chain of custody, and do detail genital exams. (T.176; R. 130). She also completed clinical portions of the training including conducting pelvic examinations and being monitored

during sexual assault cases. (T.176; R. 130). The twelve-year-old victim was the fifth and final monitored sexual assault case Nurse Propst had to complete. (T.180; R. 134). At the time of trial for her testimony, Nurse Propst completed her SANE training and was a certified SANE nurse.[3] (T.177; R. 131). Additionally, prior to testifying Nurse Propst completed a pediatric SANE course. (T.177; R. 131).

The testimony clearly established Nurse Propst's qualifications to testify regarding her examination of the twelve-year-old victim and the injuries the victim sustained. Even without having completed the SANE training, her expertise as a registered nurse would have been sufficient to present the testimony to the jury and allow the jury to assign whatever weight it deemed appropriate.

Accordingly, any deficiency in her training, especially in light of the fact she had completed the training prior to testifying at trial, inured solely to the weight of her testimony and not to its admissibility. "Generally, defects in the amount and quality of education or experience go to the weight of the expert's testimony and not its admissibility." State v. Von Dohlen, 322 S.C. 234, 248, 471 S.E.2d 689, 697 (1996) (citing State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993)). The fact Nurse Propst had not completed her training as a SANE nurse at the time she saw the twelve-year-old victim[4] is something the jury could consider in the weight it gave her testimony, but it does not render the trial court's decision to admit her as an expert an abuse of discretion.

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[3] The State notes is should be at the time of her testimony when her qualifications are viewed, and not at the time she conducted the examination. Her procedures, experience, and training regarding the actually performance of the examination are clearly within the realm of the jury and not a question regarding the admission of her testimony as an expert at trial.

[4] Again, Nurse Propst completed the SANE training prior to being admitted to testify as an expert.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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PROOF OF SERVICE

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

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I further certify that all parties required by Rule to be served have been served.
This 11th day of April, 2016.

Sally Ellison

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