STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
Honorable Steven H. John, Circuit Court Judge

Opinion No. 2017-UP-026 (S.C. Ct. App. Filed January 11, 2017)
2013-GS-23-0698A

THE STATE,

RESPONDENT,

V.

MICHAEL EDWARD WILLIAMS,

PETITIONER

APPENDIX

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INDEX

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael Edward Williams, Appellant.

Appellate Case No. 2014-002241

Appeal From Greenville County
Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2017-UP-026
Submitted November 1, 2016 – Filed January 11, 2017

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General John Benjamin Aplin, both of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, all for Respondent.

PER CURIAM: Michael E. Williams appeals his conviction of third-degree criminal sexual conduct with a minor, arguing the trial court erred by (1) ruling that section 17-23-175 of the South Carolina Code (2014) does not violate the

confrontation clause and (2) admitting a video recording of a forensic interview of the minor victim. We affirm[1] pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred by ruling section 17-23-175 was constitutional: *State v. Spears*, 403 S.C. 247, 252, 742 S.E.2d 878, 880 (Ct. App. 2013) ("In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless the findings are clearly erroneous."); U.S. Const. amend VI (guaranteeing a criminal defendant the right "to be confronted with the witnesses against him"); *State v. Hill*, 394 S.C. 280, 291, 715 S.E.2d 368, 374-75 (Ct. App. 2011) ("[T]he Confrontation Clause places no constraints at all on the use of the declarant's prior testimonial statements when the declarant appears for cross-examination at trial."); *State v. Stokes*, 381 S.C. 390, 401-02, 673 S.E.2d 434, 439 (2009) ("[A]s to cross-examination specifically, the Confrontation Clause 'guarantees only an **opportunity** for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (quoting *United States v. Owens*, 484 U.S. 554, 559 (1988))); § 17-23-175(A) ("[A]n out-of-court statement of a child is admissible if . . . (3) 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 . . . ."); *State v. Anderson*, 413 S.C. 212, 217-18, 776 S.E.2d 76, 78-79 (2015) (holding a defendant's Confrontation Clause rights are not violated as long as a minor victim testified at trial and was subject to cross-examination); *id.* at 218, 776 S.E.2d at 79 (finding the fact "[t]hat [the defendant] would have to recall the child as an adverse witness in order to examine her about her videotaped statement does not render the statute or the procedure followed here violative of a defendant's Sixth Amendment right to cross-examination").

2. As to whether the trial court erred by admitting the forensic interview: *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *id.* ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); § 17-23-175(A) ("[A]n out-of-court statement of a child is admissible if . . . (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness."); § 17-23-175(B) ("In determining whether a statement possesses particularized guarantees of trustworthiness, the

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

court may consider, but is not limited to, the following factors: (1) whether the statement was elicited by leading questions; (2) whether the interviewer has been trained in conducting investigative interviews of children; (3) whether the statement represents a detailed account of the alleged offense; (4) whether the statement has internal coherence; and (5) sworn testimony of any participant which may be determined as necessary by the court."); *State v. Tyner*, 273 S.C. 646, 653, 258 S.E.2d 559, 563 (1979) ("A leading question is one which suggests to the witness the desired answer."); *State v. Kromah*, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013) (holding a forensic interviewer may testify regarding (1) "the time, date, and circumstances of the interview"; (2) "any personal observations regarding the child's behavior or demeanor"; (3) "or a statement as to events that occurred within the personal knowledge of the interviewer").

AFFIRMED.

LOCKEMY, C.J., and KONDUROS and MCDONALD, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

MICHAEL EDWARD WILLIAMS,

APPELLANT

APPELLATE CASE NO. 2014 - 002241

Appeal from Greenville County

Honorable Steven H. John, Circuit Court Judge

Opinion No. 2017-UP-026

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on January 11, 2017. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, Appellant submits the following:

Appellant Williams raised two issues on appeal: (1) 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; and (2) 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.

On Issue One, this Court held that the Confrontation Clause placed no constraints at all on the use of the declarant's prior testimonial statements when the declarant appears for cross-examination at trial. Citing State v. Hill, 394 S.C. 280, 291, 715 S.E.2d 368, 374-75 (Ct. App. 2011). This Court also held, citing State v. Anderson, 413 S.C. 212, 217-18, 776 S.E.2d 76, 78-79 (2015), that a defendant's Confrontation Clause rights are not violated as long as a minor victim testified at trial and was subject to cross-examination.

On Issue Two, this Court cited the statute Section 17-23-175(B) which provided that in determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider whether the (1)statement was elicited by leading questions and (2) whether the interviewer has been trained in conducting investigative interviews of children. This Court also cited State v. Tyner, 273 S.C. 646,653, 258 S.E.2d 559, 563 (1979), that a leading question is one which suggests to the witness the desired answer.

Respectfully, this Court misapprehended the issues.

Issue One:

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 any 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.

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.

This Court failed to consider trial protocol that cross examination is normally limited to the scope of direct examination. This Court also failed to consider Section 17-23-175 which clearly provides that the videotape was allowed into evidence only if the child was questioned about the elements of the offense. It would have been prejudicial to Appellant Williams for the defense to recall a seven year old child to the witness stand to talk about the videotape.

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.

Issue Two:

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.

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.*

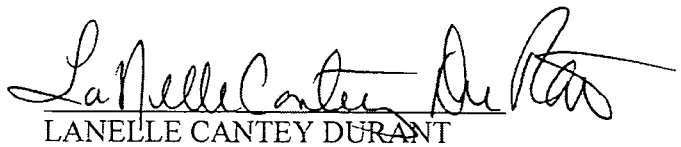
The interview lacked trustworthiness because it failed on three of the requirements as outlined in Section 17-23-175(B) for trustworthiness. Leading questions were asked. When the interviewer asked the child where a person should not touch a child, the child did not give the answer. Then the interviewer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

WHEREFORE, we respectfully request this Court to reconsider its ruling, and remand Williams' case for a new trial.

Respectfully Submitted,



LANELLE CANTEY DURANT
Appellate Defender

This 26th day of January, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL EDWARD WILLIAMS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Michael Edward Williams, #283356, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 26th day of January, 2017.

LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 26th day of January, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

The South Carolina Court of Appeals

The State, Respondent,

v.

Michael Edward Williams, Appellant.

Appellate Case No. 2014-002241

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

J.

J.

J.

Columbia, South Carolina

cc: William Walter Wilkins, III, Esquire
Alan McCrory Wilson, Esquire
LaNelle Cantey DuRant, Esquire
John Benjamin Aplin, Esquire

FILED
February 24, 2017