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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL EDWARD WILLIAMS,

APPELLANT

APPELLATE CASE NO. 2014-002241

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. Did the trial court err in denying Appellant's motion that South Carolina Code Section 17-23-175 was unconstitutional based on a violation of the Confrontation Clause when Appellant did not have the opportunity to cross examine the child during the making of the video tape interview¹ and the solicitor violated the statute by not asking the child questions about the incident during direct thus barring effective cross-examination because the only reason the videotape is constitutional is because the child testifies on direct about the elements of the offense and appellant can cross- examine the child on the offense?
2. Did the trial court err in denying Appellant's motion that the videotape should not be admitted as evidence because the forensic interviewer asked leading questions which were barred by South Carolina Code Section 17-23-175 and used the RATAC method of interviewing, a nonscientific method, which affected the trustworthiness of the interview?

¹ State's Exhibit 7 (forensic interview video) is on file with this Court.

STATEMENT OF THE CASE

In February 2013, the Greenville County Grand Jury indicted Michael Edward Williams on the charges of criminal sexual conduct (CSC) with a minor first degree and criminal sexual conduct with a minor third degree (CSC). On October 6-8, 2014, Williams proceeded to trial before the Honorable Steven H. John and a jury. Williams was represented by Dorothy Manigault, and the state was represented by Lisa Bentley. R. 1. The jury found Appellant Williams not guilty of the CSC with a minor first degree but found him guilty of the CSC with a minor third degree. R. 138, ll. 19 – R. 139, ll. 23. Judge John sentenced Williams to fifteen years incarceration. R. 143, ll. 15 – R. 144, ll. 5. Williams' attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

Tammy Sutton lived with her five year old daughter in Greenville. Ms. Sutton became friends with Appellant Michael Williams through her next door neighbor who was Williams' cousin. She and Williams were strictly friends as it was not a romantic relationship. They saw each other about once a week for dinner or bowling. Her daughter would always go along as Williams had a good relationship with the child. R. 26, ll. 1 – R. 32, ll. 8.

On the weekend of this incident which occurred March 31, 2012, Williams spent Saturday night at Sutton's home. He slept in the child's bed, but the child slept with her mother. Williams spent most of the day there Sunday. He left at 6:00 p.m. because Ms. Sutton was going to get her mother to spend the week with Ms. Sutton. Her mother was going to keep the child because Ms. Sutton had a temporary job. R. 32, ll. 9- R. 34, ll. 14.

That Sunday, the day of the alleged incident, Ms. Sutton said Williams was never 100 percent alone with the child as Ms. Sutton was always in the house, but maybe in a different room. She was always nearby. Williams and the child were usually in the playroom or outside. R. 34, ll. 15 – 25.

When the alleged incident occurred on March 31, 2012, Williams and the child spent about six hours in the playroom reading books and playing. Ms. Sutton could see them at times and could hear them. She checked on them numerous times. When it was time to leave and get her mother, she told Williams he had to leave. He got up from the floor where the child was lying on her side. The child was tugging at her shorts and panties which seemed odd to her mother. Ms. Sutton asked the child why she was tugging at her clothes, and then asked her if Williams touched her private. The child could tell her mother was

upset and the child started crying as if she had done something wrong. Ms. Sutton admitted that she was upset. R. 35, ll. 1 – R. 40, ll. 4.

After returning from getting her mother, Ms. Sutton called her next door neighbor who was Williams' cousin, and then called 911. The police responded, and Ms. Sutton talked to an investigator. She also called Williams and confronted him about the incident through a text message. She told him that he could not be around her daughter anymore. R. 40, ll. 5 – R. 47, ll. 3.

Investigator Michael Robertson contacted the child's mother, Ms. Sutton, on April 3, 2012. He took a written statement from her. Then he referred the child to the Julie Valentine Center, the child advocacy center. He did not interview the child but did observe the interview. R. 75, ll. 1 – R. 79, ll. 5.

Investigator Robertson then met with Appellant Williams who agreed to come to Investigator Robertson's office on May 4, 2012. When he told Williams that he was accused of sexual abuse of the child, Williams denied it. Then Williams voluntarily gave a statement denying the incident. R. 79, ll. 7 – R. 87, ll. 20.

Sarah Davis was the interviewer who talked with the child at the advocacy center on April 30, 2012. The interview was taped. According to Ms. Davis, the child was five at the time of the interview, and was difficult to understand at times. However, Ms. Davis would repeat back to the child what Ms. Davis heard to allow the child to correct her if Ms. Davis did not hear correctly. The solicitor moved the tape of the child's interview into evidence as Exhibit 7. R. 58, ll. 24 – R. 71, ll. 12.

When the solicitor moved the taped interview into evidence, defense counsel objected. An in-camera hearing was held. Defense counsel argued to the court that she was

challenging the constitutionality of South Carolina Code Section 17-23-175 which concerned the admissibility of out of court statements. She renewed her objection to the fact that the video of the interview “circumvented the confrontation clause rights” of the Appellant. The state argued that Section 17-23-175 had been reviewed by the Supreme Court and was found to comply with South Carolina law. The Legislature had put safeguards in the law to ensure there was no violation of the confrontation clause. The judge found that Section 17-23-175 was not unconstitutional regarding the confrontation clause. The judge ruled that the child had testified and had been subject to cross-examination. R. 63, ll. 4 – R. 65, ll. 7.

Defense counsel then argued that the video tape was suggestive in nature as the questioning was leading and suggestive. There were leading questions meant to elicit answers. In addition, there were multiple choice answers. The forensic interview protocol did not constitute a scientific method. The judge ruled that the questions were not leading but were asked in such a way that the response elicited could be of any nature. The videotape of the child’s interview was admitted into evidence over the objection of the defense. R. 64, ll. 1 – 81, ll. 24.

The videotape was published to the jury. On the tape, when the interviewer told the child that no one should touch certain body parts of a girl such as her “boobies” or her bottom, the child said that Michael (Williams) touched her bottom with his finger and his tongue. The child said she had her clothes on. His finger was not in her bottom but touched her bottom. She said it did not feel good when Michael touched her. Then she said that his tongue did not touch her skin but touched on top of her clothes. Then the child said he did not touch her bottom. The child consistently vacillated. The interviewer usually gave the

child three choices for an answer. Ms. Davis said multiple choice was a type of non-leading question. She was trained by the RATAC method. See State's Exhibit 7; R. 70, ll. 11- R. 74, ll. 15.

Dr. Nancy Henderson, director of forensic pediatrics at the Greenville Hospital System and a pediatrician, examined the child on May 3, 2012. Everything on the child's exam was normal. R. 88, ll. 15 – R. 89, ll. 25; R. 90, ll. 16.

The child testified at the trial immediately after her mother and before Sarah Davis. The videotape was admitted during Ms. Davis's testimony. During the child's direct testimony, the solicitor asked her no questions about the incident. The solicitor asked her if she knew any of the people there. The child said she knew her mother and Mike. The child pointed to Mike. When asked who Mike was, the child answered that she did not know. When asked if she remembered talking to Mike, she said yes but did not know when she talked to him. R. 66, ll. 18 – 22; R. 48, ll. 6 – R. 53, ll. 10.

Defense counsel cross examined the child but was obviously hampered in asking questions about the incident because there was no testimony about it on direct. R. 53, ll. 9 – R. 57, ll. 21.

Defense counsel made a pretrial motion to exclude the videotaped interview of the child during the pretrial in camera testimony of Sarah Davis, the interviewer. This motion to exclude was made on the basis that it was a violation of the confrontation clause because Williams did not have the opportunity to cross examine the child during the taped interview. R. 4, ll. 1 – R. 11, ll. 3.

The solicitor responded that pursuant to Section 17-23-175, the child was going to testify at trial in order to address any confrontation clause issues. The judge allowed the playing of the video. R. 11, ll. 3 – 11.

During cross examination of Ms. Davis during the pretrial hearing, defense counsel pointed out that the child said at one point during the interview that she was wearing shorts. Then, when shown the doll which wore a dress, the child said she was wearing a dress during the incident. Ms. Davis agreed that was the case. R. 12, ll. 1 – 23.

Defense counsel argued that the videotape should not be allowed into evidence because the interviewer used a lot of leading questions, and repetitive questions. The interviewer was not using scientific methods of interviewing as there were repetitive questions in addition to the leading questions. Ms. Davis was soliciting the answers that Ms. Davis thought should come from the child according to whatever information was provided to her. Despite the glaring inconsistencies, the judge ruled that the statement did have trustworthiness as it had internal coherence and met the requirements of the statute. R. 13, ll. 6 – R. 17, ll. 24.

At the close of the state's case, defense counsel moved for a directed verdict. Counsel argued that there was no testimony during the trial as to any elements of the crimes charged. The state responded that the victim's statement was in the taped interview, and the child was subject to cross - examination. The solicitor said: "And it's a matter for the jury at this point to determine whether or not the interview alone is sufficient to find the defendant guilty." The judge denied the directed verdict motion. R. 91, ll. 22 – R. 94, ll. 5.

ARGUMENT

The trial court erred in denying Appellant's motion that South Carolina Code Section 17-23-175 was unconstitutional based on a violation of the Confrontation Clause when Appellant did not have the opportunity to cross examine the child during the making of the video tape interview and the solicitor violated the statute by not asking the child questions about the incident during direct thus barring effective cross-examination because the only reason the videotape is constitutional is because the child testifies on direct about the elements of the offense and appellant can cross-examine the child on the offense?

S.C. Code 17-23-175, enacted in 2006 and entitled the "Sex Offender Accountability and Protection of Minors Act," provides that an out-of-court statement of a child may be admitted in a general sessions court if the statement was given in response to an investigative interview; the statement was preserved on film or videotape; 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 the court finds in a hearing outside the jury that the totality of the circumstances surrounding the making of the statement provide guarantees of trustworthiness.

To determine trustworthiness, Sec. 17-23-175(B) provides that the factors to be considered include if leading questions were used; if the interviewer was trained in conducting investigative interviews of children; if the statement contained a detailed account of the offense; if the statement has internal coherence; and sworn testimony of any participant deemed necessary by the court.

The Confrontation Clause of the Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.

The United States Supreme Court focused on the issue of confrontation in Crawford v. Washington, 541 U.S. 36 (2004) where it ruled that out-of-court statements that are testimonial are barred under the Confrontation Clause unless witnesses are unavailable and defendants had a prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable.

In Crawford v. Washington, *id.*, a witness's testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross examination.

The solicitor argued that the video was admissible because the child testified and defense counsel could cross-examine her. However, the solicitor asked the child no questions about the incident or anything touching or anything related to the charges which left defense counsel with nothing to ask about since the tape had not been admitted yet. The child testified before the videotape was admitted into evidence. For defense counsel to have recalled the seven year old child as an adverse witness would have appeared harsh to the jury. The solicitor did not want to ask the child questions about the incident because the child vacillated in the interview as to the incident.

The solicitor was in violation of the statute by not asking the child questions about the incident because the only reason the videotape is considered is constitutional is because the child testifies on direct about the elements of the offense and appellant can cross-examine the child on the offense.

Section 17-23-175 (A) (3) provides: the child testifies at the proceeding and is subject to cross examination of the elements of the offense.

In State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), the Supreme Court held that the statutory provision, Section 17-23-175, that permitted the admission of the child's forensic interview did not violate the Sixth Amendment's Confrontation Clause, even when the defendant did not have the opportunity to contemporaneously cross-examine the child on the video of the forensic interview. The Court ruled that although the defendant would have had to recall the child as an adverse witness to question her about the videotaped interview because the child testified before the tape was admitted, the child testified at trial and was available for cross-examination. The defendant's right to effective cross examination was satisfied during the child's actual trial testimony because that was all the confrontation Clause required.

Williams' case is distinguished from Anderson because there were no questions from the solicitor during direct testimony of the child about the incident. There was no testimony from the child about the incident. All she said about Williams was that she recognized him in the courtroom but did not know when she talked to him. In Anderson, the child testified on direct testimony about the sexual abuse by her stepfather.

The solicitor not asking the child about the elements of the offenses charged during direct testimony was in violation of the statute. Section 17-23-175 (A) (3) provides: the child testifies at the proceeding **and** is subject to cross -examination on the elements of the offense.

The word **and** in the statute meant that the child testified about the elements of the offense **and** was cross -examined about the offense. That is the logical meaning the

Legislators had in mind in creating this statute. Without direct testimony about the offense before the videotaped interview was admitted, defense counsel was left with nothing to question the child about. A key evidentiary predicate for the admission of the videotape is missing.

In State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002), the Supreme Court ruled that the defendant's right of confrontation was violated by limitation of cross-examination into the co-conspirator's potential sentence if convicted of same crimes as the defendants. The Court also ruled that if the defendant establishes he was unfairly prejudiced by the limitation on cross-examination, it is reversible error.

Defense counsel in Williams' case was limited in her cross-examination of the child because the solicitor asked no questions of the child about the offense. The videotape had not been admitted into evidence and had not been seen by the jury.

The taped interview lacked internal coherence as the child changed her answer on a few occasions. She said she was wearing shorts and then when she saw the doll, which was wearing a dress, the child said she was wearing a dress. This alone indicates that the child was easily affected by any suggestive elements. The child also changed her answer when asked if Williams touched her and where.

ARGUMENT

The trial court erred in denying Appellant's motion that the videotape should not be admitted as evidence because the forensic interviewer asked leading questions which were barred by South Carolina Code Section 17-23-175 and used the RATAC method of interviewing, a nonscientific method, which affected the trustworthiness of the interview.

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To determine trustworthiness, Sec. 17-23-175(B) provides that the factors to be considered include if leading questions were used; if the interviewer was trained in conducting investigative interviews of children; if the statement contained a detailed account of the offense; if the statement has internal coherence; and sworn testimony of any participant deemed necessary by the court.

In State v. Kromah, 401 S.C. 340, 737 S.E. 2d 490 (2013), the Supreme Court wrote in Footnote Four:

The title of "forensic interviewer" is a misnomer. The use of the word forensic indicates that the interviewer deduces evidence suitable for use in court. It also implies that the evidence is deduced as the result of the application of some scientific methodology. The exact scientific

methodology applied apparently defies identification. The RATAC style of interviewing is not scientific. It merely represents the objectives and topics of discussion between the interviewer and the child. Somehow RATAC is supposed to convert the interviewer into a human truth-detector whose opinions of the truth are valuable and suitable for the jury's consumption.

Later, in Footnote Five, the Court continued to write:

Forensic interviewers might be useful as a tool to aid law enforcement officers in their initial investigative process, but this does not make their work appropriate for use in the courtroom.

The forensic interviewer in Williams' case did not offer an opinion, and was not qualified as an expert. However, the product of her work using the RATAC method of interviewing, the forensic interview, was admitted for use in court and was viewed by the jury. It was also used by law enforcement for the charges. This was in error considering the questionable reliability of the RATAC method as described by the Supreme Court in State v. Kromah, *supra*.

The interview lacked trustworthiness because it failed on three of the requirements as outlined in Section 17-23-175(B) for trustworthiness. Leading questions were asked. When the interviewer asked the child where a person should not touch a child, the child did not give the answer the interviewer. Then the interviewer told her the three body parts being the breasts, bottom, and front bottom.

The RATAC method, which the interviewer said was her training for interviewing, was found by the South Carolina Supreme Court to not be scientific, and a direct contradiction to the trial court's finding as to admissibility.

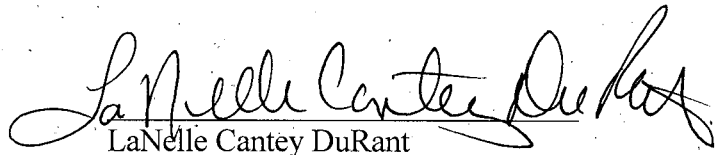
The interview lacked internal coherence because the child vacillated in the elements of the offense. Sometimes she said Williams touched her bottom with his finger and tongue. Then she said he did not touch her skin. The taped interview lacked internal coherence as

the child changed her answer on a few occasions. She said she was wearing shorts and then when she saw the doll, which was wearing a dress, the child said she was wearing a dress. This alone indicates that the child was easily affected by any suggestive elements. The child also changed her answer when asked if Williams touched her and where. The internal coherence required by the statute was severely lacking.

CONCLUSION

Based on the above, the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive, flowing style with a horizontal line drawn across the middle of the signature.

LaNelle Cantey DuRant
Appellate Defender

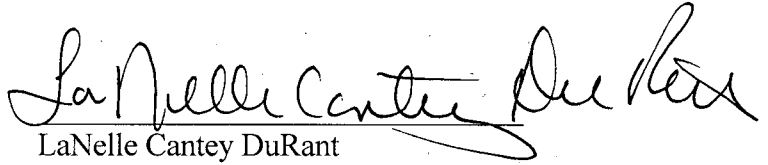
ATTORNEY FOR APPELLANT

This 25th day of January, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

January 25, 2016


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