STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Berkeley County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERAMY PARKS,

APPELLANT

APPELLATE CASE NO 2015-002050

INITIAL BRIEF OF APPELLANT

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2.

Did the trial court err in ruling that the child complainant was a competent witness based solely on its viewing of the tape of the forensic interview, refusing to examine the child in court, refusing the defense's request for an independent competency evaluation, and in refusing to allow the defense to conduct *voir dire*?

STATEMENT OF THE CASE

On February 11, 2014, a Berkeley County grand jury indicted appellant Jeramy Dale Parks for five counts of first-degree criminal sexual conduct with a minor, two counts of unlawful conduct toward a child, and one count of third-degree criminal sexual conduct with a minor. R. ___. On September 14, 2015, appellant was tried before the Honorable Deadra L. Jefferson and a jury. Tr. 1. Anne Williams and Debbie Herring-Lash represented the State. Tr. 2. David Schwacke and Debbie Littlejohn represented appellant. Tr. 2. The trial judge severed one of the unlawful conduct toward a child counts. Tr. 63, ll. 9 – 14. The jury convicted appellant of five counts of first-degree criminal sexual conduct with a minor and one count of third-degree criminal sexual conduct with a minor, but acquitted appellant of the remaining charge of unlawful conduct toward a child. Tr. 503, l. 4 – 504, l. 20. Judge Jefferson sentenced appellant to concurrent terms of thirty years' imprisonment on the first-degree criminal sexual conduct charges and a consecutive term of fifteen years' imprisonment on the third-degree criminal sexual conduct charge. Tr. 541, l. 20 – 542, l. 10. This appeal follows.

ARGUMENT

1.

The trial court erred in charging that the testimony of the victim in this sexual abuse case need not be corroborated, in violation of *State v. Stukes*, ___ S.C. ___, 787 S.E.2d 480 (2016).

The trial court erroneously charged the jury that the testimony of a victim in a sexual abuse case does not need to be corroborated. Tr. 491, l. 22 – 492, l. 2. See State v. Stukes, ___ S.C. ___, 787 S.E.2d 480 (2016). The issue is preserved for appeal. At the charge conference, the trial judge stated that she intended to give the Stukes charge. Tr. 435, ll. 18 – 22. Trial counsel objected at the charge conference; the court overruled the objection and gave the charge. Tr. 437, ll. 7 – 439, l. 23. Tr. 491, l. 22 – 492, l. 2. Because the error is clear, appellant anticipates the State will argue that the error is harmless.

The error in this case cannot be harmless because the credibility of the child complainant ("Child") was very much at issue. The trial judge used this as one of her justifications for giving the Stukes charge. Judge Jefferson stated that sexual abuse cases "are credibility contests that comes down to one person's word against another. . . ." Tr. 439, ll. 3 – 12. The court found that "the law is very clear and therefore reason based on legislative intent that the word of a victim need not be corroborated." Tr. 439, ll. 3 – 12. The trial judge further ruled that the charge was "**appropriate in this – in this instance** and, frankly, and **any other CSC case** and it will be instructed and there is case law to support that instruction."[1] Tr. 439, ll. 13 – 19 (emphasis added).

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[1] Judge Jefferson did not have the benefit of Stukes when she made her ruling. Nevertheless, the issue is preserved and appellant receives the benefit of Stukes on appeal. See State v. Brown, 401 S.C. 82, 95, 736 S.E.2d 263, 269 (2012) (ruling that Court of Appeals properly applied new rule of law on appeal from case decided after trial judge's ruling).

Child was only seven years old at the time of trial. Tr. 105, ll. 22 – 24. As will be further explored in Issue 2, Child's credibility was in question during pretrial motions. Tr. 44, l. 22 – 45, l. 16. Appellant objected to Child's competency as a witness. Tr. 44, l. 22 – 45, l. 16. Having never heard Child testify in court, the trial judge refused to have a hearing on her competency based solely on her viewing of the forensic interview videotape and called the defense's motion "superfluous." Tr. 45, ll. 13 – 16. Appellant renewed this motion before and during Child's testimony. Tr. 104, l. 15 – 105, l. 3. Tr. 108, ll. 6 – 109, l. 17.

Appellant is Child's father. Tr. 108, ll. 5 – 21. Child had two sisters and four brothers. Tr. 105, ll. 3 – 5. When the alleged abuse occurred, Child, her mother, Candace Parks ("Candace") and the rest of her family were living at "Uncle Mike's" trailer. Tr. 108, ll. 1 – 8.

Child alleged that appellant committed a variety of sexual batteries, but was not always consistent in her allegations. Tr. 110, l. 6 – 165, l. 20. Child initially stated that appellant "did bad stuff" to her. Tr. 114, ll. 17 – 18. When asked to explain by the solicitor, Child stated, "he humped me and he put his finger inside me." Tr. 114, ll. 19 – 22. She claimed this happened on the couch. Tr. 114, ll. 23 – 25. She defined "humped" as skin-to-skin genital contact. Tr. 115, 116, l. 2. When asked again by the solicitor, "What did hump mean," Child replied, "it means he put his private in my private." Tr. 116, ll. 6 – 8. Child then described vaginal penetration and oral sex. Transcript 116, ll. 11 – 23.

Child then responded inconsistently to questions about vaginal and anal sex. The solicitor asked again if appellant "ever put his penis in any other part of your body?" Tr. 117, ll. 18 – 19. Child replied, "Nope." Tr. 117, l. 20. After changing the topic of questioning to the layout of Uncle Mike's trailer, the solicitor asked Child, "Do you know what the word slobber

means?" and was able to get Child to describe appellant allegedly performing oral sex on her. Tr. 126, ll. 8 – 10. The solicitor then led Child back over the same ground:

> Q. So just to go over and make sure what you have said happened, what did you say Daddy Jeramy did to your vagina?
>
> A. Slobber.
>
> Q. Okay. And did he put anything in your vagina?
>
> A. His fingers.
>
> Q. Anything else?
>
> A. (No response)
>
> **Q. What about his penis?**
>
> **A. No.**
>
> **Q. Are you sure?**
>
> **A. Yes.**
>
> **Q. Okay. Did you just forget it, or why did you say no?**
>
> **A. Just forget it.**
>
> Q. And, [Minor], did he put his penis anywhere else in your body?
>
> A. In my mouth.
>
> **Q. In your mouth. What about anywhere else?**
>
> **A. Nope.**
>
> Q. What about on your bottom?
>
> A. Yes.
>
> Q. And what is that?
>
> A. A butt.
>
> **Q. And tell me about that. What happened with that?**

A. He put his – I mean, his penis in my butt hole.

Tr. 126, l. 25 – 128, l. 4 (emphasis added).

Child stated that appellant, during the night, would carry her from her bedroom to the couch in the living room of Uncle Mike's trailer. Tr. 121, ll. 1 – 14. Two other children also slept in this bedroom. Tr. 121, ll. 1 – 3. Her mother, Candace, would be on the couch during these instances. Tr. 121, ll. 21 – 22. Child claimed that Candace watched the sexual abuse but did nothing. Tr. 121, l. 21 – 122 – l. 10. Tr. 137, ll. 15 – 20. She stated she had seen Candace and appellant have sex on the couch. Tr. 137, ll. 21 – 25.

Child claimed that none of her brothers witnessed the abuse. Tr. 122, ll. 11 – 18. However, Child was sexually abused by one of her brothers. Tr. 138, ll. 17 – 24. The Court sustained the State's objection and prevented appellant from cross-examining Child further about this abuse, but during the *in-camera* proffer, stated that her brother had vaginal intercourse with her at Uncle Mike's trailer. Tr. 144, ll. 13 – 21.

On cross-examination, Child admitted meeting with the solicitors several times before trial. Tr. 133, l. 23 – 134, l. 20. She did not know how many times she had talked with people about the alleged abuse. Tr. 169, l. 24 – 170, l. 4. She remembered watching the videotape of a forensic interview. Tr. 170, ll. 5 – 9. Child remembered her mother offering her "Gummies, a Happy Meal, or a milk shake to talk to the nice lady." Tr. 170, ll. 13 – 16. When asked, "how many times has your mommy promised you something to talk about this," Child replied, "I don't know." Tr. 170, ll. 21 – 23.

The State's other star witness's credibility was also very much in question. Candace testified for the State under a proffer agreement. Tr. 206, ll. 18 – 25. Candace's understanding of the proffer agreement was "that what ever I said after I signed that proffer cannot be used

against me." Tr. 206, ll. 21 – 24. Candace was not facing sexual abuse charges but a charge of unlawful neglect at the time of trial. Tr. 207, ll. 1 – 14. She claimed she had not been offered anything by the solicitor and was testifying "to try to help" her kids. Tr. 207, ll. 1 – 14.

Candace testified that appellant was sexually molesting Child. Tr. 204, ll. 22 – 205, l. 2. Candace said she "had caught [appellant] a few times. I seen it." Tr. 212, ll. 15 – 24. Candace saw appellant sexually abuse Child more than four times but said she did nothing about it. Tr. 212, l. 23 – 213, l. 7. When she asked appellant to stop, she claimed appellant said, "It's his daughter; he can do what he wants." Tr. 214, ll. 5 – 12. The solicitor used this alleged statement by appellant as the very beginning of her opening statement and the final lines of her closing argument. Tr. 96, ll. 12 – 13. Tr. 467, ll. 23 – 25.

During cross-examination, Candace revealed that before moving in with Uncle Mike, she was living with the father of her three oldest boys. Tr. 258, ll. 9 – 23. Candace admitted fighting with appellant about child support owed by the father and wrote her attorney in Norbert Cummings' office about it. Tr. 262, l. 23 – 263, l. 23. Defense counsel questioned Candace about a statement made during the forensic interview that Child was "sucking your ninnies." Tr. 266, ll. 3 – 18. Candace replied, "I wasn't aware if she was. I might have been drunk and passed out." Tr. 266, ll. 17 – 20. She was forced to admit that her conduct may have been greater than simply being a passive observer because she "drank a lot." Tr. 266, ll. 21 – 24. She had not yet pled guilty to unlawful conduct. Tr. 266, l. 25 – 267, l. 23. She admitted lying to doctors at M.U.S.C. Tr. 274, l. 10 – 275, l. 17.

The solicitor had to address Candace's credibility during her closing argument telling the jury that she "is a disgusting, despicable person, but you have to evaluate her value as a witness." Tr. 442, ll. 7 – 14. The solicitor also addressed whether Candace coached Child. Tr. 442, ll. 7 –

443, l. 15. She argued, "if Candace Parks was going to coach her child to say things that hurt [appellant], would she not be smart enough to coach her not to incriminate her?" Tr. 442, ll. 20 – 23.

The solicitor was also at pains to defend Child's credibility during her closing argument. She argued that Child "did the best job she could to remember what she could." Tr. 449, l. 24 – 450, l. 8. The State tried to explain differences between Child's forensic interview and her testimony. Tr. 451, l. 2 – 452, l. 25. The solicitor stated that Child "does remember more on the tape, but that was two and a half years ago. If you notice, she is using more grown-up language in the courtroom." Tr. 452, ll. 19 – 22. The solicitor also admitted that there were differences between Child's forensic interview, Child's testimony, and Candace's testimony stating, "Are there differences? Yeah, there are differences." Tr. 453, l. 1 – 454, l. 23. Finally, the solicitor relied on the forensic interviewer to explain Child's odd demeanor on the stand arguing that anxiety produces "restlessness, giggling," in nervous children. Tr. 462, l. 2 – 463, l. 16.

Defense counsel argued Child's allegations were the result of prodding from DSS and, especially, Candace. Tr. 470, l. 4 – 474, l. 19. Arguing about the lack of evidence of physical injuries, defense counsel told the jury, "Candace made the effort over the course of the nine months she had solo with her daughter to go ahead and plant the seeds for this testimony that's been going on during the course of the trial." Tr. 477, l. 24 – 478, l. 6.

As shown above, the jury needed to believe Child and the "despicable" Candace to convict appellant. The Supreme Court has consistently ruled that where credibility is the central issue at trial, errors cannot be harmless. Stukes at ___, 787 S.E.2d at 483. In Stukes, the Court held that the case was not "amenable to a harmless error analysis" because the case "hinged on credibility." Id. See also State v. Anderson, 413 S.C. 212, 219, 776 S.E.2d 76, 79-80 (2015)

(reversing in a child sex case because the case "turned solely on the credibility of the minor and of Appellant" and because the case lacked physical evidence of sexual abuse); State v. Chavis, 412 S.C. 101, 110, 771 S.E.2d 336, 341 (2015) ("The determination whether a bolstering error is harmless depends on whether the case turns on the credibility of the victim.").

Child's credibility was the central question in the trial. The trial judge did not give the Stukes charge during its general charge on witness credibility, but immediately after she defined the elements of the offense. Tr. 490, l. 10 – 492, l. 2. The placement of the Stukes charge after the elements of criminal sexual conduct emphasized that the jury could simply believe Child and caused confusion. Therefore, the trial judge's erroneous charge cannot be harmless error beyond a reasonable doubt and this Court should reverse.

2.

The trial court erred in ruling that the child complainant was a competent witness based solely on its viewing of the tape of the forensic interview, refusing to examine the child in court, refusing the defense's request for an independent competency evaluation, and in refusing to allow the defense to conduct *voir dire*.

Appellant filed a motion to exclude Child's testimony for lack of competency to testify. R. ___ (Def. Mot. Exclude Testimony of Alleged Victims). Appellant asked, in the alternative, for the court to order a competency evaluation by a child forensic psychiatrist. R. ___ (Def. Mot. Exclude Testimony of Alleged Victims). Without ever hearing Child speak in Court, the trial judge overruled appellant's objection to her competence as a witness. Tr. 44, l. 22 – 45, l. 16. Judge Jefferson called defense counsel's motion "superfluous" and relied solely on her viewing of the videotape of the forensic interview. Tr. 45, ll. 13 – 16.

The State called Child as its first witness and before her testimony, defense counsel objected again at a bench conference. Tr. 104, ll. 7 – 105, l. 13. Defense counsel asked the court to make a determination of her competency outside the presence of the jury. Tr. 104, ll. 15 – 19. The trial judge denied the request, reasoning that witnesses are presumed to be competent. Tr. 104, l. 20 – 105, l. 13.

After the solicitor's preliminary questions about the difference between a truth and a lie, appellant again objected at a bench conference and asked again for permission to question the child. Tr. 108, l. 1 – 109, l. 17. Interrupting defense counsel's argument, the trial judge denied the request stating, "I think I have enough perspective because I've seen more. She's competent; she knows the difference between the truth and a lie. If you want to impeach her, that's up to you. Regarding her ability to recall and otherwise, that wouldn't make her any less competent. There are adults who can't recall things." Tr. 109, ll. 9 – 16.

The trial judge erred in finding Child competent without an *in-camera* examination based on the court's viewing of a videotape and without giving appellant the opportunity to cross-examine Child outside of the presence of the jury. State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987). In Hudnall, the Court reversed because the trial judge qualified the child witness "on the basis of the videotaped competency examination." Id. at 99, 359 S.E.2d at 61. The Court also ruled that "the trial judge should have presided during the competency examination of a witness of such tender years rather than determine her competence merely upon the viewing of a videotape." Id. "A judge's presence lends a courtroom-like atmosphere to better evaluate the witness's ability to appreciate the consequences of his or her testimony." Id. Here, the court failed to comply with any of Hudnall's requirements.

The error in appellant's case is more egregious than in Hudnall because the videotape here was of a forensic interview, not a competency examination. Forensic interviewers are no substitute for medical doctors and psychiatrists. Forensic interviewers are not experts in truth-telling and do not offer scientific testimony. Chavis at 106-07, 771 S.E.2d at 338-39. See also State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). The Supreme Court reversed in Hudnall **despite** a competency evaluation. Here, the trial judge denied appellant's request for a competency evaluation by a psychiatrist and used a forensic interview as the basis of her decision.

The trial judge also erred by refusing to conduct an *in-camera* examination of Child and allow *voir dire*. South Carolina Dep't of Soc. Servs. v. Doe, 292 S.C. 211, 218-19, 355 S.E.2d 543, 547-48 (1987). In Doe, the Court ruled that a "judge must rely on his personal observations of the child's demeanor **and responses to inquiry on voir dire examination.**" Id. (emphasis added). The trial court here did not allow defense counsel to conduct *voir dire* outside of the presence of the jury. Defense counsel could not conduct an adequate cross-examination on this issue in front of the jury. By this point, Child had already testified and it was too late.

The trial judge's reasoning that Child was presumed competent was also erroneous. Id. "At common law, persons **fourteen years of age and older** are presumed competent to give evidence; **proof of competency is required for children under that age.**" Id. (emphasis added). Child was seven years old and could not be presumed competent.

"The test to determine a minor's competency to testify is whether the child is aware of right and wrong and understands the probability of punishment for lying." Hudnall at 99, 359 S.E.2d at 61. The solicitor's initial questions did not meet this test. Tr. 105, l. 17 – 107, l. 25. Child did not know her birthday. Tr. 105, l. 25 – 106, l. 2. Child said she was supposed to tell

the truth in the courtroom and was able to declare that if the solicitor said a blue pen was pink, it would be a lie. Tr. 106, l. 22 – 107, l. 25. No inquiry was made about whether Child knew the difference between right and wrong. No inquiry was made about whether Child knew she would be punished if she told a lie. She was only asked whether telling a lie was "good or bad." Tr. 107, ll. 7 – 14.

The procedure used by the trial court failed to meet the requirements of Hudnall and Doe. Appellant was never allowed to examine the child on competency issues before her substantive testimony and outside of the presence of the jury. The court denied appellant's request for a competency evaluation and relied on her own viewing of the tape of an unscientifically conducted forensic interview. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand this case for a new trial.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of August, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERAMY PARKS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Jeramy Parks, #324805, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 24th day of August, 2016.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of August, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.