STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Florence County
Hon. William H. Seals, Jr., Circuit Court Judge
Appellate Case No. 2015-000235

The State,

Appellant,

v.

Bryant Christopher Gurley,

Respondent.

PETITION FOR REHEARING *EN BANC*

On August 9, 2017, this Court issued an unpublished opinion in which it reversed Appellant Bryant Christopher Gurley's conviction for lewd act on a minor child. State v. Gurley, Op. No. 2017-UP-342 (S.C. Ct. App. filed August 9, 2017). In the opinion, this Court found the trial judge erred in admitting the video recording of Victim's forensic interview and in admitting testimony of an expert, which the Court found constituted impermissible vouching. Pursuant to Rule 221(a), SCACR, the State respectfully submits this Court misapprehended or overlooked significant facts and relevant case law, and petitions this Court for rehearing *en banc*.

ADMISSIBILITY OF FORENSIC VIDEO

In ruling on the admissibility of the forensic video, this Court conflates the concepts of admissibility of the entire video with whether a particular portion of the video should be redacted. Admissibility of the video is governed by section 17-23-175 of the South Carolina Code, which provides:

> (A) In a general sessions court proceeding or a delinquency proceeding in family court, an out-of-court statement of a child **is admissible** if:
>
> (1) the statement was given in response to questioning conducted during an investigative interview of the child;
> (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
> (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; and
> (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.

S.C. Code Ann. § 17-23-175(A) (2014) (emphasis added). The statute provides factors for the trial court to consider in determining whether sufficient guarantees of trustworthiness are present:

> (B) In determining whether a statement possesses particularized guarantees of trustworthiness, the 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.

S.C. Code Ann. § 17-23-175(B) (2014). The trial court here considered the above factors and determined the video was admissible. Importantly, Appellant has not challenged on appeal the trial court's determination that the four factors provided in section 17-23-175(A) have been met. See State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) (holding an unchallenged ruling, "right or wrong," becomes the law of the case and will not be considered by the appellate court);

State v. Fripp, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct. App. 2012) (stating the appellant's failure to challenge the trial court's ruling in the appellate brief renders the unchallenged ruling the law of the case). The trial court's unchallenged finding that the video recording met the requirements of section 17-23-175, and therefore was **admissible**, is the law of the case.

Further, Appellant's only objection on appeal to the video recording centers around the inclusion of a single line of commentary by the forensic interviewer. The proper means for addressing Appellant's concerns was not for the trial court to declare the video inadmissible as asked by Appellant, but rather would have been to redact the objectionable commentary from the video and show the remaining video to the jury. At oral argument, all three members of this panel recognized the appropriate remedy was redaction. Every member of the panel indicated the video could have been redacted.

On multiple occasions this Court asked why the State did not redact this portion of the video. It is Appellant's burden to call the error to the trial court and to request an appropriate remedy. See e.g., I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) ("An appellate court may not, of course, *reverse* for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. . . . Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments.")(Italics in original). Appellant never presented the trial court with the proper remedy for addressing his concern—redaction. Instead, he only offered the trial court the option of

admitting the video or suppressing the video as a whole. The admissibility is governed by section 17-23-175 and the trial court properly found the video met its requirements. The commentary objected to by Appellant did not impact any of the four requirements for admissibility. This Court in oral argument specifically recognized this fact. Even after recognizing redaction as the proper remedy, this Court did not find Appellant failed to properly preserve that issue.

The questions, and ultimate opinion by this Court, altered the burden placed on Appellant to raise an issue to the lower court and allow that court to rule on the issue in order to preserve it for review by this Court. Appellant **never** asked the trial court to address the issue of redaction. As a result, he never requested the one remedy which the trial court could have provided him, nor did he ever allow the trial court the opportunity to alleviate his concerns regarding the commentary by the forensic interviewer. See State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (eliminating *in favorem vitae* review in death penalty cases and holding: "A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured."); Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (" 'Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.' " (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006))); State v. Morgan, 282 S.C. 409, 412, 319 S.E.2d 335, 337 (1984) ("Inasmuch as the trial judge had no opportunity to pass upon the issue, the question will not be considered on appeal."). Accordingly, Appellant cannot now complain regarding the admissibility of the video when he failed to

request the complained-of comment be redacted and its inclusion did not impact the trial court's determination under section 17-23-175 that the video was admissible.

Additionally, this Court misapprehended the State's arguments regarding the comments made at the end of the forensic video. The State did not maintain the forensic interviewer was "acting" in the sense of putting on a play or a stage performance. The State explained:

> And as far as B.G. broke the rules, I mean I think given the totality of the circumstances and the fact that she was in that room and the interviewer needed to make the child feel safe, needed to make the child feel as if she could say whatever she wanted to and that it would be okay, and she told her the rules are you have to tell the truth, I think that she was **acting**, you know, **as she should and would in any other circumstance, just like this**.

(R. 138, 3–10). A clear reading of the statement indicates the solicitor argued the forensic interviewer was just behaving as she should or treating the child as she should, not auditioning for the theater. This Court correctly cited State v. McKerley, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (Ct. App. 2012), for the proposition: "If 'there is no way to interpret [the witness]'s testimony other than as her opinion that the victim was telling the truth,' the testimony is inadmissible." However, as the State has continuously argued and this Court has overlooked in its decision in this case, there is another way to interpret the testimony. Indeed, it is clear the trial judge did interpret it another way. The State's argument all along has been the comment was made to help the child feel safe and comfortable, and this is established in the State's argument to the trial court and this Court in its Final Brief.[1] The trial court clearly did not believe the forensic interviewer was vouching for the victim and, instead, interpreted the comment as merely a calming or reassuring comment. This Court overlooked this reasonable interpretation and, instead, focused solely on the one interpretation which would lead to the comment being considered impermissible vouching or bolstering.

[1] The State, of course, incorporates by reference all arguments raised in its Final Brief of Respondent.

The State submits this Court improperly found the comment at issue rendered the video inadmissible. Admissibility of the video as a whole is governed by section 17-23-175, and Appellant has not challenged the trial court's findings that the video met the four requirements of that section for admissibility. This Court overlooked the requirement and burden for Appellant to ask for redaction of the specific comment if it is considered improper. Even though during oral argument every member of the panel indicated redaction to be the proper remedy, this Court did not find Appellant should have asked to redact the comment and instead impermissibly placed the burden on the State to redact the comment. The effect of this Court's opinion is the video potentially will not be available at all on remand for a new trial, when the appropriate remedy is to redact only the allegedly improper comment. This Court should rehear Appellant's Issue 1, find the video was correctly determined to be admissible under section 17-23-175, find redaction would have been the proper remedy but Appellant failed to request redaction, and affirm the trial court's decision.[2]

COACHING

This Court also overlooked or misapprehended the relevant testimony from the Record regarding Appellant's Issue 2 on coaching. This Court also improperly distinguished State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011), in finding Crawford's testimony impermissible. Finally, even though Appellant never objected to the testimony, this Court seems to rely on comments from Crawford regarding the fact coaching is usually performed by the abuser to support its conclusion the testimony complained of on appeal was error.

[2] Even if this Court believes the case should be reversed as to Issue 2, which will be discussed below, the State asks this Court to remove the discussion of Issue 1 from the opinion, allow the case to be remanded for a new trial in which the proper remedy would be to allow Appellant to ask for redaction of the comments rather than suppression of the video as it stands in this Court's current opinion.

In Hill, as explained by this Court in its opinion, the Court considered a similar argument that improper testimony was admitted regarding coaching. Specifically, this Court explained the argument in Hill:

> Hill argues that the State was wrongly permitted to ask the expert about the red flags he looked for to indicate a child was coached in the offered testimony, and that one of the things he looked for in an un-coached, truthful child was detailed account. **He contends, upon the expert answering the question so as to indicate that he did see the details in the interview with Victim, the jury was clearly informed the expert believed the child was uncoached and truthful.** Under these circumstances, Hill asserts the trial judge erred in allowing the State to offer expert testimony that could be construed as indicating the expert's opinion was that the child witness was truthful and had not been coached.

Id. at 294, 715 S.E.2d at 376 (emphasis added). In finding the testimony was properly admitted, this Court explained:

> [T]he forensic interviewer never addressed the veracity of Victim. He testified only that **he saw the types of details** in Victim's interview that he would look for to determine whether a child had been coached. He gave no opinion on whether Victim was being truthful, or even that Victim had not, in fact, been coached.

Id. at 295, 715 S.E.2d at 376–77 (footnote omitted and emphasis added). The same type of statement occurred in this case and this Court overlooked the clear holding of Hill in finding error in the admission of Crawford's testimony.

This Court distinguished Hill by finding the State asked for an opinion from Crawford on whether Victim had been coached. This Court overlooked or misapprehended the response from Crawford. Even if the question was not the best one the State could have asked, the answer certainly did not provide for vouching or bolstering of Victim because Crawford offered no opinion. When asked: "Did you see any evidence of coaching with Victim?" Crawford responded:

> **All I can say is** that when I met with Victim and when she drew these pictures, we went back over and only Victim and I were in the room. The mother was not in the room at all. And Victim was very detailed about the location of where it happened, and she was so detailed she even told me what pictures were on the walls, what clothes she wore the time that she was in the car.
>
> . . . .
>
> And she was consistent.

(R.113) (emphasis added). Crawford's response makes it clear she could not give an opinion regarding whether Victim was coached. Instead, all she provided were personal observations and factual information, which was not in the form of an opinion. She indicated who was in the room and who was not in the room—personal observations and statements of a fact. She indicated the child was detailed about the location and could describe pictures on the wall and clothes that she wore—again not an opinion about the veracity of the child but merely personal observations and statements of what Crawford was told by Victim. Crawford, just as in Hill, "gave no opinion on whether Victim was being truthful, or even that Victim had not, in fact, been coached." Crawford merely related to the jury what she observed and what she was told as "[a]ll I can say," and then properly allowed the jury to reach the conclusion on whether the child was coached.

Further, this Court overlooked prior, un-objected to testimony by Crawford which rendered any error harmless. This Court found four main comments by Crawford forced its conclusion that her answer can only be interpreted as an opinion that the Victim had not been coached. Two of the four, the fact she and Victim were alone in the room and the fact the mother was not in the room, were previously discussed without objection while Crawford discussed the pictures drawn by Victim. Crawford was specifically asked whether the mother was in the room with her and Victim when the pictures were drawn and Crawford responded:

"Oh, no. No, ma'am" without objection. (R.110-111). Additionally, Crawford indicated only she and Victim were in the room discussing the abuse for all but the first session when the mother was present to make the child comfortable. (R.111). In addition, Crawford began discussing the incidents relayed to her by Victim and specifically indicated Victim "was very detailed about the room that it occurred in." (R.113). Appellant did not raise any objection to this testimony. This comment is remarkably similar to the third comment relied upon by this Court to find error in Crawford's testimony, and is again admitted without objection. Finally, the fourth statement this Court found error in was the fact Victim was consistent. However, this exact statement came in without objection from Appellant during Crawford's testimony. Crawford testified: "she was very consistent with that." (R.113). As a result, even if the statements could be interpreted as an opinion regarding Victim not being coached, all four of the statements were admitted without objection by Appellant. See State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other un-objected to evidence is harmless); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 443 (1978) (stating that admission of improper evidence in harmless when it is cumulative to other, unobjected-to testimony). Any error would be entirely harmless as the jury would have the exact same information to consider even if the trial court had prohibited the response to the question on coaching. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (Error is considered harmless where it could not reasonably have affected the outcome of the trial.); State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."); State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (Ct. App.

1996) (stating that error is harmless beyond a reasonable doubt if it does not contribute to the verdict).

Finally, this Court seems to take issue with Crawford's testimony that children are usually coached by the offender not to tell. Appellant never objected during Crawford's discussion of the contents of the pictures drawn by Victim. After Crawford was asked whether she had worked with a child who has been coached, she responded: "The times that I believe that I have worked with children that have been coached is usually when they are coached by the offender not to tell." Appellant never objected to the question or the answer. This Court overlooked the fact Appellant found no error in these statements and should not have relied on them to support its conclusion Crawford's testimony was in error.

Accordingly, this Court overlooked or misapprehended the relevant testimony from Crawford, as well as misapplied this Court's prior holding in Hill. Crawford, just as the expert in Hill, never offered an opinion. Instead, she offered observations and statements given to her by the Victim and allowed the jury to reach its own conclusions regarding whether the child was coached. Further, all four of the statements this Court relied on to find her testimony inadmissible were admitted without objection during other portions of Crawford's testimony so any error is entirely harmless. Finally, this Court incorrectly relied on Crawford's testimony regarding most victims being coached by the offender to find error when Appellant never found error in the statement and never objected. Therefore, this Court should grant rehearing of Appellant's Issue 2, find the testimony was not impermissible vouching, find the testimony consistent with the testimony in Hill, and affirm the trial court's decision to admit the testimony.

CONCLUSION

For all of the foregoing reasons, the State requests the Court either grant the petition for rehearing *en banc* or the panel grant the petition for rehearing. Further the State requests this Court affirm the trial court's determination the video of the forensic interviewer was properly admitted. Additionally, the State requests the trial court's determination regarding admitting Crawford's testimony be affirmed. In the alternative, if it is found Crawford's testimony was admitted in error, the State requests the final opinion remove discussion regarding the admissibility of the video or address the fact the proper remedy on retrial would be redaction of the offending comment and not exclusion of the video as a whole. Finally, the State requests Appellant's conviction and sentence be affirmed.[3]

Respectfully submitted,

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August 29, 2017

[3] As noted above, the State incorporates by reference all arguments made in the State's Final Brief of Respondent to the extent they are necessary to address these two or the other issues raised by Appellant.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Hon. William H. Seals, Jr., Circuit Court Judge
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The State,

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PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jack B. Swerling, Esquire
1720 Main Street, Suite 301
Columbia, South Carolina 29201

Katherine Carruth Goode, Esquire
Post Office Box 1175
Winnsboro, South Carolina 29180

I further certify that all parties required by Rule to be served have been served.
This 29th day of August, 2017.

Anne Mueller

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ALAN WILSON
ATTORNEY GENERAL

August 29, 2017

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Bryant Christopher Gurley,
Appellate Case No. 2015-000235

Dear Ms. Kitchings:

Please find enclosed for filing the original and six (6) copies of the Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures
cc: Jack B. Swerling, Esquire (enclosure)
Katherine Carruth Goode, Esquire (enclosure)
Victim's Advocacy Division (enclosure)