

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Aug 26 2020
SC Court of Appeals

Appeal from Horry County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DONALD FRANK HALSTEAD III,

APPELLANT.

APPELLATE CASE NO. 2019-001863

ANDERS BRIEF OF APPELLANT

ADAM SINCLAIR RUFFIN
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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

STATEMENT OF FACTS4

ARGUMENT.....9

CONCLUSION.....12

PETITION TO BE RELIEVED AS COUNSEL13

TABLE OF AUTHORITIES

Cases

Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005)..... 3

Means v. Gates, 348 S.C. 161, 558 S.E.2d 921 (Ct.App.2001)..... 3

State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) 9

State v. Douglas, 369 S.C. 424, 632 S.E.2d 845 (2006)..... 3

State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003)..... 3

State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) 10, 11

State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018) 7

State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) 3, 9, 10

State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006) 3

State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016)..... 11

State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009)..... 9

STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in allowing a witness to testify as an expert in the dynamics of child sexual assault where his testimony improperly bolstered the minor's testimony by stating that threats made to a young child by the assailant contribute to delayed disclosure and that younger children are less likely to recall specific details of abuse?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County grand jury for criminal sexual conduct with a minor in the first degree. R. 282. Appellant's trial was held before the Honorable D. Craig Brown and a jury from October 29 – 30, 2019. R. 1. Appellant was represented by James Galmore and Jonathan Hiller. The state was represented by Leigh Andrew and Mary-Ellen Walter. R. 1.

The jury found Appellant guilty as charged. R. 272, ll. 14 - 22. The judge sentenced Appellant to life imprisonment. R. 278, l. 11 – 280, l. 2.

This appeal follows.

STANDARD OF REVIEW

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting Douglas, 369 S.C. at 429–30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct.App.2001)). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

STATEMENT OF FACTS

Elizabeth Edwards was Minor's paternal grandmother. R. 74, ll. 9 – 21. Edwards testified that her son, Christopher Mellon, was friends with Appellant. R. 75, ll. 14 – 76, l. 1. Edwards recalled that from September 2010 through December 2010, Minor stayed at her father's house every other weekend. Appellant also stayed there periodically at the same time as Minor. R. 76, l. 20 – 77, l. 6.

According to Edwards, during the summer of 2017, she was at her house swimming in her pool with Minor and Minor's sister, S.M., when Minor claimed she had been abused:

We were just cutting up about things, and they asked me why their biological grandfather and I, Christopher's father, got divorced. I remember saying, Ick, I don't want to talk about it, some things you just want to forget. [Minor] responded with, I know what you mean, there are things that happened to me in my life that I want to forget.

R. 77, l. 10 – 78, l. 2. Minor was only twelve years old at the time which caused Edwards to become concerned. R. 78, ll. 2 – 3. Edwards continued:

We were all giggling before that, and she just went completely blank. I walked over to talk to her, and she started telling me what had happened, no details. She was crying, and I just remember standing in the pool and hugging her.

R. 78, ll. 4 – 11. Edwards said that she called Minor's mother and told her to come to the house so they could tell the police. R. 78, ll. 11 – 14. Because Edwards lived at the beach, Minor's mother came down the following day from her home in Coward, S.C. Edwards, Minor, and Minor's mother all went to the police station to file a report. R. 79, ll. 8 – 20.

Minor's sister, S.M., also testified that she and Minor would stay with their father on the weekends during 2010. R. 89, l. 17 – 90, l. 7. S.M. claimed that "at some later point," Minor told S.M. that "a man stuck his thing in her." R. 90, l. 18 – 91, l. 13. S.M. recalled only being six or seven years old at that time Minor told her this. S.M. testified that as she got older, she

learned that what Minor meant was that a man stuck his penis into her mouth and vagina. R. 91, l. 14 – 92, l. 12. According to S.M., she did not tell anyone about what Minor told her because Minor “told [her] to keep it a secret because [Minor] didn’t want [their] family getting hurt.” R. 92, ll. 13 – 18.

S.M. also testified about the day Minor told their grandmother about the alleged abuse:

[W]e were in the pool, and it was like late at night, and we all took a night swim. We were talking about, like, my poppy and why they, like, got a divorce and stuff, and she was just like not because he hurt me or anything, and she said, [b]ut if anything happens to you all, you all need to tell someone. And I looked over at [Minor] and I was, like, you need to tell [Edwards]. And so [Minor] looked over at [Edwards] . . . and so she told [Edwards], and then she started crying. [Edwards] was just like holding her and rubbing her on her back and stuff, and then we swam for like five more minutes and got out of the pool.

R. 93, ll. 1 – 19.

Minor testified that on several different occasions while she was staying at her father’s house, Appellant came into her room and put his penis inside her vagina and mouth. R. 40, l. 3 – 41, l. 14. Minor was six years old at that time. R. 46, ll. 13 – 22. When Minor would stay at her father’s house, there were numerous other people staying there at the same time including Minor’s father, her stepmother, her stepmother’s four children, S.M. and Appellant. R. 51, ll. 5 – 16. Minor admitted that none of these people ever witnessed the abuse that she claimed happened to her and that she did not report the alleged abuse to any of the other people living at her father’s house. R. 51, l. 19 – 52, l. 14.

Minor recalled that she initially described her assailant to her grandmother as being “the guy that [her] dad was friends with” and that he was “tall, big, [and had] long hair.” R. 44, ll. 17 – 21. Minor admitted that she initially described her assailant as having tattoos and Appellant did not have any tattoos. R. 44, ll. 21 – 25. Minor did acknowledge that her father had tattoos along with most of his other friends. R. 45, ll. 1 – 4. Minor claimed that her assailant threatened

to “hurt [her] dad” if Minor did not comply with her assailant’s sexual requests. R. 40, ll. 9 – 18; R. 42, ll. 7 – 15.

Blake Klauder, with the Horry County Police Department, interrogated Appellant after Minor made her initial allegations. R. 156, ll. 2 – 16. The first time that Klauder interrogated Appellant was audio and video recorded. R. 158, ll. 2 – 5; State’s Ex. 2 (video of first interrogation on file with this Court). Appellant denied having any sexual contact with Minor during this first interrogation. State’s Ex. 2.

Klauder then testified that “as this investigation continued,” he obtained an arrest warrant for Appellant and went to Appellant’s home to interrogate him a second time. R. 161, ll. 2 – 24. The second interrogation took place in a police car outside of Appellant’s home and was only audio recorded. R. 162, ll. 1 – 18; State’s Ex. 4 (audio of second interrogation on file with this Court).

During the second interrogation, Appellant was confronted by two officers with Minor’s allegation that Appellant had told her that if “she did not do what [Appellant] was asking her to do, that she would be in trouble and [Appellant] would tell her father.” State’s Ex. 4 at 12:50 – 13:25. One of the officers then asked Appellant: “Are you a monster, a predator, or are you someone who made a mistake that could benefit from counseling?” State’s Ex. 4 at 13:40 – 13:50. Appellant stated that he was not a monster. State’s Ex. 4 at 13:50 – 14:00. The second interrogation of Appellant resulted in Appellant claiming that Minor had come into the bathroom while Appellant was urinating and put his penis in her mouth. State’s Ex. 4 at 16:00 – 23:00. Appellant continued to deny any vaginal or anal penetration had ever occurred. State’s Ex. 4 at 23:40 – 23:50.

The state called Ray Olszewski to testify as an expert in the dynamics of child sexual abuse. Defense counsel objected immediately prior to Olszewski’s testimony, arguing that

Olszewski would improperly bolster Minor’s testimony and that the testimony was unfairly prejudicial. R. 102, ll. 19 – 24. The assistant solicitor responded that Olszewski was a “blind expert,” which was required by South Carolina case law. R. 103, ll. 6 – 11. The judge relied on State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018) and found that Olszewski’s testimony would not be improper bolstering. R. 104, l. 5 – 105, l. 10.

Olszewski was qualified as an expert in “the array of the dynamics of child sexual assault” before the jury. R. 113, ll. 7 – 25. He admitted that he had never spoken to Minor or reviewed any of the evidence in this case. R. 114, ll. 3 – 24. Olszewski explained the concept of delayed disclosure to the jurors and then was asked by the solicitor if “a threat made to a child [would] affect whether or not they . . . disclose right away?” R. 115, l. 3 – 116, l. 21. Olszewski answered:

Yeah it would. . . . The perpetrator is concerned in making sure the secret is kept, and that can be done through fear and intimidation and threats about what would happen if you tell, and it is usually a series of bad things that might happen if the child comes forward.

R. 116, l. 22 – 117, l. 7. Olszewski also claimed that delayed disclosure is more common in younger children because “often they don’t understand what is going on.” R. 117, ll. 14 – 18. He continued: “As they get older, and begin to realize exactly what is going on, and that this may be something that shouldn’t be happening, then they sometimes come forward at that point.” R. 117, ll. 18 – 22.

The assistant solicitor asked Olszewski whether a child’s age at the time of abuse could impact their ability to recall specific details of the abuse. R. 120, ll. 14 – 19. Olszewski responded:

Yes, of course. *So we have lower expectations the younger the child is in terms of the amount of detail they are able to provide. If you think about things like timing, when an event took place, context in which the event happened, maybe peripheral details*

surrounding the event that took place; those are things for a very young person to relate, to report on.

The older a child gets, and the more grown up they get, the better able they are to put the event in context, to provide narrative responses and detail. . .

R. 120, l. 20 – 121, l. 4 (emphasis added).

The judge read his jury charge to the jury before counsel made their closing arguments. In the final sentence of the judge’s jury instruction, the judge stated: “Testimony of the victim need not be corroborated under South Carolina law.”¹ R. 244, l. 25 – 245, l. 1. The assistant solicitor then argued in her closing argument:

The defense attorney, what is the defense attorney’s role in this? In the State’s mind, the defense attorney’s role is to distract you, because the defense attorney does not want you to concentrate on what [Minor] told you happened to her. The defense attorney does not want you to listen to what [Appellant] admitted to doing, because if so, the verdict should be like that (indicates), guilty beyond a reasonable doubt. That is why I’m sure Mr. Galmore will say, well, they didn’t do this. The detective didn’t do this. There is no DNA. There is no injury. There are no eyewitnesses. *But as the judge told you, in a case such as this, the word of [Minor] alone is sufficient*, and you have more than that, which I’ll get to in just a moment.

R. 247, ll. 11 – 25 (emphasis added).

¹ Defense counsel did not object to this instruction.

ARGUMENT

The trial judge erred in allowing a witness to testify as an expert in the dynamics of child sexual assault because his testimony improperly bolstered the minor’s testimony by stating that threats made to a young child by the assailant contribute to delayed disclosure and that younger children are less likely to recall specific details of abuse.

Discussion

Child abuse assessment experts are non-scientific experts and therefore the admissibility of their testimony should be reviewed under State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). State v. Chavis, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015).

Under White, “[n]on-scientific expert testimony must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter.” White, 382 S.C. at 273, 676 S.E.2d at 688. In White, the state argued that “reliability need not be shown for the admission of non-scientific expert testimony” and the Supreme Court specifically rejected that argument. Id. at 272-273, 676 S.E.2d at 687-688. The White Court held:

[T]he trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or non-scientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact.

White, at 274, 676 S.E.2d at 689.

In State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013), the Supreme Court noted that while experts are permitted to give opinion testimony, “they may not offer an opinion regarding the credibility of others.” The Kromah Court further acknowledged that “[i]t is undeniable that the primary purpose for calling a ‘forensic interviewer’ as a witness is to lend credibility to the victim’s allegations.” Id. However, determinations of witness credibility are

within the exclusive province of the jury, which is why a witness is generally not allowed to comment on the veracity of another witness' testimony. Id.

The state's expert witness in Kromah, had testified that she made a "compelling finding" of physical child abuse after she interviewed the alleged minor victim. Id. at 351, 737 S.E.2d at 496. The Kromah Court concluded that this testimony was "the equivalent of [the state's expert] stating the [c]hild was telling the truth." Id. at 359, 737 S.E.2d at 500.

Similarly, in State v. Jennings, 394 S.C. 473, 479-480, 716 S.E.2d 91, 94 (2011), the Supreme Court held that a forensic interviewer's report, which stated that the three minor victims had made "a compelling disclosure of abuse," was improper bolstering and the trial court erred in failing to exclude it. The Jennings Court further concluded that the error was not harmless "[b]ecause the children's credibility was the most critical determination of this case." Id. at 480, 716 S.E.2d at 95.

Here, the trial judge erred in allowing Olszewski to testify because his testimony was used for the primary purpose of lending credibility to Minor's testimony. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). Olszewski specifically bolstered Minor's credibility by testifying that threats made to a child victim by their assailant are more likely to result in delayed disclosures and that younger children are less likely to have detailed recollections of their abuse. This testimony improperly bolstered Minor's credibility because Minor had specifically testified that her assailant threatened to hurt her father if she did not do what he wanted her to do. Olszewski's testimony that threats by the assailant are more likely to result in delayed disclosure improperly bolstered Minor's testimony by lending credibility to the fact that she did not disclose the alleged abuse for several years.

Olszewski further improperly bolstered Minor's credibility by testifying that younger children are less likely to recall specific details of their abuse. This was significant because

Minor was vague in her recollection of the alleged abuse and could not recall many details of the events. Minor admitted that she originally told her grandmother that her assailant had tattoos when Appellant did not have any tattoos. Olszewski's testimony was used by the state to diminish the importance of Minor's failure to recall specific details. Either Minor's assailant did not have tattoos where Minor recalled that he did, or her assailant did have tattoos and Minor later changed her story so that her description would more closely resemble Appellant. Either way, Minor's testimony was short on specific details and Olszewski's testimony sought to bolster her credibility by excusing her lack of details because of her young age.

Finally, the error in this case was not harmless. This case hinged almost exclusively on the testimony of Minor. There was no physical evidence of sexual assault against Minor and no physical evidence tying any abuse of Minor to Appellant. Although, Appellant "confessed," he only admitted to oral penetration after having been interrogated by law enforcement officers who repeatedly questioned whether Appellant was a monster or "just someone who made a mistake and needed help." State's Ex. 4 at 13:40 – 13:50. Furthermore, the trial judge's improper jury instruction that the testimony of the victim need not be corroborated, and the solicitor's reliance on this instruction in her summation to the jury, exacerbated the harm caused to Appellant by the error of allowing Olszewski's testimony. See State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) (holding that instructing a jury that a minor victim's testimony need not be corroborated was an impermissible comment on the facts and therefore, unconstitutional). Appellant's conviction should be reversed. See State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011).

CONCLUSION

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

s/Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of August, 2020.

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DONALD FRANK HALSTEAD III,

APPELLANT.

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Donald Frank Halstead states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge, which was held on, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Donald Frank Halstead.

Respectfully Submitted,

s/Adam Ruffin

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Entire trial transcript;
- (3) State's Exhibit 2 (video of first interrogation);
- (4) State's Exhibit 4 (audio of second interrogation).

I certify that this designation contains no matter which is irrelevant to this appeal.

August 26, 2020

s/Adam Ruffin

Adam Sinclair Ruffin
Appellate Defender

South Carolina Commission on Indigent
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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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 26, 2020.

s/Adam Ruffin
Adam Sinclair Ruffin
Appellate Defender

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon William M. Blich, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Anders Brief of Appellant and Designation of Matter has been served on Donald Frank Halstead, 331691, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 26th day of August, 2020.

s/Adam Ruffin

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT