

STATE OF SOUTH CAROLINA

 ORIGINAL

IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable Kristi Lea Harrington, Circuit Court Judge

RECEIVED

APR 06 2018

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JEFFEREY LANCE WHITSETT,

APPELLANT

APPELLATE CASE NO 2017-001498

INITIAL BRIEF OF APPELLANT

TAYLOR D GILLIAM
Appellate Defender

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

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting the forensic interview of a nine-year-old child two years after the interview occurred, where the child's competency and credibility were not established at the interview?

STATEMENT OF THE CASE

During its June 2016 term, a Berkeley County grand jury indicted Jefferey Whitsett for five counts of criminal sexual conduct with a minor in the first degree, one count of criminal sexual conduct with a minor in the third degree, and one count of exposing another to HIV virus.

R. __ (Indictments).

Represented by David Schwacke and Juan Tolley, Appellant's matter was called for trial before the Honorable Kristi Lea Harrington and a jury on June 27, 2017. Tr. I 1. Anne Williams and Kamilia Szymczynaka-Sas served as the assistant solicitors on this case.

After a two-day trial, the jury found Appellant guilty as indicted. Tr. II 614, l. 7 – 616, l. 6. Judge Harrington sentenced Appellant to forty-five years' incarceration on the criminal sexual conduct with a minor in the first degree charges, fifteen years concurrent for the criminal sexual conduct with a minor in the third degree, and ten years consecutive for the exposing another to the HIV virus charge. Tr. II 629, ll. 2 – 17.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

The trial court erred in admitting the forensic interview of a nine-year-old child two years after the interview occurred, where the child's competency and credibility were not established at the interview.

Background

Appellant's wife called an attorney, Kevin Kears, on or about June 1, 2015 and alleged that Appellant had "molested her daughter." Tr. II 215, l. 22 – 219, l. 18. Kears called law enforcement, and Appellant's wife came to Kears's office to meet with an officer the next morning. Id.

James Lawrence, a corporal with the Berkeley County Sheriff's Office, met with Appellant's wife and Kears on June 2, 2015. Tr. II 230, l. 7 – 233, l. 15. Lawrence provided Mrs. Whitsett with information on how to go about scheduling a forensic interview. Id.

The minor child was examined by Karen Drozd on June 2, 2015 at the Medical University of South Carolina. Tr. II 246, l. 25 – 247, l. 18. At that time, the minor child described to Drozd what she had allegedly experienced. Tr. II 253, l. 25 – 255, l. 15. She claimed that the sexual assaults had occurred in her mother's bedroom. Tr. II 256, ll. 1 – 10. The minor child was also interviewed by Elizabeth Pilcher at the Dorchester Children's Center on June 3, 2015. R. ___ (Court's Exhibit 2).

James Blakeley, an officer with the Berkeley County Sheriff's Office, located Appellant a few days later and transported him to a detention center where he was questioned by Brian Fenton. Tr. II 234, l. 7 – 241, l. 9; R. ___ (Court's Exhibit #2). Fenton spoke with Appellant on June 10, 2015. Id.; Tr. II 395, l. 21 – 406, l. 7.

Fenton was an officer with the Berkeley County Sheriff's Office. Tr. II 389, l. 3. – 392, l. 5. Previously, Fenton had received an e-mail from Beth Pilcher at Dorchester Children's Center which indicated that a child had disclosed abuse. Fenton obtained a warrant for Appellant's arrest. Tr. II 392, ll. 6 – 20. The warrant was obtained on June 5, and Fenton attempted to locate Appellant at his place of employment. Tr. II 393, ll. 3 – 14. Appellant was eventually arrested on the warrant that Fenton obtained. Tr. II 394, ll. 8 – 20.

The week before Appellant's trial was set to begin, the trial court heard pretrial motions. Tr. I 1. At that time, counsel for Appellant moved to exclude the minor child's video and audio recorded statement which he classified as a forensic interview. Tr. I 5, ll. 17 – 19. Counsel also moved to admit evidence of third party guilt. Tr. I 5, ll. 9 – 13. The trial court granted that motion. Tr. I 48, ll. 14 – 17. There was a discussion between counsel and the court of redacting some of the forensic interview based on State v. Kroham, 401 S.C. 340, 737 S.E.2d 490, (2013). Tr. I 37, l. 14 – 49, l. 13. The trial court also indicated that some of Appellant's motions were premature and indicated that a ruling would be made later. Id.

At trial, Appellant sought to exclude the minor child's forensic interview:

I would stand again on the argument that there's no indication within the video that helps establish that the child being interviewed appreciates the difference between right and wrong, and that her competency as a witness is not established by the video, that that is a video that was taken - - made more than two years - - or two years ago, and ... as it is being sought to be introduced by the State that it doesn't clearly establish that [minor child] understands the difference between right and wrong, and because of that it should be excluded.

Tr. II 32, l. 25 – 33, l. 11.

The trial court adopted its preliminary ruling and found that “the statements given were in response to questioning conducted during an investigative interview; they were preserved by videotape; there was an explanation as to the power going off why there

[were] two separate segments.” Tr. II 35, ll. 1 – 11. Furthermore, the trial court reasoned:

The child at this time, based upon statements and assertions by the State - - and I have no reason to believe that she would not be available to testify during trial and would be subject to cross-examination of the elements of the offense and the making of the out-of-court statement.

The totality of the circumstances surrounding the making of the statement do provide guarantees with trustworthiness. In consideration of the final factor of the guarantee of trustworthiness, the Court did look to the interview, which I did review, as well as Ms. Pilcher’s statements here today in court, that she asked [the minor child] to tell the truth and only tell the truth.

...

I find that the statements were made in compliance with [S.C. Code Ann. §] 17-23-175, and as such will be admissible in the trial of this case.

Tr. II 35, l. 1 – 36, l. 25.

Following proffered testimony by the minor child, defense counsel again objected:

For the record, I would make a challenge to her competency. Again, **we’re going to be dealing also with the video at some point that was two years ago and not now.** So there is no way to corroborate this understanding of truth and veracity as to what happened two years ago. That’s all.

Tr. II 172, ll. 16 – 22 (emphasis added). The trial court again denied the motion. Tr. II 172, l. 23 – 173, l. 4.

The State sought to admit Exhibits 26 and 27, the original and redacted versions of the forensic interview, respectively. Tr. II 345, l. 13 – 347, l. 13. Defense counsel objected again on the previous grounds but also objected to the publication of the interview based upon improper bolstering and hearsay. Id. The Court admitted State’s Exhibit 26, over objection, with the understanding that it would not be published to the jury. Id. State’s 27 was also admitted, over objection, for publication to the jury. Id. The video was published to and played for the jury. Tr. II 384, l. 4 – 386, l. 24.

After the State rested, counsel for Appellant moved for a directed verdict and requested a new trial based upon the Court's erroneous admission of the child's forensic interview as well as Appellant's interrogation. Tr. II 546, l. 6 – 547, l. 8. The trial court denied all of the motions. Tr. II 547, l. 9 – 552, l. 4.

Appellant chose not to testify. Tr. II 560, l. 20 – 561, l. 10. Following receipt of the jury verdict, counsel for Appellant renewed "all motions previously made on behalf of Mr. Whitsett" to include introduction of the audio-video recording of Appellant, introduction of the video of the minor child, and others. Tr. II 619, l. 25 – 620, l. 19. The trial court denied the motions. Id.

Discussion

The admission or exclusion of evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion accompanied by probable prejudice. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

Admissibility of out-of-court statements by children under twelve years old is governed by statute:

(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. Thus, the legislature has made "specific allowances" for the admission of out-of-court statements by child victims in criminal sexual conduct cases when the

requirements of section 17–23–175 are satisfied. State v. Whitner, 399 S.C. 547, 558–59, 732 S.E.2d 861, 867 (2012); State v. Perry, 410 S.C. 191, 205, 763 S.E.2d 603, 610 (Ct. App. 2014). However, because the circumstances surrounding the making of the statement did not provide particularized guarantees of trustworthiness, the interview in the matter *sub judice* should be excluded.

Prior to trial, counsel for Appellant sought to exclude this video and accompanying transcript:

I would submit that because of the circumstances of this particular interview where the examiner does not go into questioning as to the child witness's competency, whether she can differentiate right from wrong, truth from dishonest. That's normally in those interviews. It is not in this interview. She did not do it in either stage one or stage two.

Tr. I 32, ll. 13 – 19; Tr. I 35, l. 21 – 37, l. 1.

As discussed pre-trial, State v. Kromah changed the landscape of forensic interviews. 401 S.C. 340, 737 S.E.2d 490 (2013). Notably, opinions by an interviewer regarding the child's truthfulness should be avoided. 401 S.C. at 360, 737 S.E.2d at 500. However, S.C. Code Ann. § 17-23-175 remains unchanged since 2006.

As articulated by counsel, the totality of the circumstances surrounding the making of the forensic interview of the nine-year-old-minor child did not provide particularized guarantees of trustworthiness. During the forensic interview, the minor child remarked “[a]nd, anyways, right. Yeah, told this story too many times.” R. __ (Court's Exhibit 2, Part 2). As previously noted, this interview took place on June 3, 2015.

Kevin Kears, the attorney who was friends with Appellant's wife, first heard about the alleged incidents on June 1, 2015, two days prior to minor child meeting with Pilcher at the

Dorchester Children's Center. Appellant's wife testified that she called Kearsse the same day that minor child disclosed to her. Tr. II 287, l. 24 – 291, l. 15.

At the time of the forensic interview, Appellant's wife—the minor child's mother—had only known about the alleged abuse for two days. The minor child's statement "told this story too many times" should have indicated to the interviewer and the trial court that the child's trustworthiness was not guaranteed, and the audio-video interview and accompanying transcript should have been excluded.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction based upon the trial court's errors described above.

A handwritten signature in black ink, appearing to read "Taylor D Gilfiam", written over a horizontal line.

Taylor D Gilfiam
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of April, 2018.

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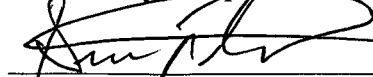
CERTIFICATE OF SERVICE

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 Jefferey Lance Whitsett, #373029, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 6th day of April, 2018.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of April, 2018.



(L.S)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.