STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
The Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2017-001498

THE STATE,

Respondent,

v.

JEFFEREY LANCE WHITSETT,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
OT Wallace Building
Charleston, SC 29401
(843)-958-1900

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court abused its broad discretion in admitting the forensic interview of Victim under S.C. Code Ann. § 17-23-175, where Victim stated in her forensic interview that she agreed to tell the truth, where Victim testified at trial and was subject to cross examination, and where the totality of the circumstances surrounding the making of the statement provided particularized guarantees of trustworthiness.

STATEMENT OF THE CASE

In June 2016, the Berkeley County Grand Jury indicted Appellant 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 person to the HIV virus. On June 27-29, 2017, a jury trial was held in the Berkeley County Court of General Sessions with the Honorable Kristi Lea Harrington, presiding. Appellant was represented by David Schwacke, Esquire, and Juan Tolley, Esquire of the Berkeley County Public Defender's Office. The Respondent (the State) was represented by Assistant Solicitors Anne Williams and Kamila Szymczynska-Sas of the Ninth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant of all seven counts. Following the verdict, the trial judge sentenced Appellant to five concurrent forty-five year terms of imprisonment for each count of criminal sexual conduct with a minor in the first degree, one concurrent term of fifteen years' imprisonment for the single count of criminal sexual conduct with a minor in the third degree, and one ten year term of imprisonment for exposing another person to HIV to run consecutively with the other sentences for an aggregate sentence of fifty-five years' imprisonment. Appellant then timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

The victim (Victim) in this case was born in 2005. (R. 361). Victim lived with her mother (Mother), brother, aunt, uncle, cousin, and Appellant in the Moncks Corner area of Berkeley County in June 2015. (R. 253, 361-64). Mother married Appellant in January 2014 and Appellant lived in Mother's home until June 2015. (R. 362-63). Victim is not Appellant's biological child. (R. 79). On June 1, 2015, Victim told Mother that Appellant had sexually abused her. (R. 83, 257). Victim could not remember the exact dates Appellant assaulted her, but she said it started happening in March 2015 and continued up until the Saturday before Victim's forensic interview, May 30, 2015. (R. 78-79). After hearing Victim's disclosure, Mother contacted her attorney, Kevin Kearse, for advice. (R. 367). Kearse contacted law enforcement on Victim and Mother's behalf and arranged for a meeting at his office the following day. (R. 293-95, 367-68). The next day, June 2, 2015, Mother and Victim met with law enforcement at Kearse's office and arranged for Victim to receive a medical exam and to give a forensic interview. (R. 368).

On June 3, 2015, Victim participated in a forensic interview with Elizabeth Pilcher. (R. 59-106, 419). During the forensic interview and at trial, Victim detailed multiple instances of sexual abuse by Appellant. Victim stated Appellant began abusing her when she was nine years old and the abuse continued up until May 30, 2015. (R. 78-79). Victim testified that Appellant would assault her when Mother was at work and her aunt, uncle, and cousin would go to the gym or a restaurant. (R. 254-55). Appellant would ask Victim's brother to play video games and leave him and Victim alone while they went into Appellant's bedroom. (R. 74-75, 258). Once inside Appellant's bedroom, Victim said that Appellant would tell Victim to take her clothes off and get on the bed while Appellant rubbed Vaseline on his penis. (R. 75, 267). On some occasions,

Appellant engaged in vaginal intercourse with Victim until "the white stuff came out." (R. 264, line 1). On other occasions, after Appellant completed vaginal intercourse with Victim, Appellant forced Victim to perform fellatio on him. (R. 76, 80, 264). On these occasions Appellant ejaculated in Victim's mouth, and allowed Victim to spit it out in her mother's sink. (R. 76, 264). On at least one other occasion Appellant engaged in anal intercourse with Victim, after which he also ejaculated in Victim's mouth. (R. 81, 265). Victim also described another occasion when Appellant performed cunnilingus on her. (R. 264). Victim never described Appellant using a condom during the assaults.

Victim was taken to the Medical University of South Carolina on June 2, 2015 for a physical examination. (R. 324). Karen Drozd, a pediatric sexual assault examination nurse, performed the physical examination of Victim. Drozd testified that her examination revealed Victim had a separated hymen, redness and irritation around her vaginal opening, and tears in a skin tag immediately above her anus. (R. 343-44). Dr. Michelle Amaya of MUSC testified that the findings of Drozd were diagnostic of a blunt force penetrating trauma to Victim. (R. 416).

Cody Millhouse, an acquaintance and neighbor of Appellant, testified that he went to Mother's house a few weeks after Victim disclosed Appellant's abuse to help Mother clean up the back yard. (R. 300). While Millhouse was in Appellant's motorcycle shop behind the residence, he found a pair of Victim's underwear in a coffee can sitting on a shelf. (R. 300-01, 373). The same pair of underwear was given to Detective Brian Fenton of the Berkeley County Sheriff's Department. (R. 489). The underwear was later sent to the State Law Enforcement Division (SLED) lab where it was analyzed for the presence of DNA by forensic analyst Donna

Money. Money testified that Appellant's DNA was present in the crotch area of Victim's underwear[1]. (R. 542).

Appellant was located and arrested approximately eight days after Victim's disclosure by Lamar Blakely of the Berkeley County Sheriff's Department. (R. 312). Following his arrest, Appellant was interviewed by Fenton on June 10, 2015. (R. 107-90, 472). During Appellant's interview, he admitted that he had been HIV positive for the last five years. (R. 162). Appellant denied he ever inappropriately touched his step daughter, but also claimed that his HIV medication caused him to black out from time to time. (R. 114, 125, 182-83). When Appellant was asked if he could have touched Victim inappropriately during a black out, he said he didn't know. (R. 167-69).

Theresa Dryden testified that she treated Appellant and Mother for the HIV virus. (R. 447). Dryden said that Appellant was originally diagnosed with HIV in April 2012. (R. 448). As of the time of trial, Victim had not yet contracted the HIV virus. (R. 375). Dryden contradicted Appellant's claims that his HIV medications caused blackouts. (R. 453). Furthermore, Dryden said Appellant never told her that his medications were causing blackouts. (R. 453).

On June 23, 2017, the trial judge conducted a pre-trial hearing to rule on a number of issues regarding the admission of Victim's forensic interview pursuant to S.C. Code Ann. § 17-23-175. Appellant contended during this hearing and at trial that Victim's recorded statement was inadmissible because 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." (R. 32 lines 15-18, R. 222-23, 249). At the pre-trial hearing, the trial judge sought clarification from Appellant about the extent of his

[1] Appellant's DNA was the major contributor to the mixture analyzed. Money testified that there was also a minor contributor's DNA present, but the sample was insufficient for interpretation, because of the small amount of DNA present. (R. 542-43).

argument. The following exchange occurred between the trial judge and trial counsel for Appellant:

> The Court: You're asking me to make some decisions based upon an interview that I don't know what the rules were for her. So that's the position that I think Mr. Schwacke [Appellant's trial counsel] is making is he doesn't know if [Victim] understood that she had to tell the truth, that there was no oath or affirmation given that would have been given to her if she is appearing in court. Is that the crux of your...
>
> Mr. Schwacke: Exactly, Your Honor, did she appreciate the consequences of being dishonest.

(R. 34, lines 2-10). Trial counsel then requested the following: "I would request the opportunity to cross her prior to the statement being played to the jury because that then gives you the full picture as to whether she appreciates what is being testified to." (R. 35-36, lines 25-4). The trial judge made a preliminary decision to allow admission of the tape subject to the testimony of Pilcher and Victim. (R. 44-45).

At trial the State and Appellant agreed to redact any reference to Victim being honest or Victim agreeing to tell the truth from the forensic interview. (R. 204). The following exchange was redacted from the interview:

> Elizabeth Pilcher: Okay. We have one important rule in this room and that's that we only talk about the truth. So, things that actually happened.
>
> Victim: That was like yesterday when I was at MUSC, the doctor said I was actually really honest.
>
> Elizabeth Pilcher: The doctor said you were really honest yesterday? Okay, good.
>
> Victim: I was.
>
> Elizabeth Pilcher: And today, that's all that I'll ask for you to be today too, is just honest and only talk about things that really happened. So, you agree to tell the truth today?
>
> Victim: Uh huh.

(R. 61-62, lines 22-9). After hearing testimony about Pilcher's training and experience, the trial judge ruled that the redacted version of the interview would be admissible. (R. 113). Prior to Victim's testimony in the State's case in chief or the publishing of the forensic interview to the jury, Victim testified in an in camera hearing. In response to questioning by the solicitor and trial judge, Victim testified that she knew the difference between telling the truth and a lie. (R. 247). Victim also stated that if she told a lie, she would get into "official trouble" and that official trouble would be a "bad thing." (R. 247-48). Appellant had an opportunity to cross examine Victim during the in camera hearing regarding whether she appreciated the consequences of being dishonest, as he had requested during the pre-trial hearing on June 23rd. Appellant declined to ask Victim any questions during the in camera hearing. (R. 248). Victim then testified as part of the State's case in chief. (R. 252-70). Appellant cross examined Victim, but he did not ask her any questions related to the forensic interview or whether she knew the difference between the truth and a lie. (R. 270-81). After Victim's testimony, the State published the forensic interview to the jury. (R. 461). Appellant did not present a defense. At the conclusion of trial, the jury convicted Appellant of all seven counts.

ARGUMENT

I.

The trial court did not abuse its broad discretion in admitting the forensic interview of Victim under S.C. Code Ann. § 17-23-175, where Victim stated in her forensic interview that she agreed to tell the truth, where Victim testified at trial and was subject to cross examination, and where the totality of the circumstances surrounding the making of the statement provided particularized guarantees of trustworthiness.

Appellant contends the trial judge erred in admitting the forensic interview of Victim under S.C. Code Ann. § 17-23-175 because the child's competency and credibility were not established at the interview. Appellant specifically argues the circumstances surrounding the making of this statement do not provide particularized guarantees of trustworthiness. In support of this contention, Appellant relies on a single statement made by Victim during her interview. Appellant alleges Victim's statement "And, anyways, right. Yeah, told this story too many times" should have indicated to the trial court that the trustworthiness of Victim was not guaranteed. (R. 74 lines 1-2, initial brief of Appellant p. 7-8). This argument is without merit. The trial judge did not abuse her broad discretion in admitting the forensic interview because she considered and weighed all of the factors listed in S.C. Code Ann. § 17-23-175(B) to determine whether the Victim's statement was trustworthy. To make her determination, the trial judge reviewed the forensic interview, listened to the in camera testimony of Pilcher and Victim, and specifically inquired if Victim knew the difference between the truth and a lie. Appellant's convictions and sentences should be affirmed.

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial courts have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial court's

ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

The Trial Court Did Not Abuse its Discretion

Appellant contends the trial court erred in admitting the forensic interview of Victim, because Victim's interview did not contain particularized guarantees of trustworthiness. On the contrary, the trial judge reviewed the interview, listened to the testimony of Pilcher and Victim, and made a careful determination based on the factors listed in S.C. Code Ann. § 17-23-175(A) and (B) to determine the admissibility of the forensic interview. The trial judge did not abuse her discretion.

S.C. Code Ann. § 17-23-175 is a valid legislative enactment. State v. Whitner, 399 S.C. 547, 559, 732 S.E.2d 861, 867 (2012). "In CSC cases involving minors, the Legislature has made specific allowances for such hearsay statements of child victims under proper circumstances." Whitner, at 399 S.C. 558, 732 S.E.2d at 867 (2012). Section 17-23-175 does not violate the Confrontation Clause of the Sixth Amendment. State v. Anderson, 413 S.C. 212, 216, 776 S.E.2d 76, 77 (2015). S.C. Code Ann. § 17-23-175 provides in relevant part:

> (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.

> (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. Our Supreme Court has cautioned that when considering the admissibility of forensic interviews, a forensic interviewer should refrain from any statement that indicates a minor victim was told to be truthful. State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013).

Here, the trial judge considered all of the factors laid out in S.C. Code Ann. § 17-23-175(A) and (B) before admitting the forensic interview. A hearing was held outside the presence of the jury in which the trial judge heard testimony from the forensic interviewer, Elizabeth Pilcher. After listening to Pilcher's testimony, the trial judge ruled that each of the requirements listed under S.C. Code Ann. § 17-23-175(A) had been met, and she articulated her findings as follows:

> The Court: So with no further argument, again, and this was my preliminary ruling, but as we've had Ms. Pilcher articulate, I ruled—under 17-23-175, I do find 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 was two separate segments. 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.

(R. 225, lines 4-21). The trial judge then went further in-depth to explain how she determined Victim's statement contained particularized guarantees of trustworthiness. The trial judge reasoned:

> The Court: In consideration of the final factor of the guarantees 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 [Victim] to tell the truth and only tell the truth.
>
> .....
>
> The statement was not elicited by leading questions. The child was given the opportunity to contradict or explain any questions and the opportunity to clarify. The statement did represent a detailed account of the alleged offense and this statement did possess internal coherence. Ms. Pilcher has received training and has been trained in conducting investigative interviews of children and, as of today's date, she's conducted 445 interviews. I find that the statements were made in compliance with 17-23-175, and as such will be admissible in the trial of the case.

(R. 225-26, lines 21-21). Although the trial judge admitted the interview before any sworn testimony by Victim, the interview was not published to the jury until after Victim testified[2]. (R. 461). Therefore, Appellant had an opportunity, as he requested during the pre-trial hearing, to cross examine Victim regarding whether she appreciated the consequences of being dishonest (R. 248). Appellant chose not to do so.

The trial judge allowed the State to enter the forensic interview of Victim into evidence after a careful analysis of the factors laid out in S.C. Code Ann. § 17-23-175. Therefore, the trial judge correctly applied the law given by the Legislature. Furthermore, there is evidentiary support in the record for each of the trial judge's conclusions, and the trial judge articulated the reasoning behind her conclusions and read those reasons into

[2] The issue of whether a defendant would be prejudiced by a child testifying before a video was entered into evidence was addressed by our Supreme Court in State v. Anderson, 413 S.C. 212, 218, 776 S.E.2d 76, 78 (2015). The Court wrote: "That Appellant 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." Id.

the record prior to admitting the interview into evidence. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
OT Wallace Building
Charleston, SC 29401
(843)-958-1900

BY:
SCOTT MATTHEWS
Bar # 101464

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR

ALAN WILSON
Attorney General

J. SCOTT MATTHEWS
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
OT Wallace Building
Charleston, SC 29401
(843)-958-1900

\

BY:
Scott Matthews
Bar # 101464

Office of the Attorney General
Post Office Box 11549
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(803) 734-3727

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Taylor D. Gilliam, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This nineteenth day of June, 2018.

SALLY ELLISON
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727