STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GEORGE ANTHONY CLARK,

APPELLANT

APPELLATE CASE NO. 2017-001861

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by refusing to redact from appellant's interview with the police his conversation about possibly pleading guilty to save the child the trauma of a trial, and his discussion of drug use, since appellant did admit his guilt, and under Rule 403, SCRE, even if relevant, these statements were unduly prejudicial or they would be confusing and misleading to the jury, and where the court also on the "drugs statements" abdicated its discretionary authority by reasoning because appellant "said it" during the interview that the statements were admissible?

2.

Whether the court erred by refusing to redact the vast majority of the forensic interview once it determined it was admissible, since the child talking about what she enjoyed doing, and about others in her life did were irrelevant to her allegation that appellant improperly touched her, since the rules of evidence still apply to a forensic interview, and the use of these overwhelmingly irrelevant matters the child discussed during the forensic interview impermissibly invited a verdict on the impermissible basis of sympathy or empathy?

STATEMENT OF THE CASE

Appellant was indicted by the Abbeville County Grand Jury for the offense of criminal sexual conduct with a minor. R. *. His case was called to trial on August 28, 2017, before the Honorable Donald Hocker, and a jury. Janna Nelson and Kami Granade represented appellant. Yates Brown and Micah Black were the assistant solicitors. Tr. 1.

On August 30, 2017, the jury found appellant guilty. Tr. 276, ll. 15-20. Judge Hocker sentenced appellant to fifteen years imprisonment. Tr. 284, ll. 19-24.

This appeal follows.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

1.

The court erred by refusing to redact from appellant's interview with the police his conversation about possibly pleading guilty to save the child the trauma of a trial, and his discussion of drug use, since appellant did admit his guilt, and under Rule 403, SCRE, even if relevant, these statements were unduly prejudicial or they would be confusing and misleading to the jury, and where the court also on the "drugs statements" abdicated its discretionary authority by reasoning because appellant "said it" during the interview that the statements were admissible.

Introduction

This case involves an allegation by a ten-year-old girl, that appellant, his aunt's boyfriend, "inappropriately" touched her while she lay on the couch in her aunt's small trailer while her mother slept very nearby on another couch in the same room. Appellant voluntarily went to the police station, was interviewed, and released. This appeal involves the trial judge's refusal to redact inadmissible statements from appellant's interview, and from the child's forensic interview.

Relevant facts

Defense counsel Nelson told the judge appellant was not in custody at the time he was interviewed by Sergeant Ashley. Appellant told Sergeant Ashley he did not want to waive all of his rights but that he was willing to talk. Tr. 51, l. 12 – 54, l. 20.

Nelson said only about three minutes of the interview were "relevant and probative" -- which is when appellant talked about what he was doing at the time the child claimed appellant improperly touched her. Counsel cited Rule 403, SCRE, on the probative value of the evidence

being substantially outweighed by their undue or unfair prejudice in support of her argument. Tr. 54, l. 21 – 56, l. 8; Tr. 73, l. 12 – 74, l. 10.

The judge said that "he, you know, has to live with what he voluntarily said. Of course, certainly I -- I have to be mindful of those things, even though he voluntarily said it. It may be so prejudicial that it needs to be redacted." Appellant never admitted his guilt during this interview, and it was largely a stream of consciousness rambling. Tr. 62, l. 16 – 63, l. 12.

Defense counsel Nelson noted petitioner's discussion of a guilty plea as a matter that needed to be redacted from the interview. This included a discussion about appellant stating he wanted to save the child the trauma of testifying. Tr. 64, l. 3 – 66, l. 23.

The assistant solicitor asserted that the jury could interpret appellant talking about the possibility of a guilty plea as "guilty knowledge" on his part, and he claimed the same was true of appellant's statements about saving the child the trauma of going to counselling. Tr. 64, l. 3 – 66, l. 23.[1]

Defense counsel Nelson then argued that appellant's statements about being drugged and the paperwork from South Regional Hospital listing all the drugs that were allegedly in his system should also be redacted. Tr. 70, l. 12 – 72, l. 23. The judge stated: "[i]f he felt like he was drugged, the fact he may be in error based upon some medical records, I think he's -- *he's got to live with it. I think he's got to live with the statement.*" Tr. 72, ll. 15-23.

The solicitor said he thought the "drugs discussion" was admissible because it "sounds like an excuse" and "almost like it was an intoxication excuse." Defense counsel said the

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[1] Defense counsel argued Relevance and the unduly prejudicial effect substantially outweighing the probative value under Rule 403, SCRE. The judge rejected other arguments that appellant discussing pleading guilty constituted "plea negotiations" or offers to compromise under Rule 408, SCRE. The judge cited State v. Compton, 366 S.C. 671, 623 S.E.2d 661 (2005), which pertained to Rule 410, SCRE, on discussions of a guilty plea not being admissible at trial. The judge also ruled that Rule 408, SCRE, was not applicable. Tr. 66, l. 24 – 70, l. 6.

defense was not offering an involuntary intoxication defense, and that under Rule 403, SCRE, that section of the interview "would be confusing and misleading to the jury" pursuant to Rule 403, SCRE. Tr. 72, l. 4 – 74, l. 10.

State's Exhibit 4, appellant's interview with Sergeant Ashley, is on file with this Court for viewing. As to the matters that the judge refused to redact, appellant talks about pleading guilty even though he was not guilty. He talks about not wanting to put the child "through it," and not wanting the child to have to testify. Appellant denied committing the crime, and he talks about pleading guilty to the charge, and that even if it cost him his freedom, he loved "the kids," and was "willing to do this."

As to drugs, appellant mentions cocaine, crack cocaine, and barbiturates. Appellant also talks about the hospital report recording the fact that he was apparently "drugged." As stated, there was discussion that appellant misunderstood the hospital report.

As seen, the judge reasoned that even if appellant was not on drugs, appellant talked about it during the interview and therefore he should have to "live with it," which was an abdication of the judge's discretionary authority to redact irrelevant or unduly prejudicial or confusing and misleading matters under the Rule 403, SCRE, standard.

In his closing argument the solicitor twice showed the jury portions of appellant's interview. He claimed and emphasized that appellant talking about a guilty plea showed his "guilty conscience." Tr. 245, l. 1- 246, l. 5.

Discussion

Appellant never admitted his guilt during the interview. Yet, as seen above, the solicitor hoped the jury would pile inference upon inference and conclude appellant was somehow admitting his guilt during this rambling discussion.

Defense counsel Nelson correctly argued that under Rule 403, SCRE, any probative value appellant's statements about pleading guilty to save the child the trauma of trial were substantially outweighed by their unfair prejudice under Rule 403, SCRE.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Unfair prejudice means an undue tendency to suggest a decision on an improper basis. See Rule 403, SCRE; State v. Dickerson, 341 S.C. 391, 535 S.E.2d 119 (2000); State v. Alexander, 303 S.C. 377, 404 S.E.2d 146 (1991).

The court reasoned that although appellant did not admit his guilt, he had to "live with" what he said to the sergeant during the interview. Respectfully, this sets a dangerous precedent of the state playing a non-inculpatory statement by a criminal defendant because it hopes that the defendant will "look bad" or acts "suspiciously" during the interview or interrogation, and urge the jury, as the solicitor did here in closing, to convict the defendant by piling inference upon inference onto his statements which do not admit guilt. That, respectfully, should be the heart of undue prejudice under Rule 403, SCRE. Cf. State v. Gray, 408 S.C. 601, 759 S.E.2d 160 (2014).

Further, appellant's statements about being "drugged" or on drugs should have been redacted since they had the tendency -- as defense counsel argued -- to mislead or confuse the jury under Rule 403, SCRE. Defense counsel correctly argued there was no defense of involuntary intoxication involved in this case, drug use was not being offered as an "excuse," and appellant was also apparently in error about the hospital records recording certain drugs in appellant's system.

The judge abdicated his discretionary authority when he reasoned that appellant had to "live with" what he said during the interview. In State v. Alexander, 309 S.C. 495, 424 S.E.2d 526 (Ct.App. 1992), this Court reversed the trial judge where he ruled he did not have the

discretion to sentence the defendants to YOA sentences, where he, in fact, did have the discretion to impose YOA sentences. Here, the judge incorrectly reasoned that appellant had no complaint about evidence being admitted about his drug use where he admitted, correctly or incorrectly, during the interview, that he was "drugged" or using drugs. Such matters are often redacted from a defendant's statement even where he makes inculpatory statements about the charged crime. See, also State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012) (inherent authority or discretion to ensure a fair trial).

Further, using the drugs appellant talked about during the interview was an admission to committing a totally unrelated crime. Moreover, a close degree of similarity or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception. State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998); State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993).

Here, there was no connection, and the judge erroneously reasoned that because appellant "said it," he had to, in the parlance of our time -- "own it." That was prejudicial error. For the reasons above, appellant should be granted a new trial.

2.

The court erred by refusing to redact the vast majority of the forensic interview once it determined it was admissible, since the child talking about what she enjoyed doing, and about others in her life did were irrelevant to her allegation that appellant improperly touched her, since the rules of evidence still apply to a forensic interview, and the use of these overwhelmingly irrelevant matters the child discussed during the forensic interview impermissibly invited a verdict on the impermissible basis of sympathy or empathy.

Relevant facts

Defense counsel argued that only about nine minutes of the forensic interview actually addressed the "incident in question." Defense counsel argued that the first "sixteen, seventeen minutes of the video, we would move that that all be redacted, the portion about the family, the portion about what she likes to do at recess and in her spare time." Tr. 83, l. 5 – 87, l. 19.

The judge stated he was not going to redact the interview other than "where she states concerning the rules and telling the truth." The judge said he would also redact the child crying during the interview. The judge refused to redact from the forensic interview the child talking about what she liked to do in her spare time, and other matters about her and her family that were irrelevant to the accusations she made against appellant. Tr. 83, l. 5 – 89, l. 6.

Other than the portion of the interview about the importance of telling the truth, and the child crying, the judge ruled: **"I'm going to allow everything else."** Tr. 87, l. 20 – 89, l. 6. (emphasis added).

The forensic interview is on file with this Court. As this Court will see, the child talks about how she likes to dance and sing. The child also talks about "girly songs," and her favorite song.

The child also talks about playing "windmill," and doing pull-ups on a bar. She is questioned about playing gymnastics.

The forensic interviewer then asks the child to "tell me about your family." The child explains that her mother and father do not hit each other but there was some "fussing" between them. The child says she has learned that drugs were "bad," and that she had seen the appellant smoking cigarettes, and she had seen her aunt drink beer. The child also said both her mother and father would spank her for misbehaving.

Defense counsel and the judge had both watched the forensic interview in its entirety. Defense counsel, respectfully, correctly argued that all the matters above in the interview were irrelevant, and should be redacted.

Trial testimony

The child was ten-years-old "almost eleven" at the time of the trial. Tr. 113, l. 20 – 114, l. 12. Both of her parents were in the courtroom and she told the jury she had one brother who was five years younger than her. Tr. 114, l. 13 – 115, l. 3.

The child testified that the alleged touching incident by appellant happened at her Aunt Frankie's house in Abbeville. Appellant was her aunt's boyfriend. Tr. 115, l. 4 – 116, l. 4. She called appellant "Ant." She alleged appellant touched her "inappropriately" while she was "sleeping on my aunt's couch." Tr. 116, ll. 17-24.

The child said that her mother and brother also spent the night there. The child slept on the couch and her mother "was across from me." Her brother was "on the same couch [with their mother] . . . across from me." Tr. 118, ll. 7-20. The child claimed that appellant touched her "on my chest and in my underwear." She claimed, "I told him to go down the hall and go to sleep." The child maintained that appellant went down the hall but she claimed he came back and

touched her underneath her underwear. Tr. 119, l. 9 – 120, l. 24. Appellant then "went down the hall and went to sleep." Tr. 120, ll. 23-25.

The child asked her mother if she could sleep on the couch with her, and told her mother how appellant allegedly touched her. She testified that her mother talked to appellant, appellant denied the allegations, and that her Aunt Frankie then took appellant back "to his mom's house." Tr. 121, l. 5 – 122, l. 23.

The child said she had a "really good bond together" with appellant, and that he played with her and her brother. Tr. 122, ll. 10-23.

On cross-examination, the child admitted her mother and brother slept close to her on the other couch when appellant allegedly touched her. She did not tell her mother after the "first time" appellant allegedly touched her that evening. Tr. 128, ll. 8-25. The next morning the police were called. Tr. 132, ll. 5-21.

The child's mother, Ms. Jones, testified that they had a "sewer line backed up" in December of 2015, and therefore they stayed with the child's Aunt Frankie. Tr. 136, l. 2 – 138, l. 25. Ms. Jones remembered that the incident allegedly happened on April 22, 2016. She said she was awakened by the child that night, and told "Ant keeps coming in here touching me." Tr. 139, l. 4. – 142, l. 10. Ms. Jones said she was told of the alleged touching at 2:34 a.m.

Ms. Jones said she was not even aware appellant had entered the trailer before her daughter made these accusations. Tr. 142, l. 4. – 145, l. 4. Ms. Jones recalled that appellant told her he would not do something like that to the child, and "that he loves us, he loves my kids." Ms. Jones said the child screamed at appellant,: "You did touch me. You came in here twice and touched me." Tr. 145, ll. 1-16.

Discussion

South Carolina Code § 17-23-175 governs the admissibility of forensic interviews of a child under twelve, after the factors determining trustworthiness are determined outside the presence of the jury by the judge. These factors include "whether the statement represents a detailed account of the alleged offense, and whether the statement has internal coherence." See S.C. Code § 17-23-175(B)(3) & (4).

Here, defense counsel correctly argued that only a small portion of the forensic interview dealt with the specific incident or allegation involved in this case. The remainder -- the vast majority -- of the forensic interview was irrelevant. This included what the child enjoyed doing: Dancing, singing, playing gymnastics, playing windmill, and doing pull-ups on a bar. The child also talked about drugs being bad, seeing appellant smoking cigarettes, her aunt drinking beer, her mother and father "fussing" but not fighting, and getting spanked by both her mother and father.

Respectfully, the legislature did not mean for the forensic interview statute, 17-23-175, to license a videotaped discussion with a child about what he or she enjoyed doing in their life, and about his or her family life, and other matters totally unrelated to the allegation in question. Such a videotape, as the one in this case, can only cause a normal juror to relate, empathize, or have sympathy for the child on the videotape. That is respectfully wholly improper.

It is elementary that the state should avoid appealing to the sympathy or passion of jurors. See State v. Crosby, 348 S.C. 387, 559 S.E.2d 352 (Ct. App. 2001) (closing argument that a not guilty verdict would give the defendant "a license to kill" was improper but remedied by a curative instruction that defense counsel did not object too).[2]

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2 Rev'd on other grounds State v. Crosby, 355, S.C. 47, 584 S.E.2d 110 (2003).

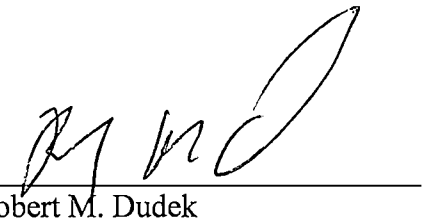
Our Supreme Court has strongly limited extraneous factors that taint a legitimate forensic interview under the statute. Comments that "bolster" the alleged victim, and subtle or not subtle statements about the veracity of the complaining witness are inadmissible. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013); Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017); State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015).

The forensic interview was not designed by statute to be a mini-documentary or interview about what child enjoyed in life, about her family, and her values as it pertained to drug use, or whom she had seen drinking or smoking.

Respectfully, the trial court in this case arbitrarily refused to redact a majority of this forensic interview which contained wholly irrelevant matters. This mini-documentary or interview about the child's life in this case was meant to show her in a very positive light so the jury would empathize with her. Such a gross abuse of S.C. Code § 17-23-175 should respectfully not be allowed, and it will spread if approved in this case. Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Abbeville County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of July, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GEORGE ANTHONY CLARK,

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 George Anthony Clark, #339289, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 6th day of July, 2018.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

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

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.