THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions
Donald Hocker, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2019-001477

The State, ... Respondent

v.

Brandon Jerome Clark, ... Appellant.

Initial Brief of Appellant

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QUESTIONS PRESENTED

Question I

Did the trial judge err when he prevented the Defendant from cross-examining the forensic interviewer regarding her suggestive interviewing technique when the judge misapplied the holdings of *Anderson* and *Kromah*?

Question II

Did the trial judge err when he admitted the forensic interview of the alleged victim into evidence when the video patently did not provide particularized guarantees of trustworthiness as required by SC Code Ann. § 17-23-175 and where the child did not demonstrate competency to testify?

Question III

Did the trial judge err by prohibiting the Defendant's expert witness from testifying when she was manifestly qualified under Rule 702 and her testimony would have assisted the trier of fact in understanding the evidence?

Question IV

Did the trial judge err in denying the Defendant's motion for directed verdict, when the only evidence of the timing of the incident, as noticed in the indictment, was improperly admitted hearsay testimony?

Question V

Did the trial judge err in refusing to find a *Brady* violation, where some evidence was delayed from production until after the trial began and other evidence was destroyed after it had been requested, when the trial judge found that he could not ascertain whether the missing evidence would have been exculpatory?

STATEMENT OF CASE

On April 14, 2017, the Pickens Police Department sought a warrant charging Brandon Jerome Clark with Criminal Sexual Conduct with a Minor in the First Degree based on allegations made by A.G. On August 22, 2017, the Pickens County Grand Jury returned a true bill indictment. R. *.

From August 19, 2019 through August 22, 2019, the State tried Brandon Clark before the Honorable Donald B. Hocker and a jury. Britni M. McCall and B. Scott Todd of the Pickens County Solicitor's Office represented the State. Jenny L. Barwick represented Brandon Clark. The jurors convicted Clark, and Judge Hocker sentenced him to the statutorily minimum prescribed sentence of twenty-five (25) years imprisonment. Tr. 655 et seq.

On August 28, 2019, Brandon Clark filed a notice of appeal, which was received by the Clerk of Court on September 3, 2019. This brief follows.

STATEMENT OF RELEVANT FACTS

On March 20, 2017, A.G., a five-year-old girl, and her father presented at the Baptist Easley Hospital. Trial Tr. 230. He reported to hospital staff that A.G. had disclosed a sexual assault by her mother's boyfriend. At the hospital, A.G. spoke to numerous adults and answered their questions, while her parents discussed the situation with law enforcement, hospital staff, a child advocate, and a representative of the South Carolina Department of Social Services. S.C. Trial Tr. 404-405. A.G. reported that the abuse had taken place two days earlier. Trial Tr. 292. Hospital staff asked the parents to allow them to perform a physical exam to search for signs of sexual assault, but the parents declined. Trial Tr. 393.

A. The Disclosure

Later, on March 28, 2017, A.G. went to the Julie Valentine Children's Center for a forensic interview conducted by Amber Hiott Cheney. Trial Tr. 125. Shortly after the interview began, A.G. told Cheney, somewhat unprompted, "there was somebody sticking their finger in my mouth. . . . and there, there behind me. . . .but they're never going to come back. It's my mom's boyfriend, his name is B, and it only gots one B." Court's Ex. 8 at 7, R *. She went on to say, "he stick his finger in my butt, the front and the back, and he sticks his finger in my mouth. . . . when my mom was asleep and Sissy was asleep, I was screaming." *Id* at 8. She told Cheney that it only happened once and that her abuser took her out of her bed and downstairs on the couch. *Id*. She said her clothes stayed on but also that he made her take her shorts off. *Id.* at 10, R *. She said that "B" took off her panties and that after the abuse occurred, he took her back upstairs. *Id*. She told the interviewer that her abuser "peed" on her with "his big fat butt" and stuck his finger in her butt. *Id* at 11. When asked what color the pee was, she replied, "like the color I'm wearing, I'm

wearing blue and white." *Id.* She said it felt "like ice coming down my butt." *Id.* at 13. Later, pressed for more details, she said that when he put his fingers in her butt, "it feeled like a rock in my butt." *Id.* at 16.

During the course of the interview, A.G. spent considerable time drawing. A.G. repeatedly asked Cheney to let her take the drawings home, but Cheney told her that she needed to keep them. *Id.* at 38, 42. Counsel for Clark requested copies of these drawings in discovery. She was told variously that they could not be located or no longer existed. Court Ex. 6.[1]

Also, during the interview, A.G. told Cheney that she had driven her mother's car, that "B" had scratched her face so she was "covered in blood." Trial Tr. 25. When Cheney introduced the question of whether anyone had ever taken pictures of her without her clothes, A.G. said that "B" had taken pictures of her with her shorts off "a long time ago." She said he took the picture with his own eyes, because "his eyes got a camera." *Id.* at 41.

A.G. also described an incident in which "B" had "knocked out" her mommy, "knocked her head wide open." *Id.* at 32-33. The five-year-old told Cheney that she had "took her to the hospital. . . . I was driving her car." *Id.* She continued:

> She was upstairs sleeping and I was screaming. She came downstairs and she was like, B, will you shut up. And we looked at her and she looked at me, and in the meantime I was like dead, but then I came back alive, and I took my mom to the hospital because she was dead, she wasn't asleep.

Id. at 34. Cheney then asked A.G. if anyone had told her what to say, and she replied, "Yeah. . . my nanny, my daddy and my mommy." Cheney reminded A.G., that "we can

[1] These drawings were not produced until the second day of trial. Trial Tr. 473, R *.

only talk about things that really happened in here, okay? So did you really drive a car?" A.G. replied, "Yeah." *Id.* at 35. A few minutes later, she repeated, "They told me to say the same thing I just told you." Cheney asked, "And did that stuff really happen?" A.G. replied, "Yeah." Cheney pressed further, "What did they tell you about telling me that?" A.G. responded, "I don't know, but it didn't really come in real life, but I really driving my mom's car." Trial Tr. At 36. When asked what she knew about what she was coming to Cheney to talk about, A.G. responded, "All about B because B's mean to me."

This interview was recorded. At trial, Brandon Clark's counsel objected to its reliability under S.C. Code Ann. § 17-23-175. The trial judge overruled the objection, and the video was admitted into evidence and played for the jury at his trial. Trial Tr. At 131.

B. The Police Investigation

Sergeant Renee Elrod of the Pickens Police Department was dispatched to Baptist Easley Hospital on March 20, 2017, where she interviewed A.G. and her parents. Trial Tr. 350. Sgt. Elrod was equipped with a body-worn camera ("BWC") which she turned on and off during the course of her interviews. Trial Tr. 353, 372-374. Sgt. Elrod forwarded information from this initial encounter to the Julie Valentine Center, for the purposes of setting up a forensic interview of A.G. Later, after the interview and subsequent physical exam, Sgt. Elrod sought a warrant for Brandon Jerome Carter for the offense of Criminal Sexual Conduct with a Minor in the First Degree. Trial Tr. 382. Sgt. Elrod did not conduct any follow-up forensic investigation that might have been prompted by A.G.'s disclosure. She testified that she did not visit the incident location or seek to have anyone obtain DNA samples from the couch where A.G. said "B" had "peed" on her butt. Trial Tr. 396. She did not review the video of the forensic interview before seeking the warrant, but relied on a summary in an email from the Julie Valentine Center. Trial Tr. at 390. From her

testimony, it appears her investigation was limited to taking initial statements and swearing out an affidavit. Prior to trial Clark's lawyer requested copies of her investigative notes, but these were never produced, and the officer indicated she could not locate them. Trial Tr. at 391, 470.

D. The Trial Proceedings

a. Pretrial matters

At a hearing to address pretrial matters, the trial judge addressed the admissibility of A.G.'s forensic interview. Counsel for Clark explained that she would consent to its admission, provided that her expert would be able to testify and that a certified transcript of the interview would be admitted into evidence. When the trial judge hesitated to agree to those provisos, counsel for Clark withdrew her consent to the video's admission. Trial Tr. 53. The trial judge ruled that the video met the requirements of S.C. Code Ann. 17-23-175 and would be admitted. Trial Tr. 83. He deferred a final ruling on the admissibility of the transcript and the scope Clark's expert would be confined to, and the trial got underway without clarity as to whether and to what Clark's expert would be permitted to testify.

b. Minor Child Testimony

The State called A.G. as its first witness. Trial Tr. 86. In a brief in-camera hearing, the State, the trial judge, and counsel for Clark questioned A.G. regarding her competency to testify. At the time of the trial, two years after the initial disclosure, she was seven years old. After acknowledging in direct examination that there would be negative consequences if she did not tell the truth, on cross-examination, counsel for Clark asked, "you said you understood the consequences if you tell a lie. What does 'consequence' mean?" Trial Tr. at 89. A.G. replied, "I don't know." Notwithstanding this evidence that

A.G. had not fully understood the competency questions she was asked, and over objection from Clark's counsel, the trial judge found her competent to testify. Trial Tr. at 90.

In her trial testimony A.G. was asked, "Who is Brandon Clark?" She replied, "The person who did this stuff to me, I think." Trial Tr. at 110. She went on to testify, "He pulled down my pants and peed in my private." Tr. 111. Asked to elaborate, she said, "That's all – all I know." *Id.* When asked if he did anything else, she responded, "no, not that I know of." *Id.* She was asked about her forensic interview: "The things that you told to Amber, is that really what happened that night?" She replied, "some of them." Tr. 114. "Tell me what that means," the solicitor asked. "Most of them," A.G. replied. "[T]ell me what you told Miss Amber that was true," the solicitor asked. "I forgot," A.G. replied. Trial Tr. 115.

All of this testimony was elicited in direct examination. On cross-examination, A.G. acknowledged having watched the video of her interview with Amber Cheney. Trial Tr. 121. Despite having been refreshed as to the contents of her interview, at no time during her trial testimony did she testify to Brandon Clark using his fingers or any other body part to enter her body. She testified only that he "peed" on her.

c. *Forensic Interviewer Testimony*

Amber Hiott Cheney was called next by the State. Cheney testified that she met with A.G. on March 28, 2017, to conduct a "child-friendly" interview in relation to the investigation of her disclosure of sexual abuse. Trial Tr. 125. She testified that her interview was neutral, fact-finding and non-biased. Trial Tr. 126. She authenticated the State's copy of the video of her interview of A.G., and the court admitted the video into evidence as State's Exhibit 1, noting "previous discussions." Trial Tr. 126-7. At the close

of the State's direct examination of Cheney, but before cross-examination by Clark's counsel, the video was played for the jury.

On cross-examination, counsel for Clark began by inquiring about Cheney's purported neutrality. Trial Tr. 132. This prompted an objection by the State, which was heard in-camera. The State objected to the scope of cross-examination, but Clark's counsel noted that Cheney had testified to her unbiased neutrality on direct. Rather than immediately rule on the objection, the Court directed Clark's counsel to continue her intended examination in camera, which she did:

> Q: Okay. When you interview children, is it not the best practice to ask non-leading and open-ended questions?
>
> A: That is correct.
>
> THE COURT: Okay. And let me – let me just stop you. As part of the – one of the factors under 175 is that even though I didn't – I didn't detail each factor in my ruling, that is one of the things that I need to find, that there was no leading questions. I didn't think Ms. Cheney throughout the interview really asked any leading questions. That – that was – that's one of the bases for my ruling for allowing the interview to come in.
>
> MS. BARWICK: Judge, it's not just leading questions, it's open-ended questions that need to be asked during these forensic interviews. Over and over and over and over again, there were yes-no questions.
>
> And there were questions assuming an answer that hadn't been given yet. And there's been examples. And I was going to go through them. Trial Tr. 136.

The Court allowed the in-camera examination to continue, during which Cheney acknowledged that the exercise in "correcting" her when she got details wrong did not result in A.G. correcting her at all. She further admitted paraphrasing what A.G. had said. Trial Tr. 137-138. When asked about the drawings A.G. had made throughout her

interview, Cheney replied, "they are housed at the Julie Valentine Center," although no such drawings had been produced at that point. The trial judge directed the State to make further efforts to obtain these drawings.

At this point, the trial judge said, "I'm going to allow this line of questioning. . . As far as being a neutral interviewer, I mean, that's – I guess she – I don't know if I would necessarily classify it as opening the door. But I'll allow this – this line of testimony." Trial Tr. 141. Counsel for the State placed her objection on the record, citing *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (S.C. 2015), for the principle that "there is to be no testimony to such things as technique." Trial Tr. 141. Counsel for Clark responded, "[T]hat's where the state is trying to introduce evidence as technique, not cross-examining about the failed technique." *Id.* She continued, "[I]f I can't effectively cross-examine this witness, I can't effectively represent my client and put up a defense. We have to be able to attack . . . the methodology." *Id.* at 142. The trial judge then directed Clark's counsel to question the witness – still in camera – as to her training and background, but said, "I'm not going to allow any cross-examination related to techniques. . . The case is clear, it says no testimony. . . . If you want to get – proffer anything else related to technique, here's your chance to do it." *Id.* at 143.

Counsel for Clark clarified the holding in *Anderson*: "[T]he purpose behind that is to prevent improper bolstering. I'm not trying to bolster. I'm trying to say that the technique that was used may have influenced it the other way." *Id.* The trial judge again directed her to conduct whatever inquiry she wanted for the record in camera. *Id.* at 145. Again, Clark's counsel led Cheney through the technique employed in the interview, highlighting instances where A.G. failed to correct her, or she inaccurately paraphrased A.G., she failed to ask open-ended questions of A.G., or she introduced new concepts to

A.G. Trial Tr. 146-156. At multiple points during the cross-examination, Cheney expressed frustration because she could not remember her exact words and did not have a transcript to refer to. *Id.* at 156, 158, 172. Clark's counsel again asked for a ruling on the admissibility of the transcript, and again the trial court declined to rule. Trial Tr. 161.

The examination continued, and Clark's counsel asked Cheney about the framing of her instruction to A.G. for what they could talk about in the interview:

> Q: Okay. So, in essence, saying, only tell me the things that really happened is the same thing as telling the child, tell me the truth?
>
> A: I don't – I think there's a difference, which is why it's allowed to say that versus saying, tell me the truth.
>
> Q: Is that not just a newfangled way of changing it up to get around the case – the recent case law that's been out?
>
> A: I can't testify to that because I didn't make the protocol. All I can say is that when I was trained in that you're allowed to say, tell me about things that really happened.

Trial Tr. 162

After counsel for Clark concluded her in-camera cross-examination, counsel for the State elicited testimony from Cheney about her training and experience, at the direction of the trial judge. Trial Tr. 176-77. When that was concluded, the trial judge restated his ruling: "Now, when we bring the jury out, I will allow cross-examination only on the issue of neutrality. I guess to some extent the witness did open up the door on that."

After the jury returned, counsel for Clark engaged in the limited cross-examination of Cheney without addressing any of the potential issues present in the interview that could have affected the reliability of the disclosure. Trial Tr. 179-184.

When the trial reconvened the next day, counsel for Clark again placed her concerns about the admission of the forensic interview video and limitation of her cross-examination of Amber Cheney on the record:

> Ms. Barwick: When I consented to the forensic interview I personally did not stipulate to the factors listed in 17-23-175 as I did not believe the video possessed any particularized guarantees of trustworthiness. The factors in that statute that I had the most trouble with were whether it was elicited by leading questions.
>
> And as – through my cross-examination, it's apparent that I believe that they were elicited by leading investigation – or questions. Also, whether the statement presented a detailed account of the alleged offense and whether any statement – that statement had internal coherence.
>
> . . . I know at the beginning of the trial, I intended to call an expert attacking the methodology that was used creating an unreliable disclosure and that any future disclosures by those unreliable methods would have tainted the witness as any further testimony as to what occurred. I would not have consented to the introduction of the forensic interview had I known I would not be permitted to attack the methodology.
>
> We are arguing that what we heard from the child in her out-of-court statement is not the testimony of the child, but the product of the power of suggestion of the interviewer.
>
> . . .
>
> We're attacking the totality of the circumstances surrounding the making of the statement. Because those circumstances don't guarantee trustworthiness of the statements. This is essential for us to be able to cross-examine, to attack the method in which the interviewer got the answers she got.
>
> . . .
>
> We're attacking the methodology so we can argue that the child's statements . . . we were planning on doing that through our expert. You haven't ruled as to that. But we are planning on attacking the methodology so we can argue that the child's statements are not, in fact, hers. . . .

> *State v. Anderson* said that the interviewer cannot talk about the importance of telling the truth and that we only tell the truth. . . what *State v. Anderson*. . . says because we're saying we did it right and this was the child's answer, that means the child must be telling the truth. And that was the danger that Anderson was trying to prevent.
>
> In this particular case, she got up – their own witness got up and testified saying she's neutral and unbiased. And then she turned around in the video and explained to the child the importance of telling us things that really happened, which is just another way of saying to tell the truth. . . and then she was – proceeded to lay out several other rules, all of which Anderson says you're not supposed to lay out the rules.

Trial Tr. 203-204.

The Court responded by noting that Clark's counsel had not moved to redact portions of the interview. Trial Tr. 205. Thereafter, Clark's counsel reiterated her request that the transcript of the video also be admitted into evidence and published to the jury. At the close of argument on that matter, counsel for the State reiterated, "It's not appropriate to question the technique of the forensic interviewer in these proceedings. So anything that would be used to even question that is inappropriate." Trial Tr. 219.

d. A.G.'s Parents' Testimony

The State's next two witnesses were A.G.'s father and mother. A.G.'s father testified as to the circumstances that led him to take A.G. to the hospital. He denied having refused to allow her to have a sexual assault exam that night (at odds with the testimony of Sgt. Elrod). He confirmed having met with the State and A.G. on multiple occasions. A.G.'s mother also confirmed that A.G. met with the solicitor multiple times. A.G.'s mother also refuted other details in A.G.'s forensic interview: she said A.G. had not disclosed the abuse to her prior to March 20, 2017; she denied laughing at A.G. when she was told about it; she denied that Brandon Clark had ever busted her head open or scratched her daughter

in the face; and she denied that her five-year-old daughter had ever driven her to the hospital. Trial Tr. 251-253.

e. Allison Meena's Testimony

Prior to calling Allison Meena to testify, the State proffered that she would be offered to establish the time that the assault occurred, as she would be able to testify that A.G. reported on March 20, 2017, that it had taken place "two day ago." Trial Tr. 262. The State argued that this hearsay testimony would be admissible under the medial diagnosis exception in S.C.R.E. 803, since that information would have been relevant to the decision of whether or not to perform a rape kit. Counsel for Clark responded that the State was using Meena improperly:

> "to get around the fact of directed verdict because their indictment gives notice for a one-month time period. And they're trying desperately to get into evidence that it happened within that time period.
>
> So if they're wanting that statement to come in only for the purpose of explaining why the SANE nurse decided not to do it, it should not be allowed in for the truth of the matter asserted when it comes to the directed verdict stage.

Indeed, in her *in camera* testimony, Meena acknowledged that she is not a sexual assault nurse, but an emergency room nurse and is not trained in making medical diagnoses. She testified that she could not recall with specificity the guidelines in place in 2017 for when to conduct a SANE exam, that such decisions were never up to her, and she was uncomfortable answering the question because the decision was not up to her. Trial Tr. 277-79. The trial judge nonetheless allowed that testimony by Meena without specification as to whether he deemed it as offered for the truth of the matter asserted. Trial Tr. 267.

f. Shauna Galloway-Williams' Testimony

The State called Shauna Galloway-Williams as a "blind expert" in child abuse dynamics. Trial Tr. 414. Galloway is the director of the Julie Valentine Center, where A.G. was interviewed, but testified she did not have direct knowledge of the interview. Acknowledging the state of the case law, Clark's counsel nonetheless placed her objection on the record that the use of such experts constitutes improper bolstering, "because it can be linked to saying, yes, this is what's normal with child abuse victims, and this is what she's doing. And the questions are going to be geared, specifically, to the issues in this case, even though the answers are general in terms." *Id.* at 415. Counsel for Clark stipulated that Galloway-Williams would qualify as an expert, but the Court held an in-camera hearing to address whether her testimony would aid the trier of fact and the reliability of her process and methodology. Trial Tr. 416, 428. The court found that her testimony would aid the jury and that her methodology was sufficiently reliable. Galloway-Williams testified broadly as to generalities regarding the behaviors of children who are victims of abuse.

g. Sergeant Renee Elrod's Testimony

Sergeant Renee Elrod of the Pickens Police Department testified to her investigation as the officer who responded to Baptist Easley Hospital on March 20, 2017. Elrod interviewed the adults present, including A.G.'s father and his girlfriend, A.G.'s mother, as well as A.G. She testified that A.G. had disclosed the abuse to her and that at least some of these conversations were recorded with her body-worn camera.

Sgt. Elrod was asked about a comment that was captured on the body-worn camera in which she asked A.G.'s mother who "Ashley" was. The mother replied, "I don't know Ashley. Who's Ashley," and Sgt. Elrod replied, "I just have her name in the notes don't

worry about it." Trial Tr. 369. She acknowledged that this was a reference to handwritten notes she made in the case. When asked where these notes were, she responded, "I would have taken everything from my notes to here," presumably referencing her case file. *Id.* And yet there was no reference in her incident report to "Ashley," and she could not remember the significance of that name at trial. *Id.* at 371. She could not answer where the notes were, only that she did not have them. Trial Tr. 369-70.

Sgt. Elrod acknowledged on cross-examination that there were gaps in the recording of her body-worn camera, and that she had the ability to control when it started and stopped recording. On cross-examination she conceded that she had not conducted or attempted to conduct any investigation of the alleged crime scene and that she had not reviewed the forensic interview video or the medical exam before seeking a warrant. Instead, she relied on an email from the Julie Valentine Center summarizing the interview. Trial Tr. 389-90, 396. She acknowledged that she suggested a sexual assault exam of A.G. on the night of March 20, but the parents did not allow it. *Id.* at 393.

Sgt. Elrod testified that A.G. disclosed that she told her mother about the abuse allegations before March 20, 2017. But she acknowledged she did no investigation into that and did not consider or seek charges against A.G.'s mother in relation to that allegation. Ultimately, she conceded that her investigation was limited to the interviews she conducted at the hospital and her review of summary information contained in an email from the Julie Valentine Center:

> BY MS. BARWICK:
>
> Q: So the only evidence you had in this case before making this charge is what the child told you at the hospital.
>
> A: No. I, also, had information from Julie Valentine.

> Q: The summary that you don't recall what was in it?
>
> A: Correct.
>
> Q: So besides this summary from a third party and the child's statements to you at the hospital, you had no other evidence in this case?
>
> A: Correct.
>
> Q: And you made the charge?
>
> A: Yes, ma'am.

At a break in the proceedings, the Court directed Sgt. Elrod to review her body camera footage. When cross-examination resumed, Elrod acknowledged that during either A.G.'s father's or mother's interview, she had asked when the abuse had occurred, and one of them reported that she couldn't really say and that, "sometimes when she says something happened yesterday, it could have been three weeks ago." Trial Tr. 471. She acknowledged that A.G.'s mother had said, "she's got that thing where yesterday could be last year." *Id.* at 472.

At the close of Sgt. Elrod's testimony the State rested.

h. Late Production and Destruction of Brady Material

After the State rested, the Court heard argument on several issues, the first of which was Clark's motion for a dismissal arising out of multiple instances of delayed discovery and Sgt. Elrod's combined failure to record portions of her investigation and either destroying or failing to maintain her original handwritten notes. Her testimony on cross made clear that at least some of what was contained in those handwritten notes did not make it into the incident report that was turned over to Clark in discovery. In correspondence before the trial, counsel for Clark and the State had discussed whether any emails had exchanged between Elrod and the Julie Valentine Center. Counsel for the

State represented that there were no such emails, but on cross-examination, Elrod conceded that there had, in fact, been emails.

The Court, acknowledging the frustration of Counsel, said, "I don't see a Brady violation insofar as I don't have anything to tell me that it is exculpatory or impeachment value to these documents. So I can't definitively say, hey, there's a Brady violation." Trial Tr. 482. Clark's counsel replied, "Judge you're right, we don't know what's in . . . those notes. And there is an inference that it's favorable. Otherwise, it would have been produced. . . it seems to be a repeated thing." Trial counsel asked for a dismissal on the basis of a violation of *Brady v. Maryland*, or, in the alternative a spoliation charge. The Court denied the *Brady* motion but later granted the request to charge the jury on spoliation.

i. Directed Verdict Motion

Clark moved for a directed verdict at the close of the State's case on two grounds: The first ground was that A.G. did not testify as to the time period specified in the indictment – February 20 to March 20, 2017 – and the only testimony to establish that time frame was the impermissible hearsay testimony by the emergency room nurse. The second ground was that there was no testimony in open court to penetration of the vaginal or anal openings by the Defendant's body part, as A.G. testified only that he "peed" on her butt. The child testified in open court but denied remembering significant aspects of her forensic interview disclosure. Clark's counsel reiterated the problems of reliability and internal consistency associated with the forensic interview. The State argued that the directed verdict motion should be denied on the basis not of the weight but of the existence of evidence of the offense. The trial court agreed. Trial Tr. 507.

j. Defendant's Expert Witness

After the State rested, Counsel for Clark again raised the issue of the methodology employed in A.G.'s forensic interview: "The purpose of [my expert's] testimony is to attack the methodology of that interview . . . and to testify as to the matter of suggestion that was made to this child by the interviewer. Your Honor has told me that you are unwilling to allow that to happen. Is that still the case?" Trial Tr. 490. The Court noted, "[W]e had some in-camera testimony from Ms. Cheney. And we dealt with that issue and wherein I ruled that you could not get into methodology. . . . So if I didn't allow the State, would it be fair to allow you to do it?" Trial Tr. 491. Clark's counsel noted that it had not been the State trying to introduce the methodology but her effort to place questions about it before the jury. *Id.* at 492. Counsel for Clark noted that the rules are clear that forensic interviewers cannot testify as to rules and methods in order to bolster or vouch for child witnesses but that having another expert review and comment on the propriety of the interview methods is not an improper attack on the credibility of the child witness. *Id.* at 493. She further noted, "All I'm trying to do is tell the jury that the words they heard coming out of the child were not the words of the child, but the words of the interviewer." *Id.* at 493. The Court responded, "Would that not be attacking the credibility of the child? Because she, for whatever reason, was not being – either because she was being led, coerced, whatever, she was not being truthful with – with her answers. So wouldn't you be attacking the credibility of her?" The colloquy continued, and Counsel for Clark cited *Kromah* and *Anderson* to the trial court in support of her position. Ultimately, the Court placed its ruling on the record as follows:

> "[T]he reason why, again, is because of case law preventing the State from – from getting into methodology. And I think the reason for that is that if you – you know, if you try to

> elevate the – the methodology and the sufficiency of the methodology – the end result is to bolster the child's testimony and – which, of course, we don't want to do.
>
> So if – if the State is prevented from doing that, it would seem like the Defense would, also, be prevented from creating some issue with the methodology. Therefore, the inference being don't believe the child. And so I think we just need to stay away from that.

Trial Tr. 511.

The trial judge allowed Clark's counsel to call her expert, Dr. Amanda Salas, *in camera* in order to proffer her testimony. Salas, a psychiatrist who is board certified in adult psychiatry, child psychiatry, and forensic psychiatry, testified that she had served as an expert witness in roughly 50 cases since 2009. Trial Tr. 527, 532. She testified that following best practices in child interviewing is important because "it allows you to get information from the child that is the child's information and not something that I've implanted in the child or skewed the child to report that's not in the child's words or experience. After a detailed colloquy involving her experience, the trial judge declined to allow her to testify to the jury or to qualify her as an expert. Trial Tr. 539-40.

Counsel for Clark moved onto the substance of Dr. Salas' opinions generally regarding proper child-interviewing techniques and A.G.'s interview, specifically. Dr. Salas explained the importance of asking developmentally appropriate questions with a focus on open-ended questions, the importance of limiting any perceived power differential, and creating conditions to allow them to speak in their own words without the interviewer consciously or unconsciously putting words to their experiences. Trial Tr. 541. She underscored the importance of avoiding leading questions or inaccurately restating what a child says. *Id.* at 542. Dr. Salas testified that she watched the video of A.G.'s interview and reviewed the certified transcript of the interview before her

testimony, and provided that in her professional opinion, "there was a substantial amount of use of suggestible techniques that were influencing the child in the interview." *Id.* at 544. She explained that, generally, preschool children like to please and look for positive feedback, and are very sensitive to power differentials. Specifically, she testified, "I saw evidence in the interview that this child, in particular, did not have the comfort level correcting the adult." *Id.* at 547. Dr. Salas also testified about the danger of bribing or punishing a child during an interview. Specifically, she said, "I saw that this interview opened up a – a wide door for increasing this child's suggestibility and relying on the power of suggestion to get information and words to come out of the child's mouth." *Id.* at 549. She gave numerous examples of the interviewer using raised inflection and a confirmatory, "right?" to elicit agreement with the interviewer. *Id.* Dr. Salas noted instances of incorrect feedback and misapplied ground rules. She noted that A.G. demonstrated very limited ability or willingness to correct the interviewer.

Dr. Salas noted numerous instances of the interviewer inaccurately parroting the child, most notably, "I remember the most remarkable one that stands out was the child had said that something happened with the finger. And the immediate response from the interviewer was that finger translated into a new noun, which was hand." *Id.* at 553.

Additionally, Dr. Salas noted that the interviewer set up problematic positive and negative reinforcement in the interview. As an example, she noted that A.G. "is definitely looking for an opportunity for positive reinforcement. Because the child from the beginning of the interview starts off with being proud about how she can make a . . . five, a seven, write her name, spell a friend's name." *Id.* at 555. "[S]he's looking for the opportunity for more attention and focus on what she's capable of doing, not necessarily giving a disclosure." But, Dr. Salas noted, "when the child deviates from giving a

disclosure, the interviewer begins to withdraw. And when the interviewer starts asking more close-ended questions, which increases the risk of suggestibility, the child starts getting more positive feedback." *Id.* at 558. She continued, "And then the kid starts giving more responses to close-ended questions that are congruent with what appears to be interviewer bias." *Id.*

Dr. Salas testified that the interviewer used "bribing" in the interview. She explained that while Amber Cheney went out of the room, A.G. continued to draw on the board and was clearly enjoying that. When Cheney returned, she told A.G. she could keep drawing as long as she keeps answering her questions. Dr. Salas explained, "this is very concerning because it's telling the kid you can do what you want to do if you give me what I want from you, which is you've got to answer my questions." *Id.* at 560.

Dr. Salas testified that a child witness's disclosure can become tainted as a result of interviewer biases creating increased suggestibility in children. She testified that in her opinion the techniques and methods used by Amber Cheney tainted the interview irretrievably. *Id.* at 563.

ARGUMENTS

Question I

Did the trial judge err when he prevented the Defendant from cross-examining the forensic interviewer regarding her suggestive interviewing technique when the judge misapplied the holdings of *Anderson* and *Kromah*?

When Counsel for Clark attempted to question Amber Cheney's chosen method for interviewing A.G., the State objected and the trial court constrained meaningful cross-

examination of Cheney, relying on a misunderstanding or misapplication of the holdings of *State v. Anderson* and *State v. Kromah*.

In *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (S.C. 2015), Anderson claimed that the State had improperly used the forensic interviewer's testimony to bolster the credibility of the child witness. The Supreme Court agreed. In Anderson's case, the trial judge had admitted the forensic interviewer as an expert without making requisite findings of the interviewer's expertise. While the court acknowledged that forensic interviewers *can* be experts in forensic interviewing and child abuse, the better practice is to have an independent expert testify to such matters. *Id.* at 219, 79.

In *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (S.C. 2013), the Supreme Court held that "it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." The *Kromah* court sought to clarify the limits of forensic examiner testimony to minimize the risk that such testimony would be used to impermissibly bolster through transitive credibility the testimony of a child witness. The *Kromah* court provided a non-exhaustive list of topics forensic interviewers should avoid and topics upon which they could reasonably testify.

Here, the trial judge read *Kromah* to foreclose cross-examination about the propriety of the forensic interviewer's method of questioning A.G. Here, counsel for Clark did not seek to ask Cheney to opine on the child's veracity, which would have been impermissible under *Anderson*. Instead, she sought to highlight for the jury the ways in which Cheney's style of interviewing may have inadvertently affected the nature and scope of A.G.'s disclosures. *Kromah* specifically allows testimony by interviewers of the "circumstances" of the interview. To permit such testimony without permitting cross-

examination on the ways in which the circumstances may have affected the disclosure is to impermissibly foreclose witness confrontation.

Here, Clark was prevented from meaningfully cross-examining Amber Cheney about the circumstances of her interview of A.G. based on the trial court's misreading of the confines of *Kromah*. This Court should order a new trial.

Question II

Did the trial judge err when he admitted the forensic interview of the alleged victim into evidence when the video patently did not provide particularized guarantees of trustworthiness as required by SC Code Ann. § 17-23-175 and where the child did not demonstrate competency to testify?

Section 17-23-175 of the South Carolina Code provides an exception to the rules prohibiting hearsay for the admission of out-of-court statements by victims in abuse cases under the age of twelve, provided that certain conditions are met: (1) the statement was made during an investigative interview, (2) the statement was preserved by an audio or video recording, (3) the child testifies at trial and is subject to cross-examination on the offense and the making of the 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."

Here, Clark had initially consented to the admission of the video, without stipulating to the four factors listed above, but withdrew that consent when the State declined to allow him to enter a transcript of the video into evidence. In a brief recitation of the standard, the judge stated he had reviewed the video and found it to satisfy the requirements for admission, though he did not articulate with any particularity what of the circumstances provided the requisite guarantees of trustworthiness. Trial Tr. 83.

The issues regarding the trustworthiness of the video were not yet irredeemable, though. Indeed, had the trial court permitted the full line of questioning of Amber Cheney regarding her interview of A.G., the trial court may have had sufficient information and context to revisit his conclusion that the interview—which was marked by A.G. making fantastical claims about driving her mother's car, gory acts of violence, and her abuser having cameras in his eyes, he might have recognized that the interview did not meet Section 175's requirements. The video should never have been played to the jury. This Court should order a new trial.

Question III

Did the trial judge err by prohibiting the Defendant's expert witness from testifying when she was manifestly qualified under Rule 702 and her testimony would have assisted the trier of fact in understanding the evidence?

When he limited the questioning of Amber Cheney and when he permitted the admission of the forensic interview video, the trial judge prejudiced Clark from receiving a fair trial. But perhaps these improper limitations would not have been so damaging, if not for the trial court's refusal to allow Clark's expert witness, Dr. Amanda Salas, to testify. Again, the trial court relied on a misapplication of *Anderson* and *Kromah* to effectively prohibit Clark from mounting a defense to the single piece of evidence against him: A.G.'s recorded statement.

The *Anderson* court, citing *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that trial court's qualification of forensic interviewer was unnecessary when testifying to lay observations), and *State v. Kromah*, 401 S.C. 340, 357, 737 S.E.2d 490, 499 n. 5 (S.C. 2013) (holding that qualifying forensic interviewers as experts is never

appropriate), wrote in agreement with Anderson's argument that South Carolina Courts do not recognize this type of expertise. *Anderson*, 412 S.C. at 291, 776 S.E.2d at 79. While *Anderson* could be read to foreclose any expert from opining about the propriety of a forensic interview, it should not be read so broadly, as it stands merely for the proposition that interviewers whose percipient observations of child witnesses will be sought at trial should not have those observations unduly elevated by qualifying them at experts for the purposes of giving that testimony. To read *Anderson* otherwise produces absurd results in which experts in child psychology and psychiatry could never be called before a jury to provide expertise in understanding the best practices and propriety of a given forensic interviewer's chosen techniques. The absurdity of this reading would be compounded, given our court's approval of the practice of using "blind" experts to educate jurors about the dynamics of child abuse and abuse disclosures.

Here, the trial judge repeatedly worried that both the cross-examination of Cheney and the introduction of Dr. Salas would be used to challenge the credibility of the child. Of course it would. That is the essence of impeachment through cross-examination and other testimony. What our courts have prohibited is not challenging the credibility of children, but, rather, the expression by experts of impermissible opinions as to the ultimate issue: the child's veracity. The trial judge's apparent expansion of this rule to prohibit any testimony that might challenge the veracity of A.G.'s statement undoubtedly prejudiced Clark at trial.

Here, as demonstrated in her *in camera* testimony, Dr. Salas possesses substantial experience, based on rigorous study and practice, in the field of child psychiatry. She demonstrated fluency with the research and guidance regarding recognized best practices for interviewers and the *reasons* those best practices have been embraced. She possesses

specialized knowledge outside the experience of the average juror and substantial insight about the kinds of questions Cheney asked and the interview environment she created that likely contributed in both scope and detail to A.G.'s disclosure. Dr. Salas was ideally situated to share her opinion about the interview under S.C.R.E 702. Her testimony would still leave the ultimate question — whether A.G.'s statement was true — to the jury's consideration and provide additional context for how A.G.'s statements could be influenced by the interviewer. The failure to allow this testimony was compounded by the fact that Shauna Galloway-Williams was permitted to opine broadly about the nature of child abuse victims, all with the imprimatur of the expert witness designation.

This Court should order a new trial.

Question IV

Did the trial judge err in denying the Defendant's motion for directed verdict, when the only evidence of the timing of the incident, as noticed in the indictment, was improperly admitted hearsay testimony?

There were two issues before the Court at the directed verdict stage. First: had the State produced evidence that an assault occurred when and where the indictment alleged it did? Second: had the State produced any evidence that a criminal sexual assault of a minor in the first degree had occurred?

An indictment is a notice document. It must apprise the defendant of the evidence he must be prepared to meet at trial. *State v. Thompson*, 305 S.C. 496, 500, 409 S.E.2d 420 (Ct. App. 1991). Here, the indictment notified Clark that he was accused as follows:

> That Brandon Jerome Clark did in Pickens County, on or about or between the dates of February 20, 2017 and March 20, 2017, commit a sexual battery on a minor with the initials of A.N.G., who was less than 11 years of age. This is in violation of Section 16-3-655, Subsection A(1), formerly 16-3-655,

> Subsection 1 of the Code of Laws for the State of South Carolina.

A.G. did not describe the date of the incident with any particularity, either in her forensic interview or in her testimony at trial. She variously said she was five or four or three years old when the assault took place. She could not orient the time frame of the assault to any other anchoring event like her birthday, either.

In the absence of direct testimony as to this timing, the State first sought to elicit testimony as to the timing of the assault through A.G.'s father. When the trial court ruled such testimony would be impermissible, the State pivoted to Nurse Allison Meena, and sought to introduce the testimony through the medical diagnosis exception, even though Meena told the court *in camera* that she didn't remember what the guidelines were for the timing of SANE exams, that she was not a decision maker, and that she did not feel comfortable answering the State's questions. Clark's counsel renewed her objection to the admission of this impermissible hearsay as the basis for proof of the State's case. The trial court brushed those concerns aside and conflated the rules regarding the sufficiency of indictments with the standard for directed verdicts. The trial court should have directed a verdict of not guilty.

In her courtroom testimony, A.G. told the jury that "B" peed on her. She did not testify to any penetration of her body by any part of his body. The only evidence before the Court of a penetration was A.G.'s disclosure in her deeply flawed forensic interview. Because that interview did not bear the hallmarks of reliability and should never have been submitted for the jury's consideration, the trial court, likewise, should not have considered it in ruling on Clark's directed verdict motion. The State utterly failed to

submit evidence in support of a criminal sexual conduct with a minor in the first degree, and the trial court should have directed a verdict of not guilty.

This court should reverse the ruling of the trial court and order that a verdict of not guilty be entered.

Question V

Did the trial judge err in refusing to find a *Brady* violation, where some evidence was delayed from production until after the trial began and other evidence was destroyed after it had been requested, when the trial judge found that he could not ascertain whether the missing evidence would have been exculpatory?

Brady v. Maryland, 373 U.S. 83 (1963), has become a shorthand for criminal practitioners. Discoverable evidence is known as *Brady* material, and at some point every defense lawyer will find herself or himself complaining about insufficient compliance with Brady. But while *Brady v. Maryland* articulated the due process protections of the Constitution in new and clear terms, stating, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution," the law of what constitutes sufficient government compliance with the obligation to share evidence with the accused did not end with and is not fully proscribed by *Brady*.

The remedies of *Brady* violations are clear: when exculpatory evidence emerges along with proof that it was suppressed from disclosure, defendants are entitled to a new trial. But courts have been more restrained in ordering relief where, as here, evidence is destroyed, rendering its exculpatory value unable to be fairly evaluated: "Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of

divining the import of materials whose contents are unknown and, very often, disputed." *California v. Trombetta*, 467 U.S. 479, 486 (1984). The Supreme Court in *United States v. Augurs*, 427 U.S. 97 (1976), had focused on materiality as the test of a *Brady* violation. The *Trombetta* court wrote, "To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Trombetta* at 488-89 (internal citations to *Augurs* omitted).

Here, the intermittent video recordings from Sgt. Elrod's body-worn camera reveal that there was a person of interest in her investigation named "Ashley," whom Elrod asked A.G.'s mother about. When the mother did not know, Elrod dismissed her concern and said she had "Ashley" in her notes and would ask A.G.'s father. Elrod, who controlled the operation of the body-worn camera and was the only law enforcement officer involved in the investigation of this case, failed to record portions of her interviews with A.G.'s family and could not or would produce her handwritten notes nor provide any explanation as to what had happened to them. Her claims that her notes had been fully incorporated into her incident report were contradicted by her acknowledgement that no mention of "Ashley" or any investigative steps she took to evaluate Ashley's materiality to the investigation ever made its way into the incident report she prepared in this case. At every step, Sgt. Elrod failed to seek or preserve evidence in the case. Whether negligent or intentional, this hurts defendants and victims alike, for the failure to investigate or preserve material evidence limits both from the vindication of their causes.

Where, as here, the State is in the exclusive position to control the information in an investigation and fails to maintain that information, a spoliation instruction to the jury

is insufficient to cure the error. Indeed, such a bland pronouncement insulates the State from the consequences of such destruction—whether careless or intentional—of evidence, and in so doing promotes similar future misconduct.

This Court should remand the case to the court below with instructions to dismiss the indictment against Brandon Clark.

CONCLUSION

For the foregoing reasons, this court should vacate the judgment below and provide relief, either in the form of an instruction to direct a verdict of not guilty as to Brandon Clark, a dismissal of the indictment, or an order for a new trial.

Respectfully submitted,

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July 9, 2020

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions
Donald Hocker, Circuit Court Judge

RECEIVED
Jul 09 2020
SC Court of Appeals

Appellate Case No. 2019-001477

The State, ... Respondent

v.

Brandon Jerome Clark, ...Appellant.

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I certify that I have served the Initial Brief and Designation of Matter to be Included in the Record on Appeal on the State of South Carolina by electronic mail, on the date reflected below, addressed to:

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