

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEITH GADSDEN,

APPELLANT

Appellate Case No. 2012-211729

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

RECEIVED
JUL 09 2013
SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUES ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	5
CONCLUSION	14

TABLE OF AUTHORITIES

Cases

<u>State v. Dawkins</u> , 297 S.C. 386, 377 S.E.2d 298 (1989).....	12
<u>State v. Dempsey</u> , 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000).....	12
<u>State v. Douglas</u> , 380 S.C. 499, 671 S.C.2d 606 (2009)	12
<u>State v. Forrester</u> , 343 S.C. 637, 541 S.E.2d 837 (2001).....	13
<u>State v. Govan</u> , 372 S.C. 552, 643 S.E.2d 92 (Ct. App. 2007).....	12
<u>State v. Jennings</u> , 394 S.C. 473, 716 S.E.2d 91 (2011).....	12, 13
<u>State v. Mueller</u> , 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995).....	13
<u>State v. Schumpert</u> , 312 S.C. 502, 435 S.E.2d 859 (1993).....	5
<u>State v. Weaverling</u> , 337 S.C. 460, 523 S.E.2d 787 (1999).....	5

STATEMENT OF ISSUES ON APPEAL

Did the trial court err by allowing an expert witness for the prosecution testify regarding delayed disclosure by sexual assault victims, which had the effect of bolstering the victim's testimony and vouching for the victim's credibility, and where the prejudicial effect of such evidence outweighed the probative value?

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant for criminal sexual conduct with a minor in the first degree during its July 2010 term. R. 173. The prosecution called the case for trial on April 9, 2012 before the Honorable Roger M. Young, Jr. and a jury. Elizabeth Gordon prosecuted the case, and Melisa Gay represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 171, lines 16-19. Judge Young sentenced Appellant to thirty years in prison. R. 172, lines 15-20; R. 175.

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

ARGUMENT

The trial court erred by allowing an expert witness for the prosecution testify regarding delayed disclosure by sexual assault victims, which had the effect of bolstering the victim's testimony and vouching for the victim's credibility, and where the prejudicial effect of such evidence outweighed the probative value.

Relevant facts

Prior to the start of trial, Appellant objected to the prosecutor calling Dr. Donald Elsey as a witness. Appellant objected on the basis of bolstering. R. 4, lines 1-2. The prosecution explained that the case involved a delayed report of an alleged sexual assault. On this point, the prosecution expected Dr. Elsey to testify generally regarding delayed reporting by sexual assault victims. Specifically, the prosecutor wanted Dr. Elsey to testify "regarding the reasons why children don't tell." R. 3, lines 14-25. The trial court agreed to address the matter later and asked the prosecutor to find law supporting her position. R. 4, lines 3-16.

After some testimony, the court entertained arguments concerning Appellant's motion to limit and/or exclude the testimony of Dr. Elsey. The prosecution cited State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) and State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (1999) to argue the testimony was admissible. The prosecution categorized the testimony of delayed disclosure as rape trauma evidence and explained that a testifying expert need not have interviewed the victim in order for the testimony to be admissible. According to the prosecutor, Dr. Elsey would explain "delayed disclosure and why, particularly men, do not disclose, and that has been researched for a long, long time." R. 72, lines 15-24; R. 73, lines 10-13. The prosecutor argued that "delayed

disclosure is a recognized phenomenon in clinical psychology,” which “ha[d] been studied and researched,” and was “not the type of thing that the jury would necessarily know about.” She proposed using the testimony to rebut Appellant’s questioning of Nelson as to his failure to report the alleged assault. R. 75, line 18 – R. 76, line 8. The state argued the testimony was more probative than prejudicial because it would ensure the jury understood exactly what delayed disclosure was. R. 78, lines 18-24.

Appellant argued that Dr. Elsey’s testimony regarding delayed disclosure would vouch for and bolster Nelson’s credibility. Additionally, Appellant argued the prejudicial effect of the testimony outweighed the probative value. R. 73, lines 14-24. Appellant explained that Dr. Elsey had never seen Nelson or Appellant. Further, Appellant argued that allowing Dr. Elsey to testify regarding delayed reporting, specifically that men delay reporting, was overly prejudicial and went to the very essence of the case. The testimony would supplant the common sense of the jury. R. 74, line 9 – R. 75, line 8. Appellant noted that none of the authority relied upon by the prosecution involved delayed reporting. Additionally, Appellant argued the prosecution would use Dr. Elsey’s testimony to prove the alleged sexual assault. R. 76, line 9 – R. 78, line 1; R. 79, lines 1-11.

The judge ruled that Dr. Elsey could testify on the focused issue of delayed disclosure. According to the trial judge, the “threshold issues are what are the symptoms of this delayed disclosure syndrome? How does that lead to diagnosis?” The court ruled that “to the extent that he can testify that he’s reviewed the records and that those records indicate that the victim’s symptoms are consistent with the diagnosis of this delayed disclosure, then he’ll be allowed to do that.” Turning to Appellant’s argument about the

overly prejudicial nature of the testimony, the trial judge ruled there was an obvious prejudicial effect of the testimony, but the prosecution “ha[d] the right to bring this in, under the case law, under the theory that they need to be able to answer a reasonable juror’s question as to why did you take so long to report this to anyone, and to the extent that this is not an unusual phenomenon, based on the studies and evidence that these folks have developed over the years, then the probative value of that, I think substantially outweighs any prejudicial effect. R. 81, line 10 –R. 82, line 1.

The judge cautioned the prosecutor that the expert witness must not vouch for the credibility or veracity of the victim. The judge interpreted the case law as permitting the expert to testify as to the characteristics of rape trauma and whether the victim’s symptoms were consistent with those characteristics. R. 72, line 25 – R. 73, line 9; R. 82, lines 3-7.

The alleged victim, Theoderrick Nelson, testified that Appellant was his basketball coach when Nelson was between the ages of seven and eight, which would have been in 1984 or 1985. R. 22, lines 11-12 (testimony of Nelson that he was born on August 8, 1977); R. 24, lines 1-8; R. 46, lines 1-2; R. 20, lines 6-16 (testimony of investigator that specific date of the alleged abuse was unknown).¹ One evening when Nelson was sitting on his porch alone, Appellant stopped his car and asked Nelson if he would like to practice basketball and become a starter on the team. Nelson consented and went with Appellant to St. Julian the Divine, one of the local recreational centers used by

¹ Nelson testified that he was born in 1977, that the alleged abuse occurred when Appellant was his basketball coach, and that he was between the ages of seven and eight when he played basketball for Appellant. Therefore, the alleged abuse would have occurred between 1984 and 1985. However, the indictment alleged sexual battery

the city. R. 23, line 24 – R. 25, line 8; R. 26, lines 19-23; R. 39, lines 12-16. At the center, the two went to a bathroom located on the third floor. R. 26, line 24 – R. 27, line 1; R. 28, lines 16-25. Nelson alleged that he lowered his pants and lay on the floor at Appellant's instruction. He further alleged that Appellant "got on top of [him] and inserted his penis inside [him]." R. 29, lines 1-4; R. 29, lines 14-19. After the incident, Nelson returned home. R. 30, lines 1-4; R. 30, lines 23-25.

Years later in 2009, Nelson began working for the city as a recreational leader. Appellant also worked for the city in the recreational department. R. 32, lines 4-11; R. 48, lines 3-11. Nelson and his stepson had an argument. Although Nelson described the argument as involving minor teenage conduct, Nelson admitted he called law enforcement. R. 33, line 13 – R. 34, line 21. When his stepson left the home after the argument, Nelson saw his stepson get into a vehicle that Nelson recognized as belonging to Appellant based upon their working together. R. 34, line 20 – R. 35, line 14. Nelson claimed he had no idea his stepson even knew Appellant. R. 35, lines 17-18.

At some point thereafter, Nelson told Shirley Scott, a co-worker, about the alleged abuse. Nelson, Scott, and other co-workers then spoke to one of the supervisors, Brenda Shokes, regarding the alleged abuse. R. 36, line 17 – R. 37, line 5; R. 37, line 24 – R. 38, line 2. Afterwards, Nelson reported the alleged incident to police. R. 37, lines 6-8. The police explained they needed evidence in order to do anything. Nelson arranged to meet with Appellant, and the police recorded the conversation in July of 2009. R. 37, lines 9-17; R. 49, lines 2-5.

between January 1, 1985 and December 31, 1987, which would have placed Nelson's age between eight and ten.

On cross-examination, Nelson admitted that he and his wife had their wedding reception at St. Julian Devine Center in 2000. R. 46, lines 3-11; R. 46, lines 18-20. Although Nelson did not want to talk about it, he admitted that when his stepson left his residence, the stepson's disability check left with him. R. 54, lines 4-18; R. 55, line 4 - R. 56, line 18.

Following the court's ruling regarding the testimony of two proposed expert witnesses, the prosecution called its first expert witness, Jacqueline McDonald. R. 84, lines 17-18. Immediately thereafter, the prosecution called Dr. Elsey. R. 102, line 5. He testified that delayed disclosure "means the person has provided information about something that happened to them sometime after the actual event occurred." R. 104, lines 2-6. Dr. Elsey said he found delayed disclosure common in his clinical practice. R. 104, lines 13-14. The phenomenon of delayed disclosure first appeared in the research in the 1980s and continued until recently. He claimed the research showed "kids do not talk about this right away." He referred to "[s]tudies in 2000 at the medical university show[ing] roughly five years." He cited other "studies showing a delay of a year or two." However, he offered no citations for those studies. After offering the evidence of those studies, he claimed that in the group for men that he ran at the center, the average number of years between the date of the incident and the date of disclosure was twenty-seven years. R. 104, line 15 - R. 105, line 2.

Dr. Elsey claimed that his clinical experience and research showed a difference between males and females in terms of disclosure. According to Dr. Elsey,

Boys are often trained to be macho and you take care of yourself, you're rougher, and when a child finds themselves being hurt by an older person, usually somebody in some sort of authority, somebody the family knows, they don't know what to do. They're not prepared for that. They're

terrified, confused; they feel like it's their fault: I should have stopped this and I didn't.

The feelings of guilt perpetuate the desire of not wanting to tell. He continued to opine:

Also for boys it's different because most of the time people that hurt kids are men, and for a little boy to be sexually hurt by an older man, it's confusing because their private part might feel good when this is happening, so they wonder does this mean I'm gay or not gay?

R. 105, line 8 – R. 106, line 8.

Dr. Elsey's testimony went beyond delayed disclosure at the prompting of the prosecutor. He also testified concerning "grooming." R. 106, line 15 – R. 107, line 6. Based upon specific hypothetical questioning by the prosecution, Dr. Elsey testified that a promise of being a starter on a basketball team could be considered grooming. R. 107, lines 7-15. The prosecution took his testimony another step further and asked him whether perpetrators of sexual abuse of children are known to the children. Dr. Elsey testified that in his practice and in the research "it's far more often someone the child knows and trusts." In his personal practice of seeing almost six thousand kids, the perpetrator was a stranger in only two cases. R. 107, lines 16-25.

Appellant testified in his defense. According to Appellant he began working for the city recreational department in 1987, but did not coach a sports team until the next year. R. 110, line 21 – R. 111, line 24. Appellant admitted he coached Nelson, but stated it was in baseball and when Nelson was thirteen or fourteen years old. R. 112, lines 12-14. He denied any contact with Nelson prior to that time. R. 112, lines 19-25. Appellant explained that he did not have keys to St. Julian Divine during the first five years of his employment and would have been unable to enter the building when it was closed. R. 113, lines 1-18. Also refuting Nelson's testimony, Appellant testified he did not own a

car or have access to a car at the time. R. 113, line 19 – R. 114, line 23. Appellant testified that he had multiple contacts with Nelson when the two were adults due to their employment and their sons being friends in school. R. 117, line 4 – R. 119, line 7. Appellant testified that he attended the reception of Nelson's wedding as part of the maintenance crew for the facility. R. 116, line 11 – R. 117, line 3.

Regarding the recorded conversation between Appellant and Nelson in July of 2009, Appellant testified that he went to discuss the situation with Nelson's stepson, who had run away from home and was living with Appellant. R. 121, line 17 – R. 122 line 12. On the tape, Appellant stated he did not want to go to jail. He explained that he was referring to what he perceived as threats by Nelson to report him for using corporal punishment on the baseball players when Nelson was a player. He also feared Nelson accusing him of kidnapping Nelson's stepson. R. 124, line 22 – R. 125, line 20; R. 126, lines 10-13; R. 126, lines 23-25; R. 133, lines 6-11; R. 133, lines 18-24. Appellant adamantly and repeatedly denied any sexual contact with Nelson. R. 126, lines 14-22; R. 133, line 25 – R. 134, line 3.

Discussion

The trial judge erred in allowing Dr. Elsey to testify regarding delayed disclosure of childhood sexual assault, specifically among males, because the evidence vouched for and bolstered Nelson's testimony, and the danger of unfair prejudice resulting from the evidence outweighed its probative value.² In State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94

² Appellant concedes there was no contemporaneous objection to Dr. Elsey's testimony. However, South Carolina jurisprudence governing error preservation does not require a contemporaneous objection in this scenario. "[W]here a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection. The issue is

(2011), the South Carolina Supreme Court held that introduction of a forensic interviewer's written reports was error because the reports improperly vouched for the victims' credibility. Specifically, the reports described the victims' disclosure of abuse as "compelling" and "consistent with the background information received from their mother, the police report, and the other children." Id. The Court concluded that the only way to interpret the language used in the reports was that the forensic interviewer believed the victims were being truthful. Id. The Court held that it is improper for an expert to comment on the veracity of a child's accusations of sexual abuse. Id. (citing State v. Dawkins, 297 S.C. 386, 393-394, 377 S.E.2d 298, 302 (1989); State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000); State v. Douglas, 380 S.C. 499, 671 S.C.2d 606 (2009)).

Further, the Court held the introduction of the forensic interviewer's reports containing the improper vouching evidence was not harmless in Jennings were the only evidence presented against the defendant was the children's accounts of alleged abuse and other hearsay evidence of such accounts. Jennings, 394 S.C. 480, 716 S.E.2d at 94-95.

Dr. Elsey vouched for and bolstered Nelson's testimony by informing the jury that Nelson's delayed disclosure was common in the area of child sexual abuse and very common among male victims of child sexual abuse. Nelson failed to disclose the alleged sexual abuse for over twenty years. Although he referred to studies to support his opinion, he offered no specific citations for such studies. His testimony demonstrated an inconsistency between his clinical practice and the research. According to Dr. Elsey, the average time between assault and disclosure was well over twenty years among the group of

preserved." State v. Govan, 372 S.C. 552, 557, 643 S.E.2d 92, 94 (Ct. App. 2007)(internal citations omitted); see also State v. Forrester, 343 S.C. 637, 642, 541

men with whom he shared a support group, but the research indicated an average disclosure time of one year to five years. Dr. Elsey's testimony was improper, and the trial court erred in allowing the prosecution to present such evidence.

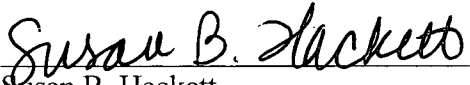
Just as the Court found the improper vouching evidence was not harmless in Jennings, Dr. Elsey's improper vouching for and bolstering of Nelson was not harmless in Appellant's case. The only evidence presented against Appellant was Nelson's testimony and hearsay statements by others. The recorded conversation between Nelson and Appellant did not include a confession by Appellant or even Nelson's direct confrontation of Appellant with a claim of alleged abuse.

S.E.2d 837, 840(2001); State v. Mueller, 319 S.C. 266, 268-269, 460 S.E.2d 409, 410-411 (Ct. App. 1995).

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and sentence and remand the case for a new trial.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of July, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

July 9th, 2013

Susan B. Hackett

Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUL 09 2013
SC Court of Appeals

Appeal from Charleston County
William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEITH GADSDEN,

APPELLANT

Appellate Case No. 2012-211729

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; SC 29472, this 9th day of July, 2013.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of July, 2013.

Emily B. (L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2022.