STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID MATTHEW CARTER,

APPELLANT

APPELLATE CASE NO. 2018-001032

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The court abused its discretion by ruling that appellant would be removed from the courtroom when the twelve-year-old victim testified, and that appellant could watch the testimony on CCTV, since the twelve-year-old minor was not "very young" within the common meaning of the phrase, and defense counsel argued previous victims who testified pursuant to CCTV pursuant to S.C. Code §16-3-1550 (E), were ages 3-7. Further, (1) the minor here did not categorically claim she could not testify with appellant being in the courtroom, (2) the testimony of the victim's social worker therapist PTSD testimony appeared inconsistent, and (3) overall the testimony here did not justify the extreme measure of removing appellant from the courtroom during the minor's testimony.

STATEMENT OF THE CASE

Appellant was indicted by the Lancaster County Grand Jury for three counts of criminal sexual conduct with a minor in the first degree. R. p. * (Indictments). His case came on for trial on May 21, 2018, before the Honorable Steven H. John, and a jury. Ashley McMahon and Henry McMaster, III, were the assistant solicitors. Brandon Steen and Ryan Payne represented appellant. Tr. 1.

On May 24, the jury found appellant guilty on all three counts. Tr. 276, l. 16 – 277, l. 11. Judge John sentenced appellant to forty years' imprisonment. Tr. 297, ll. 2-13.[1]

This appeal follows.

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[1] The court reporter in this case did the May 21, 22, and 24, 2018 days of court which are referred to as "Tr." in this brief for ease of reference. The transcript of Day 3 court, May 23, 2018, is separately numbered and is referred to as "Tr. I," where applicable.

STANDARD OF REVIEW

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." This procedural protection applies in both federal and state prosecutions by virtue of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

A trial court's decision to allow videotaped or closed-circuit testimony is reversible "only if it is shown that the trial judge abused his discretion in making such a decision..." State v. Murrell, 302 S.C. 77, 82, 393 S.E.2d 919, 922 (1990). The requisite finding of necessity for this course of action must be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. Maryland v. Craig, 497 U.S. 836, 855 (1990).

ARGUMENT

The court abused its discretion by ruling that appellant would be removed from the courtroom when the twelve-year-old victim testified, and that appellant could watch the testimony on CCTV, since the twelve-year-old minor was not "very young" within the common meaning of the phrase, and defense counsel argued previous victims who testified pursuant to CCTV pursuant to S.C. Code §16-3-1550 (E), were ages 3-7. Further, (1) the minor here did not categorically claim she could not testify with appellant being in the courtroom, (2) the testimony of the victim's social worker therapist PTSD testimony appeared inconsistent, and (3) overall the testimony here did not justify the extreme measure of removing appellant from the courtroom during the minor's testimony.

Relevant Facts

Prior to the trial, the judge said he would hear "the matter of testimony of the minor victim in a different courtroom than the defendant. . ." Tr. 53, ll. 7-11. The state called David Kellin, who had a master's degree in social work and worked at the Palmetto Citizens Against Assault center. Tr. 55, ll. 9-25. Kellin was the applicable minor's therapist in this case. "Most of my children that I'm working with are underneath the age of twelve, so we use a chest or crafts to work at the same time we're talking. So it makes it more of a comfortable environment for them to talk." Tr. 57, ll. 6-25.

Kellin said he "believed" that the alleged victim testifying in the same courtroom with the defendant would "impede her ability to fully and accurately testify in this case." Tr. 59, l. 23 – 60, l. 2. Kellin said, "I think T.P. [the alleged victim] is okay in front of a jury. I think that the fear that she's expressed is to be in front of David. And I think if that's not there, I think she will be okay to testify wherever she's at. The idea of me maybe looking at the CCTV was to be able

to put a physical distance between her and David Carter." Tr. 62, ll. 18-25. Kellin opined that a distance "of any kind" would allow the alleged victim to testify without a problem. Tr. 63, ll. 1-3.

The assistant solicitor argued that she was not asking for closed-circuit television for the minor is this case but asking instead that the minor and appellant "not be in the same room together, they'd be okay. She will be in the courtroom. And if Mr. Carter is next door in Courtroom B, we can video stream in there the ability to see and hear." Tr. 64, ll. 1-11.

The judge said he understood that if he granted the state's motion, appellant would be in a different courtroom with counsel, and he would be able to hear and communicate. Tr. 64, l. 12 – 66, l. 7.

Defense counsel Steen objected to this procedure. Counsel argued, "Your Honor, she's twelve years old. I went through pretty much -- I've attached it and given it to the solicitor, too -- all the case law with CCTV. The ages of the witnesses testifying by CCTV are three, six, five, seven, five, four, and seven. Miss T.P. [the alleged victim] is 12 years old and she's almost a teenager. This statute is not meant to protect people of her age. With a forensic interview a child is 12 years old, but yet, and *they say very young witness*, I would assume the Court means less than 12." Defense counsel also noted, as seen below, that Kellin's observations of the minor here were dated, and that he could not currently diagnose the alleged victim as having post-trauma stress disorder. Tr. 66, l. 16 – 67, l. 6. (emphasis added).

The judge then asked Kellin to talk again with the alleged victim. Kellin did so, and then offered that he "redid the UCLA PTSD RI index that we used initially to look at her PTSD symptoms. Her initial scores when she first started were 34, *today they're 25*. So there's still the presence of symptoms there. They're less than what they initially were." Kellin claimed the

alleged victim still had PTSD in his opinion. "It would be more classically looked at as either moderate or beginning of remission." Tr. 70, l. 10 – 72, l. 17. In the presence of the jury shortly thereafter, Kellin admitted even the minor's score of 34 "[w]as one point below" the score of 35 necessary "[f]or a diagnosis of PTSD . . ." As seen, it now was 25. Tr. 115, l. 9 – 117, l. 24.

The alleged victim's mother then claimed that if her daughter testified "in front of the defendant, "there's not going to be any good reaction whatsoever." Tr. 74, ll. 1-8. She said the alleged victim was on "Vistaril" for anxiety. Tr. 74, ll. 17-24. The following occurred on cross-examination of Tiffany Carter:

> Q: And you mentioned she would not have a good reaction *if she had to testify?*
>
> *A: No, she'd shut down.*
>
> *Q: She would shut down?*
>
> *A: Yeah.*
>
> Q: Do you ever talk to her about this case?
>
> A: Sometimes. Not really asking her any questions, just giving her the opportunity to whatever she feels like she needs to talk about.
>
> Q: *Does she ever shut down with you?*
>
> *A: Yes.*
>
> Q: Does she ever talk to you and tell you stuff? I don't need to know what she told you --
>
> A: Very limited. It's very -- I barely know any details just coming from her.

Tr. 75, l. 20 – 76, l. 9. (emphasis added).

The alleged victim, T.P., then testified. She was twelve years old. Tr. 78, l. 20 – 79, l. 9. She was in sixth grade. Tr. 79, ll. 24-25. The minor attended Andrew Jackson Middle School. Tr. 82, ll. 3-4.

The judge then questioned T.P. She said she understood there would be twelve adult men and women constituting the jury. Tr. 83, l. 18 – 84, l. 3. The following occurred on examination of T.P. by the judge:

> Q: Okay. All right. And you know that you're going to be asked questions by the young lady that just asked you some questions about what happened? You understand that?
>
> A: Yes, sir.
>
> Q: And the attorney over there is going to be asking you some questions, also? You understand that?
>
> A: Yes, sir.
>
> Q: And you're telling me you're going to tell the truth, correct?
>
> A: Yes, sir.
>
> Q: All right. Now, I know it may be a tough question, but if David Carter were sitting at that table over there, *could you answer any of the questions?*
>
> *A: One or two.*
>
> *Q: Okay. And what do you think would happen after that?*
>
> *A: I'd probably freeze up and have a meltdown.*

Tr. 85, ll. 3-18. (emphasis added).

Defense counsel Steen again requested that the judge deny the state's motion to have the defendant removed from the courtroom during the minor's testimony. Steen argued there was no "testimony introduced here today that says she would not be able to testify with Mr. Carter in the room. I believe the necessity requirement requires that she not be able to testify if Mr. Carter is here. She testified that she would be able to testify some. Mr. Kellin testified that she would only not be able to testify accurately and fully." Tr. 87, ll. 11-23.

The judge then cited S.C. Code § 16-3-1550(E) and ruled for the state. The judge said he thought appellant's constitutional right to confrontation would be protected by him having

counsel present in one courtroom with the testifying minor, and a communication system available to communicate with appellant in another courtroom. Tr. 88, l. 24 – 91, l. 12.

Testimony in the presence of the jury

David Kellin testified that in his opinion the alleged victim suffered from post-traumatic stress disorder. Tr. 141, ll. 21 – 22. Kellin testified that the "cutoff score" on the UCLA PTSD test for diagnosing post-trauma stress disorder was 35. He testified the alleged victim scored 34 but nonetheless maintained that in his opinion, she had PTSD.[2] Tr. 143, l. 6 – 144, l. 2.

T.P. then testified that she was twelve years old. Tr. 151, ll. 4-5. She testified appellant was her stepfather. She said she learned he was her stepfather in the first grade. Tr. 152, ll. 3-6.

T.P. said in a fourth grade guidance class, the teacher read the class a book called Not in Room 204, which was about a girl being sexually abused by her father. She said a few months after this book was read to her class, she told her mother "he [appellant] sexually abused me." Tr. 152, l. 5 – 153, l. 11. T.P. claimed appellant repeatedly had sexual intercourse and anal intercourse with her. Tr. 153, ll. 4-22; Tr. 154, l. 1 – 155, l. 14.

T.P. testified that appellant had a "smiley skull tattoo and it had momma's name, her first name on top and last name on the bottom." The import of the solicitor's questioning about tattoos was that the minor had seen appellant without his clothes on. Tr. 158, ll. 19-21.

Tiffany Carter testified that T.P. told her on September 24, 2016, about the alleged sexual assaults. She took T.P. to Piedmont Medical Center for an evaluation which was "normal."[3] Carter said when she returned to the house two days later with a police escort, T.P.'s room "was

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2 As seen above, the minor's rescore on this test was 25. 34 was her prior score.

3 The nurse, Stephanie Schaller, said the "normal examination" essentially was meaningless since only a small percentage revealed trauma. Tr. 205, l. 4 – 208, l. 7.

a mess." Carter offered: "[E]verything was pulled out, not anything like how it was when we left." Carter said T.P. became more withdrawn, talked back, and acting differently after disclosure of the abuse. Tr. 213, l. 14 – 215, l. 17.

Appellant testified in his own defense. He was thirty-three years old and he was born in Lancaster, South Carolina. Tr. I, 43, ll. 15-24. Appellant had been in the Army, and then he pursued a career in welding. Tr. I, 44, l. 12 – 45, l. 18. Appellant testified his wife, T.P's mother, was angry with him about his affairs or alleged affairs she learned about. She even carved the word "cheater" into his truck with a knife. Tr. I, 49, l. 11 – 53, l. 24.

Appellant testified his wife and children returned to live with him about "three weeks before the allegations" in this case were made against him by T.P. Tr. I, 52, l. 13 – 53, l. 24. Appellant said, "I noticed that my kids knew about the affairs because Tiffany had admitted to me that she told the kids that I had an affair on her and I cheated." Tr. I, 54, l. 6 – 55, l. 17.

Appellant denied he ever sexually molested the minor. Tr I. 61, l. 4 – 62, l. 5. Appellant said he went to DSS to talk with Jacqueline Hicks about the alleged abuse. Appellant had found a Journal that was used by his wife and T.P, to communicate. "The journal had some disturbing stuff in it that I didn't know about because, you know, it was between a mother and daughter. And I took that journal with me that Monday morning to talk to the cops, and they told me to hang on to it." Tr. I, 56, ll. 4-21; Tr. I, 57, l. 8 – 58, ll. 12. Appellant said the Journal contained explicit sexual discussions and sexual pictures. Tr. I, 57, l. 8 – 58, l. 24. DSS worker Jackie Hicks said she saw this Journal, a collection of writings between the minor and her mother, but she maintained: "I did not have a copy." Tr. I. 23, ll. 5-13.

The cross-examination by the Assistant Solicitor McMahon of appellant about his affairs, work history, and what he did for relaxation made appellant out to be a bad person irrespective of

the allegations in this case. The trial judge even told the solicitor at one point not to "make comments and testify." Tr. 62, l. 11 – 83, l. 9.

Discussion

"It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' ... That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult" Maryland v. Craig, 497 U.S. 836, 846-47 (1990); Coy v. Iowa, 487 U.S. 1012, 1019 (1988).

S.C. Code §16-3-1550(E) states, "The circuit or family court must treat sensitively witnesses **who are very young**, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate. . . ." (emphasis added). Defense counsel correctly argued in this case that the alleged victim was twelve years old. This was not "very young," and counsel noted in his memorandum that this statute was used for victims ranging from three to seven years old. R. p. *. The alleged victim here was "almost a teenager," she was twelve-years-old. Counsel also used the analogy of the forensic interview which was limited to those below twelve years old. Tr. 66, l. 16 – 67, l. 6. See S.C. Code §17-23-175(C) (1) defining a child as one "under the age of twelve years at the time of the making of the statement. . ."

Twelve-years-old is not "very young" in common usage of the term "very young," and for that reason alone the judge erred in mandating that appellant not be in the courtroom when his stepdaughter testified. But there was more. Kellin's PTSD testimony was seemingly inconsistent. While he did admit this twelve year old minor was improved, he stood by his claim she had PTSD despite her score of 25 on the day of court, and her score of 34 on a prior occasion

despite 35 being the lowest score on the UCLA-PTSD test for having PTSD.[4] Tr. 70, ll. 10-16; tr. 116, l. 20 – 117, l. 24. He asserted he believed that the twelve year old testifying in the same courtroom would impede her ability to testify "fully and accurately." That was not trauma evidence.

In State v. Murrell, 302 S.C. 77, 393 S.E.2d 919 (1990), cited by the trial judge, the victim was five years old. The Supreme Court in Murrell noted that the United States Supreme Court in Coy v. Iowa, 487 U.S. 1012 (1988), had found unconstitutional, on confrontation clause grounds, an Iowa statutory procedure which permitted the placement of a screen between the defendant and witnesses so that the witnesses could not see the defendant. In Coy v. Iowa, the United States Supreme Court suggested that exceptions to the right to personal confrontation could exist if based on individualized findings of need. State v. Murrell, 302 S.C. 77, 81, 393 S.E.2d 919, 921-922 (1990).

Our Supreme Court in Murrell found no error in that case involving the five-year-old victim. Our Supreme Court reasoned the judge did not abuse his discretion in concluding that testimony by the victim in the defendant's presence would have had a traumatic effect on the child. The Court further noted the child was placed in a courtroom setting. Appellant was allowed to view and hear the child and appellant's counsel was permitted to cross-examine the child. "Appellant not only had counsel present with him and in the courtroom, but a communication procedure between all three was made available." State v. Murrell, 302 S.C. at 82, 393 S.E.2d at 922.

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[4] Appellant is aware Kellin said he could take other factors into account when "diagnosing" PTSD. Although not an issue in this case, Kellin had a master's degree in social work, and a BS degree in psychology. Kellin was not a doctor, and he could not prescribe medication. While he claimed there was no limitation of diagnosis he could make he was very much an advocate as his sentencing comments to the court revealed. Tr. 55, ll. 21-24; tr. 57, ll. 10-15; tr. 287, l. 23 – 289, l. 15.

In Maryland v Craig, 497 U.S. 836 (1990), the Court held that the confrontation clause did not categorically prohibit a child witness in child abuse case from testifying against defendant at trial, outside defendant's physical presence, by one-way closed circuit television. However, a finding of necessity for use of one-way closed circuit television procedure had to be made on case specific basis. The child in that case was six years old.

In State v. Bray, 342 S.C. 23, 535 S.E.2d 636 (2000), this Court reversed the defendant's conviction where the alleged victim, who was five at the time of the alleged abuse, and seven years old at the time of trial, testified via CCTV. The Supreme Court found that the decision to allow videotaped or closed circuit television testimony is reversible "only if it is shown the trial judge abused his discretion in making such a decision." State v. Bray, 342 S.C. at 27, 535 S.E.2d at 639. The Court in Bray found that while there was evidence the victim was afraid of the defendant, there was also more generalized testimony concerning her fear of the courtroom and her relatives.

In this case, the situation is not much different. The minor's mother said that the minor would "shut down" if she had to testify. The minor had "shut down" just talking to her mother in a seemingly relaxed environment. Tr. 75, l. 20 – 76, l. 9. This was generalized testimony of the subject matter itself being dramatic, not appellant, or not just appellant.

Further, as defense counsel noted, the minor did not claim she could not testify in appellant's presence in the courtroom. Why she maintained she could answer a question of two only in appellant's presence is unknown, but she did not claim she could categorically could not do testify in appellant's presence.

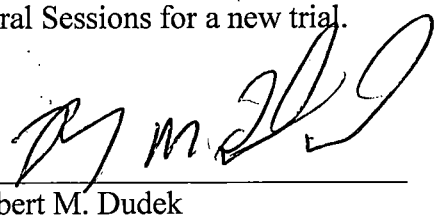
Again, defense counsel correctly argued and presented a memorandum which sufficiently informed the court that the minor here being twelve years old, and "almost a teenager," was not

"very young" as was required. That was what the Legislature provided the exception for in S.C. Code § 16-3-1550(E).

The right to confront an accuser is obviously a very important fundamental right of a criminal defendant as the Court found in Coy v. Iowa, and Maryland v. Craig, supra. It seems intuitive that a defendant not being present when the accusing child, here a twelve year old minor, testifies is going to make an average juror draw a negative inference about the character of the defendant from that fact alone. Sometimes such an extraordinary procedure can be justified. In the case of this twelve year old, and for the reasons argued at trial and repeated above, it respectfully was not. The judge abused his discretion in allowing appellant to be removed from the courtroom during the child's testimony. Appellant should be granted a new trial.

CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of May, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID MATTHEW CARTER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on David Matthew Carter, #376585, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 13th day of May, 2019.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of May, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028