

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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AUG 12 2014

SC Court of Appeals

Appeal from Greenville County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL ERWIN MOON,

APPELLANT

APPELLATE CASE NO. 2013-001793

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting the DVD of the child's interview with the forensic interviewer because the DVD did not meet the guarantees of trustworthiness pursuant to S.C. Code Section 17-23-175 and State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) and thus the court should remand for a new trial on all charges with the forensic interview excluded?

STATEMENT OF THE CASE

In September 2012, the Greenville County Grand Jury indicted Michael E. Moon on the charges of committing a lewd act on a child under the age of sixteen, and criminal sexual conduct (CSC) with a minor first degree. On August 12-13, 2013, Moon proceeded to trial before the Honorable Eugene C. Griffith, Jr. and a jury. Moon was represented by Susannah Ross, and the state was represented by Charles Bondurant. R.1 The jury returned verdicts of guilty on both charges as indicted. R. 132, ll. 1 – 25. Judge Griffith sentenced Moon to twenty-five years on the CSC with a minor first degree, and to ten years on the lewd act charge. Both sentences were to run concurrently to each other. R. 135, ll. 6 – 20. Moon's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

Michael Moon lived with his wife and young daughter, who was born in 2002, in Greenville in a mobile home on property that was owned by his sister. R. 20, ll. 16 – 22. When his daughter was nine years old in 2011, the child told her mother that her father had been touching her sexually. The child then told DSS and the police investigator when they talked to her at school. R. 23, ll. 1 – 25; R. 28, ll. 11 – R. 29, ll. 24; R. 35, ll. 1 – 24.

The child, who was eleven when she testified at trial, said when she was around six or seven years old, her father sexually abused her by touching her private parts with his hand. He touched her vagina on top and her butt. R. 24, ll. 1 – R. 25, ll. 25. He then made her touch his penis and put her mouth on it. R. 26, ll. 19 – R. 28, ll. 10. After she told the police, she went to live with her grandmother, who was her father's mother, for a couple of months. Then she returned to live with her mother. R. 29, ll. 12 – R. 31, ll. 4.

While she was living with her grandmother, she went to the Julie Valentine Center and spoke with a lady there about all of these things. R. 30, ll. 1 – 17. She admitted on cross examination that she told the lady at the Valentine Center more details than she did when she talked to DSS initially. She did not remember talking to DSS again before going to the Valentine Center. R. 31, ll. 10 – R. 32, ll. 9.

Ivette Moon, the child's mother, did not go to the police when the child told her of the alleged abuse because she was scared. She was afraid she would lose custody of the child. She told Moon's mother, whom she trusted. Then the police became involved, and came and talked to Ivette. She told the police what the child told her. R. 34, ll. 6 – 25; R. 35, ll. 1 – R. 38, ll. 23.

Sharon Schoenholz was the sister of Michael Moon, and acted as the landlord for the property where he lived R. 40, ll. 1 – R. 45, ll. 25. She learned of the sexual abuse allegations of her niece from Sharon's mother. Sharon then went to Judge Taylor and told him about it because she was afraid that her brother would leave with the child and the abuse would continue. After this, Sharon was contacted by the police. R. 46, ll. 1 – R. 47, ll. 25.

Investigator Heather Hubert with the Greenville County Sheriff's Office was contacted by the lead investigator, Investigator Mike Robertson, in March 2011 and was told to go to the elementary school and interview a child who had allegations of abuse. Investigator Hubert had advanced training in forensic interviewing of children but did not consider herself to be a professional forensic interviewer. R. 48, ll. 18 – R. 49, ll. 23; R. 50, ll. 1 – R. 51, ll. 1 – 23.

Investigator Hubert called the Department of Social Services (DSS), and a DSS case worker, Pat Aguedello, was assigned to go with the investigator to the school for the interview. The two of them met with the child at school. The child was described as not being hesitant to talk to them. When the child disclosed the abuse, she became apprehensive and guarded. The child said the abuse occurred two years earlier at her home. The interview lasted about thirty to forty minutes. R. 51, ll. 25 – R.54, ll. 24.

After Investigator Hubert talked with Investigator Mike Robertson about the interview, Moon was charged with lewd act on a minor. Investigator Hubert testified that the child had not been interviewed by DSS prior to her interview. Investigator Hubert did not know if the child had talked with DSS again before going to the Valentine Center. R. 56, ll. 1 – 25.

At the Valentine Center, the child was interviewed by Stephanie Smith who was the Empowering Families supervisor with the Specialized Alternatives for Families and Youth at the Julie Valentine Center. R. 68, ll. 10 – 24. She testified at trial that she conducted forensic interviews with children. She had a master's degree in social work, but still received training through the program, Child First. This program taught the protocols of using the RATAAC interviewing technique. It means Rapport, Anatomy identification, Touch inquiry, Abuse scenario, and Closure. She defined RATAAC as: "a semi-structured evidence based interview technique that allows the child to tell information without using leading questions or any kind of information that would put words into their mouth." R. 69, ll. 1 – R. 70, ll. 25.

Ms. Smith interviewed the child in Moon's case when she was referred by Investigator Mike Robertson with allegations of possible sexual abuse. Ms. Smith was given details of the alleged abuse allegations. The child was nine years old at the time of the interview which was in April 2011. Ms. Smith recorded the interview, and then made a copy for the solicitor's office R. 71, ll 15 – R. 73, ll. 25.

On cross examination, Ms. Smith admitted that the child told her that the child had been interviewed by DSS before and told them everything that happened. R. 75, ll. 1 – R. 76, ll. 2.

Investigator Mike Robertson testified that he learned of the alleged sexual abuse allegations in March 2011 from Sharon Schenholz. R. 61, ll 18 – R. 62, ll. 25. Upon learning of the allegations, he sent Investigator Hubert to talk with the child, and he talked with the mother. He then obtained a warrant charging Moon with committing a lewd act on a child. R. 63, ll. 1 – R. 64, ll. 10.

He then scheduled a forensic interview for the child and did attend the interview. Based on that forensic interview at the Valentine Center, he obtained a second warrant charging Moon with criminal sexual conduct with a minor first degree. R. 64, ll. 13 – R. 65, ll. 16; R. 67, ll. 1 – 8. Investigator Robertson did not know if the child had another interview with DSS or anyone else between the time he obtained the warrant for lewd act and the interview at the Valentine Center. He did know that law enforcement did not interview her again. R. 67, ll. 1 – 25.

The state called Linda Hutton, a clinical social worker, who was qualified by the judge as an expert in sexual abuse. R. 76, ll. 16 – R. 78, ll. 23; R. 84, ll. 5 – 15. She clarified that she did not give opinions as to whether abuse occurred or not because she was in the treatment part and not evaluation. She did not treat this child nor evaluate her in any way. R. 80, ll. 1 – 24. The defense counsel objected to Ms. Hutton being qualified as an expert because her expertise was based solely on her experience and not on any empirical data. R. 81, ll. 22 – R. 83, ll. 4.

The judge limited Ms. Hutton to four points to discuss: (1) delay in reporting by the child; (2) confusion about dates; (3) behavioral changes; (4) physical evidence. Supp. R. 2, ll. 10 - 23. Ms. Hutton testified that it was common for a child to delay reporting the abuse. It was not unusual for children to be confused and get dates mixed up. Significant behavioral changes would not necessarily occur during the abuse unless the child showed sexual knowledge beyond their years. She also said it was common not to have physical evidence. R. 84, ll. 20 - R. 88, ll. 24.

At the close of Ms. Hutton's testimony, the state published the DVD of the forensic interview from Valentine Center for the jury. R. 89, ll. 15 – 24.

Michael Moon was sixty-four years old at the time of trial. He was older than his wife as she was twenty-nine when they married, and he was fifty-one. They had only one child. They moved to a mobile home near his family which was owned by his father at the time. His sister later bought the land. His sister raised the rent on him because his sister did not want him living there. R. 91, ll. 9 – R. 94, ll. 14.

Moon testified that he was not guilty of these charges. He never allowed his daughter to touch his penis, and he never touched her vagina. R. 90, ll. 19 – R. 91, ll. 8. He was completely surprised when he learned of the allegations. The only thing that had ever occurred was when he took a shower sometimes. There was only one bathroom in their mobile home so they never locked the door in case someone needed to use the bathroom while someone else was showering. Sometimes, when he took a shower, the child would pull the curtain back to talk to him. He always made her stop. R. 94, ll. 15 – R. 96, ll. 13.

In a pretrial motion, defense counsel objected to the forensic interview being admitted because it did not meet the guarantees of trustworthiness. Counsel argued that the child said in the interview that she had said all of this before to DSS, and there was no evidence of another interview with DSS. The only one was when the law enforcement investigator and the DSS worker talked to the child the first time at school. There was no mention of the CSC during that interview. Only the lewd act—the touching—was discussed. The CSC came out during the forensic interview. Because that interview was not trustworthy, counsel moved to “quash the CSC with a minor charge.” R. 5, ll. 10 – R.7, ll. 10.

Counsel had made every effort to obtain all of the discovery previously, and again moved for all of the discovery before trial. There was no evidence of any reference to an

interview with DSS. The solicitor responded that he had gone through the DSS files and could find no reference to any interview. He did not know what the child was referring to other than the school interview. R. 5, ll. 10 – R. 6, ll. 13.

Counsel argued that Jessie's Law or S.C. Code Section 17-23-175 provided the guidelines for the admission of the interview. However, counsel noted that this statute required a guarantee of trustworthiness. R. 6, ll. 14 – 25.

The judge asked if counsel were referring to the newest case law that came out in January. Counsel said she had that case and handed the judge the case of State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). The judge denied counsel's motion based on the totality of the whole interview. R. 7, ll. 11 – R. 8, ll. 4.

Later, when the solicitor asked the judge if he found that the DVD of the forensic interview had guaranteed trustworthiness under 17-23-175, the judge responded yes. R. 13, ll. 4 – 11.

When the state admitted the DVD of the forensic interview into evidence, defense counsel objected based on her previous argument. The judge ruled that the objection was made on the record, and his ruling was the same. R. 74, ll. 25 – R. 75, ll. 13.

ARGUMENT

The trial court erred in admitting the DVD of the child's interview with the forensic interviewer because the DVD did not meet the guarantees of trustworthiness pursuant to S.C. Code Section 17-23-175 and State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) and thus the court should remand for a new trial on all charges with the forensic interview excluded.

S.C Code Section 17-23-175 is titled: "Admissibility of out-of-court statement of child under twelve; determination of trustworthiness; notice to adverse party. Section 17-23-175 (B) provides guidelines to determine whether a statement possesses particularized guarantees of trustworthiness. These include;

- (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.

The problem with the interview was that the child said she had given this same information to DSS, and there was no evidence. She did not provide the same information to the interviewer as she did in the first interview with law enforcement and the DSS worker. Time had expired and she had been in the company of her grandmother and her father's sister who wanted Moon to move from her property. Because her statement changed, trustworthiness as far as coherence and consistency was not guaranteed

In State v Kromah, *supra*, the Supreme Court wrote in Footnote Four:

The title of "forensic interviewer" is a misnomer. The use of the word forensic indicates that the interviewer deduces evidence suitable for

use in court. It also implies that the evidence is deduced as the result of the application of some scientific methodology. The exact scientific methodology applied apparently defies identification. The RATAC style of interviewing is not scientific. It merely represents the objectives and topics of discussion between the interviewer and the child. Somehow RATAC is supposed to convert the interviewer into a human truth-detector whose opinions of the truth are valuable and suitable for the jury's consumption.

Later, in Footnote Five, the Court continued to write:

Forensic interviewers might be useful as a tool to aid law enforcement officers in their initial investigative process, but this does not make their work appropriate for use in the courtroom.

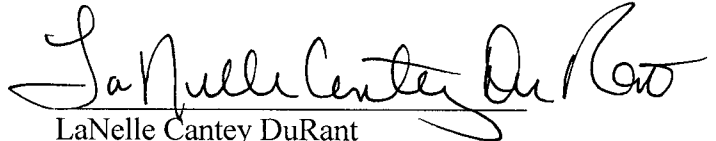
The issue in Kromah was that the forensic interviewer gave an opinion that there was a "compelling finding of child abuse" which the Court said was error but harmless in that case.

The forensic interviewer in Moon's case did not offer an opinion, and was not qualified as an expert. However, the product of her work using the RATAC method of interviewing, the forensic interview, was admitted for use in court and was viewed by the jury. It was also used by law enforcement to add the more serious charge. This was in error considering the questionable reliability of the RATAC method as described by the Supreme Court.

CONCLUSION

Based on the above, the convictions and sentences should be reversed, and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a horizontal line underneath the name.

LaNelle Cantey DuRant
Appellate Defender

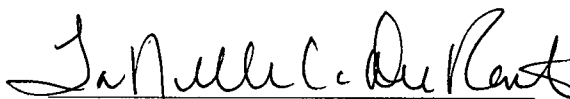
ATTORNEY FOR APPELLANT

This 12th day of August, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

August 12th, 2014



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