STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARROLL TREMAYNE WASHINGTON,

APPELLANT

APPELLATE CASE NO. 2016-000792

ANDERS BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARROLL TREMAYNE WASHINGTON,

APPELLANT

APPELLATE CASE NO. 2016-000792

ANDERS BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF ISSUE ON APPEAL

Did the trial court abuse its discretion by admitting the videotaped forensic interview of the minor complainant pursuant to S.C. Code Ann. § 17-23-175 when the forensic interview was hearsay, was cumulative to and impermissibly bolstered Minor's testimony, and was unduly prejudicial under Rule 403, SCRE, particularly where there was no physical evidence presented and Minor's credibility was the most critical determination in this case?

STATEMENT OF THE CASE

A Newberry County Grand Jury indicted Appellant on October 9, 2015 for first degree criminal sexual conduct (CSC) with a minor. R. 382-383. His case was called to trial on February 29, 2016 before the Honorable Donald B. Hocker, and a jury. R. 1. Assistant Solicitors Dale Scott and Taylor Daniel represented the state, and Charles Verner represented Appellant. R. 1.

On March 2, 2016, the jury found Appellant guilty. R. 370, l. 19 – 371, l. 5. Judge Hocker sentenced Appellant to the mandatory minimum sentence of twenty-five years' imprisonment. R. 378, ll. 16-22.

This appeal follows.

ARGUMENT

The trial court abused its discretion by admitting the videotaped forensic interview of the minor complainant pursuant to S.C. Code Ann. § 17-23-175 when the forensic interview was hearsay, was cumulative to and impermissibly bolstered Minor's testimony, and was unduly prejudicial under Rule 403, SCRE, particularly where there was no physical evidence presented and Minor's credibility was the most critical determination in this case.

Minor's grandmother lived in an apartment complex in Whitmire, South Carolina. Minor, who was ten years old at the time of trial, and her two sisters would frequently visit their grandmother on the weekends and during the summer months. R. 98, l. 2 – 99, l. 23. Appellant lived in the same apartment complex as Minor's grandmother with his girlfriend, Tonya, and his girlfriend's ten year old son. R. 100, l. 11 – 102, l. 14; R. 290, l. 25 – 291, l. 5. Tonya and Minor's mother are second cousins. R. 100, ll. 11-18; R. 121, ll. 15-20.

Minor, her sisters, and several other neighborhood kids would often play at Tonya and Appellant's apartment. R. 298, l. 24 – 299, l. 23. The children loved to play at the couple's apartment largely because the family had a Wii U, a videogame console. R. 202, ll. 8-25; R. 275, ll. 3-11. When the neighborhood children came over, including Minor, they would be "in and out playing" all day long. R. 277, ll. 12-16. Tonya, Minor's grandmother, and other neighbors would sit out on the porch and socialize while the children played. R. 278, l. 19 – 279, l. 12. Sometimes the children were inside playing videogames or dancing and other times they were outside playing baseball, basketball, football, and other sports. R. 277, ll. 22-24; R. 301, ll. 22-25.

Appellant worked odd hours during the day, but if he was home he was usually upstairs in a spare bedroom playing on his Xbox, another videogame console. R. 286, ll. 4-20; R. 287, ll. 24-25. Appellant loves children and would occasionally play with the children when he was not working or playing on his Xbox. R. 280, ll. 5-6.

Minor claimed that when she was eight years old while the children were playing hide and seek inside Tonya and Appellant's apartment, Appellant "took [her] to the bathroom" and "touched [her] heinie . . . under [her] pants." R. 203, l. 8 – 204, l. 17. Minor was very hesitant and wavered regarding whether Appellant touched her on the "outside" or "inside" of her "heinie." The following exchange took place between Minor and the assistant solicitor:

Q: When he touched your heinie did he touch the outside of it.

A: Yes.

Q: Did he touch any other part of it?

A: *Now that I think about it, no.*

Q: No? [Minor] what was - - where did he touch your heinie?

A: In the - - inside of my pants.

Q: Inside of your pants, okay. Once he touched the inside under your pants what part of your heinie did he touch was the question.

A: Mostly the outside.

Q: Mostly? What was the other part that he touched?

A: Once he did it - - I felt pressure on my heinie, so *I thought the inside.*

Q: Did it feel like he touched the inside?

A: Yes.

R. 205, ll. 5-21 (emphasis added).

Minor later claimed that when Appellant touched her it felt "hard" and "weird" and "cold." R. 205, l. 24 – 207, l. 1. The solicitor then asked Minor the following leading question, "How many times did that happen where he put his hand on the inside of your heinie?" Minor responded "I think twice." R. 207, ll. 9-14. However, Minor said she "kind of like forgot" how old she was when the second time happened, but then later claimed the "second time was like one month before I turned nine." R. 207, l. 19 – 208, l. 208, l. 6.

Minor alleged that the second time happened in Tonya and Appellant's upstairs bedroom while the other children were "mostly downstairs." She said another neighborhood child came into the bedroom before "it happened" to ask Minor a question and then after she left Appellant "forced [her] to pull [her] pants down." R. 208, l. 7 – 209, l. 6; R. 212, l. 13 – 213, l. 2. However, Minor claimed on this occasion Appellant "was just looking at [her]." R. 213, ll. 5-8.

Lastly, Minor explained a third occasion when Appellant allegedly touched her "inappropriately." She claimed while the other children were outside playing, she was inside with Appellant who did "a hand movement that he does a lot." She said he was "pulling on . . . his pants" and she thought it meant he wanted her to pull her pants down. She was "terrified" but did not pull her pants down and nothing happened because by then she was "not that afraid to say no." R. 215, l. 5 – 218, l. 21.

Despite claiming Appellant touched on her two occasions, Minor could not describe the second occasion and admitted she was "[k]ind of rusty on it." R. 219, l. 3 – 221, l. 21. She later contradicted herself and said Appellant only touched her one time. R. 221, ll. 17-21.

Appellant testified in his defense. He adamantly denied the allegations and firmly stated that he never touched Minor improperly. R. 311, ll. 13-24. He also stated that he was never

alone with Minor in his apartment and that there were always children and adults in and out of the house. R. 309, l. 7 – 310, l. 10.

Tonya, Appellant's girlfriend, also testified on Appellant's behalf. She said she never witnessed any sort of "inappropriate behavior" between Appellant and the neighborhood children who frequently came to visit and play. R. 280, ll. 13-19; R. 284, ll. 20-22; R. 288, ll. 11-12. She also testified that even after these allegations surfaced, the other neighborhood kids still came over to play at her apartment. R. 281, l. 18 – 282, l. 4.

The Objection

Before the forensic interview was admitted into evidence and published to the jury, defense counsel objected. While he conceded the interview met the elements of S.C. Code Ann. § 17-23-175 for admissibility, he argued it was "cumulative to the child's testimony" and should be excluded for that reason. He also objected under Rule 403, SCRE, and argued the interview constituted hearsay. R. 177, l. 15 – 178, l. 8.

The court overruled the objection, and after conducting an *in camera* hearing, found the interview met the elements of the statute and contained particularized guarantees of trustworthiness. R. 184, l. 6 – 185, l. 3. Therefore, the court admitted the interview and allowed the state to publish it to the jury. R. 186, ll. 6-12. The forensic interview was marked as State's Exhibit No. 1 and is on file with this Court.

The statements Minor made during the forensic interview were consistent with her testimony before the jury. However, she was more assertive during the interview and wavered less in her account. See State's Exhibit No. 1 (DVD of Forensic Interview).

The Solicitor's Closing Argument

During his closing argument, the assistant solicitor used Minor's forensic interview to bolster her trial testimony and the state's case.[1] R. 349, ll. 3-17. The solicitor exclaimed:

> This **[Minor's] story has been consistent from the very get go** from the initial allegation to the times - - **you all [are] going to get to watch that forensic interview as much as you all want to, by the way, and you're going to find, and you can compare it to her testimony yesterday, that its wholly consistent.** Is a nine, 10-year-old capable of doing that. You know, if you're lying, you got to be good at it. If you're lying you got to remember what the lie is so you can carry it on. You know what I'm saying? But if you tell the truth you don't have to do all that because you remember what happened. If you're telling the truth your story is going to be consistent. The big part's going to be consistent, and that's what you're going to find when you watch that forensic interview and you remember how she testified yesterday.

R. 349, ll. 3-17 (emphasis added).

Verdict and Sentencing

As seen, Minor's credibility was crucial to the state's case. There was no physical evidence or eyewitness testimony presented. The only evidence against Appellant was Minor's testimony and the cumulative forensic interview that was admitted over defense counsel's objection. Despite the lack of evidence, the jury convicted Appellant of first degree CSC with a minor. R. 370, l. 19 – 371, l. 3. Because he had no prior record, the court sentenced him to the mandatory minimum sentence of twenty-five years imprisonment. R. 378, ll. 16-22.

---

[1] The solicitor also repeatedly argued in his opening statement and closing argument that under South Carolina law Minor's testimony does not need to be corroborated. R. 90, ll. 12-21; R. 351, ll. 8-19. The court likewise charged the jury "that the testimony of the victim need not be corroborated in prosecutions under Section 16-3-655 Code of Laws for South Carolina." R. 366, ll. 15-18. Defense counsel did not object to the solicitor's arguments or the court's erroneous charge. See State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) (holding that instructing the jury that the victim's testimony need not be corroborated by additional evidence or testimony pursuant to S.C. Code Ann. § 16-3-657 is an impermissible charge on the facts and, therefore, unconstitutional).

Discussion

The trial court abused its discretion by admitting Minor's forensic interview pursuant to S.C. Code Ann. § 17-23-175 since the forensic interview was hearsay, was cumulative to and impermissibly bolstered Minor's testimony, and was unduly prejudicial under Rule 403, SCRE, particularly where there was no physical evidence presented and Minor's credibility was crucial to the state's case.

The evil of improper bolstering and cumulative hearsay testimony is that both impermissibly give the jury the false impression that by repeating the same story it has been corroborated, and is true. Hearsay is "a statement, other than one made by a declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "Generally, a prior consistent statement is not admissible unless the witness is charged with fabrication or improper motive or bias." State v. Whitner, 399 S.C. 547, 558, 732 S.E.2d 861, 867 (2012) (citing Rule 801(d)(1), SCRE). "However, in CSC cases involving minors, the Legislature has made specific allowances for such hearsay statements of child victims under the proper circumstances." Id. (citing S.C. Code Ann. § 17-23-175 (Supp.2010)). If certain requirements are satisfied, a minor's out of court statements, like those made during a recorded forensic interview, may be admitted. See S.C. Code Ann. § 17-23-175.

Minor's statements during the forensic interview were clearly hearsay and were not admissible under any hearsay exception. The court admitted the videotaped interview pursuant to § 17-23-175. However, there is nothing in a criminal sexual conduct case that allows for the admission of hearsay testimony that is cumulative to and impermissibly bolsters the minor's trial testimony. Therefore, the trial court should have excluded Minor's forensic interview.

As seen, the assistant solicitor argued to the jury that Minor's out of court's statements made during the forensic interview, which went far beyond time and place, were consistent with her trial testimony. The solicitor argued Minor's "story has been consistent from the very get go" and "you all [are] going to get to watch that forensic interview as much as you all want . . . and you're going to find, and you can compare it to her testimony yesterday, that its wholly consistent." R. 349, ll. 3-17. It is undisputed, as admitted by the solicitor in his closing argument, that Minor's out of court statements made during her forensic interview were cumulative to her trial testimony and, consequently, constituted impermissible bolstering.

In State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), our Supreme Court held the trial court erred in allowing the state to introduce portions of a forensic interviewer's written reports about interviews conducted with the three alleged minor victims. The Court stated, "In each report, the forensic interviewer stated that during the interviews, each child had 'provide[d] a compelling disclosure of abuse by [appellant].'" Id. at 480, 716 S.E.2d at 94 (alterations in original). The Court found this was error as "[t]here is no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful." Id.

In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), our Supreme Court likewise held that the forensic interviewer's testimony about a "compelling finding of child abuse" was the equivalent of the witness stating the minor was telling the truth and was improper bolstering. Id. at 359, 401 S.E.2d at 500.

While in Jennings, Kromah, and Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), the bolstering centered on the forensic interviewer, here Minor's in court testimony was improperly bolstered by her out of court forensic interview. Under the reasoning of Kromah and that line of

cases, Minor's forensic interview should have been excluded. Minor made allegations during her forensic interview that she repeated during her trial testimony. The videotaped forensic interview presented the jury with a sympathetic forensic interviewer eliciting the same story Minor told at trial. The evil, again, of improper bolstering is that the jury will impermissibly think that because it hears the same testimony or story more than once that it more than likely is true.

The out of court statements Minor made during the forensic interview were also highly prejudicial under Rule 403, SCRE. The state sought to admit the recorded interview merely to reiterate and reinforce Minor's testimony. See Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) ("Improper corroboration testimony that is ***merely cumulative to the victim's testimony***, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.") (emphasis in original).

Due to the trial court's error in admitting Minor's forensic interview, which was highly prejudicial in this "he said, she said" case, Appellant should be granted a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of March, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

MAR 17 2017

SC Court of Appeals

Appeal from Newberry County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARROLL TREMAYNE WASHINGTON,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Carroll Tremayne Washington states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before the Honorable Donald B. Hocker, which was held on February 29, 2016 through March 2, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Carroll Tremayne Washington.

Respectfully Submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of March, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

March 17, 2017.

Lara M. Caudy
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARROLL TREMAYNE WASHINGTON,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-Billed Indictment:
(2) Complete Trial Transcript Dated February 29, 2016 through March 2, 2016;
(3) State's Exhibit No. 1 (DVD of Forensic Interview);
(4) State's Exhibit No. 2 (Photographic Lineup).

I certify that this designation contains no matter which is irrelevant to this appeal.

March 17, 2017

Lara M. Caudy

Lara M. Caudy
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARROLL TREMAYNE WASHINGTON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders 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 Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Carroll Tremayne Washington, #367333, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 17th day of March, 2017.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of March, 2017.

Brittany Wilkinson (L.S)
Notary Public for South Carolina
My Commission Expires: November 3, 2026.