

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No: 2011-199787

THE STATE,

Respondent,

v.

JOHN PETER BARNES,

Appellant.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in qualifying the forensic interviewer as an expert in child forensic interviewing because he testified regarding types of disclosure, the disclosure process, and delayed disclosure. Even if the trial court did err in qualifying him as an expert, any error was harmless in light of the fact that Appellant suffered no prejudice as a result of this decision.

II.

The trial court correctly denied Appellant's motion for a hearing pursuant to State v. Sanders to remove one of the solicitors from the case because the State did not violate Rule 3.7, RPC, Rule 407, SCACR, by interviewing the victim in preparation for trial.

STATEMENT OF THE CASE

A Richland County Grand Jury indicted Appellant for lewd act on a minor child. (R. pp.197-198) On September 12-15, 2011, Appellant proceeded to trial before a jury. J. Rhodes Bailey, Esquire, and Gregory B. Collins, Esquire, represented Appellant, and Assistant Solicitors Margaret Fent Bodman and Debra Barry represented the State. The jury found Appellant guilty as charged, and the Honorable DeAndrea G. Benjamin sentenced Appellant to fifteen years' imprisonment. (R. p.185, lines 12-15; R. 191, lines 6-8.)

On September 20, 2011, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

After initially disclosing to his sister what took place at his biological father's (Appellant) home, Appellant's eleven-year-old son (Victim) disclosed to a forensic interviewer at the Assessment Resource Center (ARC) that Appellant had given him bubble baths and masturbated Victim as he bathed him. (SROA. p.1, lines 20-23; R. p.50, lines 11-25; pp.51-54.) Appellant was contacted by law enforcement, went in voluntarily, and gave a written statement. (SROA. p.3, lines 1-8; SROA. p.4, lines 6-8.) In this first statement, Appellant admitted to bathing his son, but he said that if he had washed the boy's genitals it was unintentional. (SROA. p.5, lines 5-7, 22-24.) Appellant later returned and gave a second statement, in which he admitted to touching and masturbating Victim. (R. p.93, lines 7-12; R. p.95, lines 2-25.) Appellant was arrested and charged with lewd act on a minor child. (R. pp.197-198)

Pretrial, Appellant moved to disqualify one of the solicitors pursuant to Rule 3.7, RPC, Rule 407, SCACR. (R. p.4, lines 1-25; R. p.5, lines 1-25; R. p.6, lines 1-19.) Appellant argued that because both solicitors interviewed Victim prior to trial, the trial court should conduct a hearing pursuant to State v. Sanders¹ to determine the manner in which Victim was interviewed. (R. p.5, lines 18-22.) Appellant argued one of the solicitors would need to be called as a witness by the defense and should be removed from the case. (R. p.6, lines 12-19.) Appellant asked for a proffer and a hearing based on Sanders. (R. p.10, lines 17-25; R. p.11, lines 1-3.) The trial court allowed the proffer. (R. p.11, line 15.) Appellant objected to the proffer because the trial court did not require the solicitor to be put under oath and take the stand. (R. p.11, lines 18-19; R. p.12, lines 13-25; R. p.13, lines 1-7.) The trial court determined it would order a hearing if one was

¹ 341 S.C. 386, 534 S.E.2d 696 (2000).

needed after the State's proffer. (R. p.14, lines 13-16.) The State then explained it had interviewed Victim, received details from him consistent with the ARC interview, sent the ARC interview tapes home with Victim for him to review, and then interviewed Victim again. (R. p.14, lines 17-25; R. p.15, lines 1-8.) The State reported that after viewing the ARC videotapes, Victim relayed three details he had not given the ARC interviewer, which the State provided to defense counsel in an email: 1) he would use the excuse that he had to urinate to stop the masturbation, 2) he remembered Appellant playing music and remembered two songs in particular, and 3) it started after he found out Appellant was his biological father. (R. p.15, lines 9-23.) At the end of the proffer, the trial court ruled the interviews were trial preparation and there was no violation of Rule 3.7. (R. p.16, lines 24-25; R. p.17, lines 1-3.)

At trial, Appellant cross-examined Victim concerning his interviews with the solicitors. (R. p.56, lines 12-23; R. p.57, lines 10-25; R. p.58, lines 1-23.) Appellant specifically questioned Victim about what type of questions the solicitors asked and whether they were the only ones present during the interviews. (R. p.55, lines 24-25; R. p.58, lines 1-17.)

The State called Raymond Olszewski, the forensic interviewer from the ARC. (R. p.59.) The State moved to qualify him as an expert in child sexual abuse and child forensic interviewing. (R. p.63, lines 4-7.) Appellant initially objected that the proper foundation had not been laid, and he then objected that child sexual abuse was too broad a category. (R. p.63, lines 9-17.) The trial court permitted him to examine Olszewski. (R. p.63, line 18.) After his *voir dire*, Appellant again objected that child sexual abuse was too broad a subject in which to be deemed an expert. (R. p.68, lines 12-14.) He also objected to Olszewski's being an expert in child forensic interviewing "because there is

no way to test if it is actually a science.” (R. p.68, lines 15-18.) The trial court admitted Olszewski as an expert in child forensic interviewing. (R. p.68, lines 23-25.)

Olszewski testified he used the R-A-T-A-C method to interview Victim.² (SROA. p.2, lines 4-9.) He explained the difference between purposeful and accidental disclosures, the process of delayed disclosure in children, and the commonality of tentative, incomplete disclosure in children. (R. p.76, lines 11-25; R. p.77, lines 1-16; R. p.79, lines 1-22.) He then went into further detail regarding delayed disclosure and minimization of abuse and why it is not common for children to give all details in one interview. (R. p.80, lines 2-25; R. p.81, lines 1-25; R. p.82, lines 1-25; R. p.83, lines 1-16, 22-25; R. p.84, lines 1-20.) Olszewski then testified about the two interviews he conducted with Victim, explaining Victim was able to give additional details in the follow-up interview. (R. p.84, lines 21-25; R. p.85, lines 1-25.)

Ultimately, the jury found Appellant guilty, and the trial court sentenced him to fifteen years’ imprisonment. (R. p.185, lines 12-15; R. p.191, lines 6-8.)

² R-A-T-A-C is an acronym for Rapport, Anatomy, Touch, Abuse scenario, and Closure. (R. p.70, lines 13-22.)

ARGUMENTS

I.

The trial court did not err in qualifying the forensic interviewer as an expert in child forensic interviewing because he testified regarding types of disclosure, the disclosure process, and delayed disclosure. Even if the trial court did err in qualifying him as an expert, any error was harmless in light of the fact that Appellant suffered no prejudice as a result of this decision.

Appellant argues the trial court erred in qualifying the forensic interviewer as an expert in child forensic interviewing because his testimony was not required to be presented by an expert witness. Appellant rests his argument on the Supreme Court's ruling in State v. Douglas³ that, under the circumstances of that case, it was not necessary for the forensic interviewer to be qualified as an expert. However, in this case, the forensic interviewer's testimony went beyond his own personal observations based on his interviews with Victim. Because the interviewer in this case testified regarding the disclosure process, an area in which he had more knowledge than the jury and could assist them in understanding why Victim disclosed the abuse in the manner he did, the trial court correctly qualified him as an expert. Additionally, Appellant was not prejudiced even if the trial court did err in qualifying him as an expert.

In State v. Douglas, the Supreme Court addressed the issue of when a witness needs to be qualified as an expert to testify regarding a forensic interview in a child sexual abuse case. In that case, Gwen Herod, a Sumter County Victim's Assistance Officer, first explained how she conducts interviews using the R-A-T-A-C method. Douglas, 380 S.C. at 500, 671 S.E.2d at 607. Next, she testified she used the R-A-T-A-C method to interview the victim and received information that led her to recommend a

³ 380 S.C. 499, 671 S.E.2d 606 (2009).

medical evaluation. Id. Initially, the Court of Appeals affirmed the trial court's qualification of Herod as an expert, but the Supreme Court reversed. In its ruling, the Supreme Court stated, "Under the facts presented here, we find it was unnecessary for Herod to be qualified as an expert." Id. at 501, 671 S.E.2d at 608. The Court stated:

We find the testimony given by Herod in the present case simply was not required to be presented by an expert witness. Herod testified **only as to her personal observations and experiences and her interview with the Victim in this case.** Accordingly, we find it was unnecessary for the trial court to have qualified her as an expert.

Id. at 502-03, 671 S.E.2d at 608 (emphasis added). Further, the Court cited Rule 701, SCRE, to support its finding that Herod only needed to be a lay witness "to offer testimony in the form of opinions or inferences . . . rationally based on [her] perception." Id. at 502, 671 S.E.2d at 608.

On the other hand, "If scientific, technical, or other specialized knowledge will **assist the trier of fact to understand the evidence or to determine a fact in issue**, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE (emphasis added).

The case sub judice can easily be distinguished from Douglas. Here, the forensic interviewer from the ARC, Raymond Olszewski, testified regarding the process of disclosure, delayed disclosure, minimization, and types of disclosure. He testified during defense counsel's *voir dire* that the methods used at the ARC are based on a body of research and named two articles that describe the methods followed by the ARC. (R. p.67, lines 9-24.) Olszewski explained the difference between purposeful and accidental disclosure. (R. p.77, lines 11-25; R. p.78, lines 1-17.) During that explanation, Appellant

objected that this testimony was not Olszewski's field of expertise because he was talking about initial disclosure instead of the interview itself. However, Olszewski had already been qualified as an expert in child forensic interviewing. Regardless of the label attached to his field of expertise, it was within his knowledge and outside the typical juror's knowledge to explain the disclosure process in child sexual abuse cases. The objection was overruled. Olszewski then went into detail regarding the dynamics of delayed disclosure, based on his training in a program called Finding Words. (R. p.80, lines 4-25.) He specifically described minimization and its role in the disclosure of child sexual abuse. (R. p.81, lines 1-25.)

Here, Victim gave a tentative or minimized disclosure in his first interview. Victim testified he did not disclose all the details during the first interview. Typical jurors do not have the knowledge to ascertain whether it is "normal" for a young person to initially minimize sexual abuse and then fully disclose at a later date. Without expert testimony to help explain delayed disclosure, a juror could doubt a victim's story if the abuse was not disclosed in a manner that made sense to that particular juror. For example, a juror might imagine himself in the same situation and not understand why a child would not run out of the room and tell someone immediately about the abuse. It is only with the help of a qualified expert that many jurors would be able to understand the dynamics of sexual abuse and why children often delay disclosure and minimize the abuse. Thus, the trial court's qualification of Olszewski as an expert met the standard set forth in Rule 702, SCRE, because his knowledge assisted the jurors in their understanding of Victim's disclosure, which was presented as evidence in the case.

In Douglas, Justice Pleicones' dissent and the Court of Appeals' opinion⁴ focused on the fact that the witness's testimony went to the issue of credibility of the victim. As Justice Pleicones stated in his dissent, "Juries do not require the assistance of human 'truth detectors' in assessing the credibility of testimony." Douglas, 380 S.C. at 505, 671 S.E.2d at 610 (Pleicones, J., dissenting). Here, the situation is vastly different. Olszewski did not make any comment on Victim's credibility. Appellant does not even argue Olszewski bolstered Victim's credibility.

Appellant's sole argument is that Olszewski based his testimony on his interview with Victim, his own perceptions and personal observations, and his experience. However, the record shows Olszewski spent seven pages of testimony explaining the interview process and the setting in which a typical interview takes place. He then spent another nine pages describing typical disclosure scenarios, listing reasons there are often delays in reporting, and explaining minimization in initial disclosures. Olszewski's testimony goes well beyond Herod's testimony in Douglas. Herod merely reported that she had interviewed the victim using the R-A-T-A-C method and, based on the interview, referred the victim for a medical examination. The Court found that based on the specific facts of Douglas, it was not necessary to qualify Herod as an expert. However, the Court made clear that in some situations, qualification in the field of forensic interviewing would be proper. Douglas, 380 S.C. at 503 n.2, 671 S.E.2d at 609 n.2. This case is the very situation the Court had in mind when it wrote that. If the Court had wanted to hold that expert witnesses are never proper in cases of forensic interviewing for child sexual abuse victims, it could have done so. On the contrary, the Court carefully fashioned the opinion to limit its holding to the specific set of facts present in Douglas rather than make

⁴ State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006).

a bright-line rule that it is never necessary for a forensic interviewer to be qualified as an expert.

Here, because Olszewski's testimony provided necessary assistance to the jury in understanding why victims of sexual abuse disclose the way they do, the trial court properly qualified Olszewski as an expert. However, if this Court finds the trial court erred, Appellant suffered no prejudice as a result of this decision. The jury was free to accept or reject Olszewski's testimony. The fact that Olszewski was qualified as an expert did not require the jury to give his testimony any greater weight than that given to a lay witness. In the jury instructions, the trial court clarified this by stating:

You should consider any expert opinion received in evidence in this case and, like any other evidence, give it the weight you think it deserves. If you decide that the opinion of an expert witness is not based on sufficient education and experience or if you conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, you may disregard the opinion entirely. **An expert witness's testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert.** Further, you are not required to accept an expert's opinion even though it is not contradicted.

(R. p.176, lines 2-17 (emphasis added).)

The foregoing demonstrates the jury was charged that it was free to determine whether to assign any weight to Olszewski's testimony. Further, the instructions made clear that any expert's testimony was not to be afforded more weight simply because he was qualified as an expert. Thus, Appellant was not prejudiced by the trial court's decision to qualify Olszewski as an expert. See Douglas, 380 S.C. at 503, 671 S.E.2d at 609 ("The fact that Herod was qualified as an expert did not require the jury to accord her testimony any greater weight than that given to any other witness.").

Regardless of whether the trial court erred in qualifying Olszewski as an expert witness, any error is harmless in light of the statement given by Appellant, in which he admitted to touching and masturbating Victim.

II.

The trial court correctly denied Appellant's motion for a hearing pursuant to State v. Sanders to remove one of the solicitors from the case because the State did not violate Rule 3.7, RPC, Rule 407; SCACR, by interviewing the victim in preparation for trial.

Appellant argues the trial court erred in denying his motion for a hearing pursuant to State v. Sanders⁵ to remove one of the solicitors from the case pursuant to Rule 3.7, RPC, Rule 407, SCACR, because the solicitor was a necessary witness. Specifically, he argues that because the solicitors interviewed Victim prior to trial, one of them should have been removed from the case and required to testify regarding the trustworthiness of the child's statement, which Appellant alleges contained new information. On the contrary, the trial court correctly denied Appellant's motion for a hearing as one was not necessary because the State did not violate Rule 3.7 by interviewing Victim in preparation for trial.

Rule 3.7, RPC, Rule 407, SCACR, provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

⁵ 341 S.C. 386, 534 S.E.2d 696 (2000).

In State v. Sanders, the defendant's sister, Brenda Sanders, was admitted *pro hac vice* to assist as co-counsel in his trial. 341 S.C. 386, 388, 534 S.E.2d 696, 697 (2000). The State announced it intended to call Sanders as a witness based on interactions she had with the State's witnesses. Id. at 388, 534 S.E.2d at 697. Two jailhouse informants testified the defendant told them Sanders was going to talk to the State's witnesses "to get them to change their statements." Id. at 389, 534 S.E.2d at 697. The trial court then removed Sanders as the defendant's co-counsel because she was going to be called by the State as a witness. Id. at 388, 534 S.E.2d at 697. The trial court did not hold a hearing on the matter, and the Supreme Court was unable to determine from the record whether Sanders was a "necessary witness" pursuant to Rule 3.7. Id. at 390, 534 S.E.2d at 698. The Court set forth the following guidelines for similar situations:

We take this opportunity to set forth the proper procedure when counsel's removal is sought under Rule 3.7. As a procedural safeguard, an evidentiary hearing is appropriate to determine whether there is evidence to support counsel's removal. This procedure will enable the trial judge to fully assess counsel's anticipated role as a necessary witness before restricting the defendant's exercise of his right to counsel. Further, it will provide a record for meaningful review of the issue on appeal.

Id. at 390-91, 534 S.E.2d at 698.

Initially, these guidelines contemplate a situation in which the trial court finds counsel "likely to be a necessary witness" as specified in Rule 3.7. Rule 3.7(a), RPC, Rule 407, SCACR. It is a procedure to be used by a trial court to "assess counsel's anticipated role as a necessary witness" after it has determined counsel is likely to be a necessary witness and before the court removes counsel, thus restricting the defendant's rights. Sanders, 341 S.C. at 391, 534 S.E.2d at 698. This is not what occurred in the case sub judice. Here, the solicitors simply interviewed their victim prior to trial. In Sanders,

it was alleged Sanders tried to influence the State's witnesses, and it became necessary to question Sanders regarding any interactions she may have had with the witnesses. The solicitors in this case were merely conducting trial preparation. Applying the guidelines in Sanders to every case in which an attorney interviewed its victim would lead to an absurd result. It is not reasonable to believe solicitors can never interview their victims and witnesses prior to trial without subsequently being required to withdraw from the case in order to be called as witnesses. This was not the intention of Rule 3.7.

Moreover, the comments section to Rule 3.7 states: "The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation." Rule 3.7, RPC, Rule 407, SCACR, cmt. 2. There is no prejudice here. When Appellant asked for a proffer in light of Sanders, it was granted. In her proffer, Assistant Solicitor Fent Bodman reported that during the interview, Victim answered the solicitors' questions consistently with what he told the ARC. The solicitors gave Victim the ARC videotapes, which he took home and watched. He then came back and disclosed three additional details he had not disclosed to the ARC: 1) he would use the excuse that he had to urinate to stop the masturbation, 2) he remembered Appellant playing music and remembered two songs in particular, and 3) it started after he found out Appellant was his biological father. The State notified defense counsel about these new pieces of information prior to trial. After the proffer, the trial court ruled the solicitors' interview of Victim was trial preparation, that there was no violation of Rule 3.7, and that neither solicitor needed to step down. Appellant was able to cross-examine Victim on all aspects of his interviews with the solicitors.

Appellant argues he should have been allowed to question one of the solicitors on the methods used in their interview with Victim, and that the trial court erred in not

holding a hearing to determine if one of the solicitors should be removed. However, the trial court did permit the proffer and subsequently ruled there was no violation of Rule 3.7. The trial court determined the solicitors were not necessary witnesses and that Appellant could cross-examine Victim to find out what the solicitors asked him, which he did. The proffer achieved the same result an evidentiary hearing would have and provided sufficient evidence to allow the trial court to determine whether the solicitors were necessary witnesses under Rule 3.7. Further, the proffer “provide[d] a record for meaningful review of the issue on appeal[,]” which is one of the intended outcomes of the procedure outlined in Sanders. Sanders, 341 S.C. at 391, 534 S.E.2d at 698. Evidence was provided on the record as to what the trial judge based her decision on. Thus, the procedure laid out in Sanders was not necessary under the facts of this case and a hearing was not required.

To the extent Appellant argues this was a violation of section 17-23-175, this issue is not preserved. At trial, Appellant did not object that determinations of trustworthiness were not made by the trial court pursuant to section 17-23-175. Furthermore, this statute is not applicable because the State was not trying to admit into evidence the solicitors’ interview with Victim.

Appellant cites Collins Entm’t, Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005), to support his argument. However, this case is inapplicable as it involves an attorney having to choose between acting as trial attorney or testifying as a witness regarding the issue of damages. This does not have any connection to the case at hand, and Appellant does not indicate how the Collins case is relevant here. However, it is interesting to note that even though this Court affirmed the trial court’s decision that White could not serve as both trial attorney and witness, in its analysis of the Rule 3.7

issue this Court did not specify any requirement that a trial court conduct a Sanders hearing.

In State v. Inman, the Supreme Court analyzed the trial court's decision not to recuse the members of the solicitor's office when defense counsel wanted to call them as witnesses. 395 S.C. 539, 720 S.E.2d 31 (2011). While this case did not specifically address Rule 3.7, the situation was similar to the case at hand. Inman "sought to recuse the Solicitor's office as advocates and call certain members as witnesses in order to establish the defense's claim of intentional prosecutorial misconduct." Id. at 552, 720 S.E.2d at 38. The Court found that although a defendant has a right to call the prosecuting attorney as a witness, that right is subject to a trial court's usual discretion to exclude witnesses. Inman, 395 S.C. at 557, 720 S.E.2d at 41 (citing State v. Quattlebaum, 338 S.C. 441, 453, 527 S.E.2d 105, 111 (2000)). The Court made clear this right is not without limitation: "Although a prosecuting attorney is competent to testify, his testifying is not approved by the Courts *except* where it is made necessary by the circumstances of the case" Inman, 395 S.C. at 557, 720 S.E.2d at 41 (quoting State v. Lee, 203 S.C. 536, 540, 28 S.E.2d 402, 403 (1943) (emphasis added)). "It is evident that this Court and courts from other jurisdictions disfavor defense counsel calling a prosecuting attorney to testify in a case in which he is participating as an advocate." Inman, 395 S.C. at 558, 720 S.E.2d at 41.

The trial court correctly denied Appellant's motion for a Sanders hearing and its decision should be affirmed. However, regardless of whether the trial court erred in its denial of Appellant's motion, any error is harmless in light of the statement given by Appellant, in which he admitted to touching and masturbating Victim.

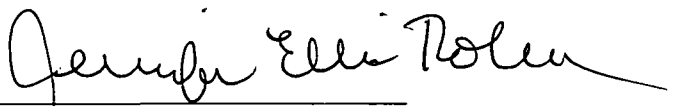
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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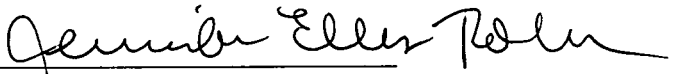
Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b),
SCACR.

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