

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Horry County

Honorable Paul M. Burch, Circuit Court Judge

RECEIVED

JUN 01 2018

SC Court of Appeals

THE STATE,

RESPONDENT,

v.

ANGEL LUIS SANCHEZ, JR.

APPELLANT

APPELLATE CASE NO. 2017-001157

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief 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

Whether the court erred by finding the forensic interview had particularized guarantees of trustworthiness where defense counsel correctly argued the child was led by leading questions, and that the interview did not have internal coherence pursuant to S.C. Code § 17-23-176(B), especially where the court acknowledged the interviewer used leading questions?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County Grand Jury for the offense of criminal sexual conduct with a minor in the first degree. R. 298-299. Appellant's case was called to trial on May 8, 2017, before the Honorable Paul M. Burch, and a jury. James Galmore represented appellant. Joshua D. Holford and C. Leigh Andrew were the assistant solicitors. R. 1.

On May 11, 2017; the jury found appellant guilty as charged. R. 287, ll. 1-6. Judge Burch sentenced appellant to thirty-five years imprisonment. R. 295, ll. 6-12.

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

The court erred by finding the forensic interview had particularized guarantees of trustworthiness where defense counsel correctly argued the child was led by leading questions, and that the interview did not have internal coherence pursuant to S.C. Code § 17-23-176(B), especially where the court acknowledged the interviewer used leading questions.

Relevant Facts

The trial court heard the testimony of the forensic interviewer, Haydee Sencion, out of the presence of the jury. Sencion worked at the Children's Recovery Center in Horry County. R. 56, l. 22 – 57, l. 9. Sencion testified that she used the RATAC protocol. R. 57, ll. 19-22.

The alleged girl victim in this case was appellant's eight-year-old "step-daughter," although appellant was not yet married to the child's mother -- that was allegedly planned in the future at the time. R. 58, l. 17 – 59, l. 9.

Sencion, in conclusory fashion, testified on direct examination that she used "nonleading questions." R. 59, ll. 19-21. The videotape of the forensic interview was then played for the trial judge. R. 60, l. 21 – 61, l. 5. It is now on file with this Court.

The assistant solicitor informed the court that the state had redacted "talk from the forensic interview about what is real and what is not." The state also redacted "talk about the truth room," and redacted whatever was on the tape about the alleged victim's birthday as well. R. 61, ll. 8-23.

Defense counsel objected to the judge finding the forensic interview trustworthy pursuant to S.C. Code § 17-23-170. Defense counsel pointed out that there were leading questions during the forensic interview, and he argued it was not internally coherent. R. 62, ll. 5-15.

The assistant solicitor argued that the forensic interviewer only repeated parts of what the child said, and she maintained “the majority of what was said on the video came from the child herself, it was her testimony.” The solicitor also maintained it was internally coherent and “the child tells a pretty consistent story about what happened . . .” R. 62, ll. 16-25.

The judge responded that he did remember “a couple leading questions,” but he maintained that wasn’t the “heart of the issue in this matter.” The judge said he found the forensic interview “pretty straightforward, nothing really unusual about it.” R. 62, l. 5 – 63, l. 14.

Later, when the state moved to introduce the forensic interview in the presence of the jury, defense counsel added additional objections that it was cumulative because the alleged victim had already testified. R. 210, ll. 9-20.

Other Evidence

The alleged victim was eight-years-old at the time of the alleged incident. The complaining girl witness was nine-years-old, and in the third grade at the time of trial. R. 95, ll. 7-22. The child acknowledged she called appellant “daddy,” when he lived with her, her mother, and her two brothers. R. 96, ll. 6-25. As will be seen infra, appellant and his two children also lived there, as well as another couple and their children.

The complaining witness testified that she was playing in the play room with her brothers when appellant told her he needed to talk with her. The child maintained that appellant took her inside the bedroom, and he locked the door. Tr. 97, ll. 9-25.

The child maintained that appellant told her, “You’re the oldest, you need to take care of the young ones.” The complaining witness then testified that appellant made her perform oral sex on him. R. 98, ll. 6-25.

The child said when her mother returned home, she immediately told her mother what had happened. Her mother confronted appellant, who "kept saying that was a lie, that was a lie. And it wasn't, because Mommy said, I knew my daughter wouldn't say anything like that." Appellant then told her mother to "take me to my mom's house." Tr. 99, l. 13 – 100, l. 10. That was the last time the complaining witness saw appellant before the trial.

On redirect examination, the child admitted she did not like appellant before this alleged incident ever happened. The child maintained that appellant and her mother fought, but did not have "a lot of problems." R. 117, l. 22 – 118, l. 2.

The complaining witness's seven-year-old brother remembered the day of the alleged incident. He said that his sister was crying on the couch after it occurred, and he maintained he tried to open the bedroom door where appellant was with his sister but "the door is locked." R. 120, l. 6 – 121, l. 6.

Ann Arnett was the mother of the alleged victim. She testified that she had three children, including the alleged victim. Prior to the alleged incident in this case, Arnett said in addition to her and her three children, she also lived with appellant and his two children. In addition, there was another couple and their children living in the house also. R. 130, l. 1 – 131, l. 22. Arnett said that appellant and his children, and the other couple, and their children, moved out on the night of the incident. R. 131, l. 23 – 132, l. 24.

Appellant always denied having committed the sex act with the complaining witness. He denied the act to Arnett, and to the police during his videotaped interrogation. R. 149, ll. 17-23.

On cross-examination, Arnett denied she intended to break up with appellant, and she denied that she asked appellant to stay with her until their other roommates moved out. R. 152, l. 23 – 153, l. 3. Arnett admitted she telephoned DSS alleging appellant's mother was neglectful in

taking care of appellant's grandmother. R. 153, ll. 4-16. Arnett also admitted she wanted to hurt appellant, and to get even with him. R. 155, ll. 12-14.

Detective King Hemingway testified that appellant denied committing the sexual act with the alleged victim but he did admit he told the child that she was "the oldest and needed to be responsible." R. 169, l. 21 – 170, l. 4. Appellant also told Hemingway he never locked the bedroom door when he was with the child. R. 171, ll. 17-18. Hemingway also acknowledged that he was going to arrest appellant after the interrogation regardless of what appellant said during the videotaped interview. R. 201, ll. 2-22.

Discussion

South Carolina Code § 17-23-175 allows the admission of a forensic interview of a child under twelve years old if the trial court determines it possesses "particularized guarantees of trustworthiness." See S.C. Code § 17-23-175(B). The statute provides in determining "trustworthiness" the court can consider whether the statements were elicited by leading questions, and whether the statement has internal coherence. See S.C. Code § 17-23-175(B)(1) & (4).

As seen, defense counsel stated that the forensic interviewer used leading questions, and the judge agreed that several of the questions during the interview were leading. Defense counsel also argued the forensic interview lacked internal coherence. The judge did not rule on that objection.

Viewing the forensic interview reveals that it does lack internal coherence, and the leading of the child to get her story straight and plausible was noticeable. It far from inspires confidence.

At one point the child said she and appellant were both on the bed when it happened. At another point she says she was kneeling. While acting out her position later in the interview she indicates she was standing.

She claims appellant was wearing freshly washed all white underwear which is in conflict with other trial evidence. She claimed appellant got blood on his white boxers or underwear because she was bleeding from the mouth because appellant's belt hit her tooth. She told Marcus afterwards that nothing happened. The child mumbles, is distracted, and the interviewer's influence and leading is apparent.

Additionally, the forensic interview had been redacted at the time the judge viewed it to make his "trustworthiness determination." That was legal error. The judge was obligated by the statute to make the trustworthiness determination from "the totality of the circumstances." See S.C. Code § 17-23-175(A)(4). That means prior to the state removing part of the evidence – the forensic interview – by redacting it before the judge could view the entire original product.

The solicitor said the forensic interview had already been redacted to remove the "telling the truth" discussion, the "what is real and what is not" discussion, and the forensic interviewer talking about the alleged victim's birthday. R. 61, ll. 8-23.

However, each of these redacted discussions were also critical to the judge's determination of whether the child was coached or influenced. The redacted interview certainly shows the interviewer's influence on a child unsure of her story or what happened. It is not internally coherent. The judge could not exercise his discretion where part of the evidence was removed before he ever viewed the forensic interview. See State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) (The judge abused his discretion by admitting fifteen minutes of jail tapes without listening to them).

In State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012), the Court addressed the same foundational trial concerns that are involved in this case. In Whitner, the Court found the forensic interview of the child served as a model of how the statute was designed to work. Specifically, the Whitner Court held that the forensic interviewer did not improperly lead or influence the alleged victim in any way. The alleged victim answered the questions of her own accord.

Here, conversely, it is undisputed that the forensic interviewer asked some leading questions. The court abused its discretion by ruling the forensic interview met the foundational requirement of having “particularized guarantees of trustworthiness” where the court did not view the forensic interview before it was redacted. The items redacted may well have been critical also to the court’s “internal coherence” ruling as well. The state was allowed to remove portions of the forensic interview by redaction, and therefore the judge could not make a finding of trustworthiness based on the “totality of the circumstances.” See S.C. Code § 17-23-175(A)(4) and S.C. Code § 17-23-175(B)(1) – (5).

Defense counsel properly objected when the state moved to introduce the forensic interview in the presence of the jury, and he added additional objections. The trial court abused his discretion in admitting the forensic interview because leading questions were employed, it lacked internal coherence, and the judge did not view the entire forensic interview before ruling the foundation of trustworthiness, in the totality of the circumstances, had been met.

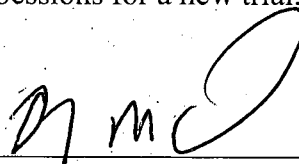
The forensic interview is obviously highly prejudicial because it is a legislative enactment which allows the jury -- as in no other case -- to consider the child’s prior consistent statement. Prior consistent statements are not admissible because they have the impermissible spurious tendency to have the jury determine because the witness is telling a consistent story that

it must be true. A prior consistent statement therefore is not admissible unless it is to rebut a charge of recent fabrication or improper influence. See Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1960).

Appellant understands a forensic interview is admissible if a proper "trustworthiness" foundation is laid, and it is not abused by way of improper bolstering or otherwise but its prejudicial effect as a prior consistent statement cannot be, respectfully, underestimated.

CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of June, 2018.

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Honorable Paul M. Burch, Circuit Court Judge

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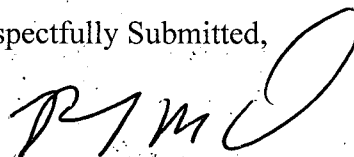
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Angel L. Sanchez states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Paul M. Burch, which was held on May 8 - 11, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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, He asks the Court to relieve him as counsel for Angel L. Sanchez.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 1st day of June, 2018.

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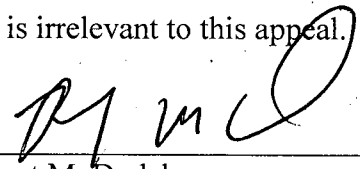
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment:
- (2) Entire trial transcript
- (3) State exhibit 4 (forensic interview).

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

June 1, 2018


Robert M. Dudek
Chief Appellate Defender

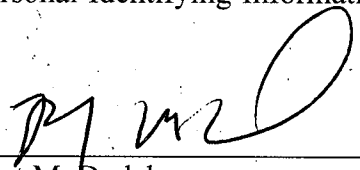
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Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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."

June 1, 2018.



Robert M. Dudek
Chief Appellate Defender

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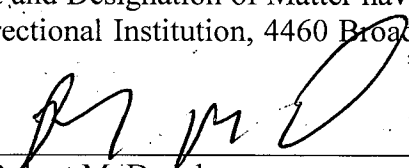
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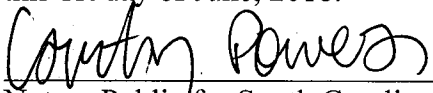
CERTIFICATE OF SERVICE

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 have been served on Angel L. Sanchez, 372557, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 1st day of June, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of June, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 2, 2027.