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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case Tracking No. 2013-001793

The State,

Respondent,

vs.

Michael Erwin Moon,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I The trial court did not abuse his discretion in finding the video met the requirements of section 17-23-175 of the South Carolina Code, and in particular, the requirement that it demonstrate particularized guarantees of trustworthiness.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court did not abuse his discretion in finding the video met the requirements of section 17-23-175 of the South Carolina Code, and in particular, the requirement that it demonstrate particularized guarantees of trustworthiness.

Appellant contends the trial court erred in finding the videotape of the forensic interview conducted with the victim failed to meet the requirements of section 17-23-175 of the South Carolina Code. Specifically, he contends the videotape fails to demonstrate particularized guarantees of trustworthiness. The trial court viewed the videotape and considered the requirements of section 17-23-175. The court properly found it contained particularized guarantees of trustworthiness and allowed it to be admitted into evidence.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). This Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000) (citing State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993) (appellate courts are bound by the trial court's fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law)).

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001); see also, State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."). An abuse of discretion occurs when the trial court's ruling lacks any evidentiary

support or is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

Section 17-23-175 provides:

(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.

S.C. Code Ann. § 17-23-175(A) (Supp. 2013). Appellant has not challenged the first three requirements but has focused on whether “the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.” The statute provides factors for the trial court to consider in whether sufficient guarantees of trustworthiness are present:

(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(B) (Supp. 2013).

In making his ruling, the trial court specifically stated: “I have watched the video. I understand your motion, but I think, considering the totality of the whole interview, the child’s comments and responses to questions that were provided, that I will deny that motion.” (T.38; R. 7) Later the trial court specifically stated he found the video to contain guarantees of trustworthiness. (T.44; R. 13)

A review of the video demonstrates the interviewer allowed the child to dictate where the interview went throughout the majority of the interview. She did not ask leading questions, but instead asked questions designed to allow the child to answer and explain. The video was internally consistent and coherent with no major missing details or information.

The child victim provided a detailed account of the abuse. She said it happened when she was about six and lasted until she was seven. She indicated her father touched her vagina on the outside and rubbed it. She indicated he also touched her bottom. She stated he made her rub his penis, and she would sometimes rub it using a rag. She indicated that Appellant would say “Ah, it feels good” when she was rubbing his penis. The child victim explained it happened while no one else was in the house and her mother was at work. The child then disclosed that Appellant also made her perform oral sex on him. She indicated the abuse occurred more than one time. The child victim also indicated the incidents of abuse occurred in the bedroom as well as the bathroom. Finally, she used dolls to demonstrate the way Appellant touched her and how she had to touch him. The child victim testified very similarly at trial. (State’s Exhibit 1, Video of Interview; T.60-63; R. 24-25)

The child victim does mention talking to DSS on the videotape, and this is the single comment used by Appellant to argue the videotape lacks particularized guarantees of trustworthiness. However, the evidence at trial supports the victim's statement she talked with DSS. When interviewed at the school, she was interviewed by law enforcement and a DSS worker. (T.112-113, 117; R. 51-52; 56). Further, on cross-examination the child victim indicated she knew of no other time she talked to DSS. (T. 68; R. 32). Nothing in the videotape indicates anything other than a properly conducted interview, and it contains proper guarantees of trustworthiness as found by the trial court. (State's Exhibit 1, Video of Interview).

Any discrepancies or additional details provided in the interview compared to other disclosures by the child could be, and were, brought out on cross-examination. Appellant's counsel asked the child victim whether she provided the same details. Specifically:

- Q. Now when you initially talked to your mom, you didn't say many details that you later said at the Julie Valentine Center [the location of the interview], did you?
- A. No, ma'am
- Q. And when you initially talked to DSS at the school, when you talked to them, you didn't say the details that you said at the Julie Valentine Center, did you?
- A. No, ma'am.

(T.67-68; R. 31-32). Based on the totality of the circumstances surrounding the video, the trial court properly found it contained the requisite particularized guarantees of trustworthiness and properly allowed it to be admitted into evidence. He did not abuse his discretion in his finding because the video provides ample support for the finding.

On appeal, Appellant also seems to argue the RATAC method is not an appropriate method for conducting interviews of child victims. This issue was never raised at trial and is, therefore, not preserved for review on appeal. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (same).

The argument is also entirely without merit. In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the case relied on by Appellant, the Supreme Court was concerned with whether a forensic interviewer could be qualified as an expert witness. The Court found the RATAC method was not established with a scientific basis to support the qualification of a witness as an expert. The Court did specifically find the method was designed as a means of conducting an investigatory interview. See Kromah, 401 S.C. at 357 n 5, 737 S.E.2d at 499 n.5. As a result, the interview complied with the factor the court could consider under section 17-23-175(B)(2). Accordingly, the trial court did not err in admitting the video of the interview conducted with the child victim under section 17-23-175 of the South Carolina Code.

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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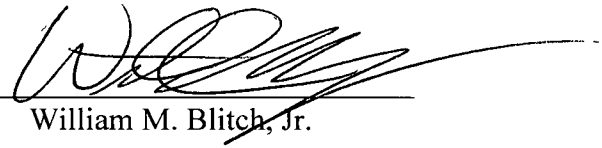
Appellant.

CERTIFICATE OF COUNSEL

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

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