

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**

**Nov 13 2020**

**SC Court of Appeals**

\_\_\_\_\_  
Appeal from Colleton County

Honorable Thomas W. Cooper, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

ROBERT WAYNE EAVES,

APPELLANT

APPELLATE CASE NO. 2019-001683  
\_\_\_\_\_

ANDERS BRIEF OF APPELLANT  
\_\_\_\_\_

ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW .....3

ARGUMENT

The court erred by admitting the forensic interview, where the interviewer impermissibly had the child promise to tell the interviewer the truth, thereby improperly bolstering the credibility of the child, and where the interviewer asked leading questions since the forensic interview was not admissible, pursuant to the statute given these fundamental defects. ....4

Relevant Facts.....4

Discussion.....11

CONCLUSION.....13

PETITION TO BE RELIEVED AS COUNSEL .....14

**TABLE OF AUTHORITIES**

**Cases**

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

State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) ..... 3, 11, 12

State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) ..... 11

**Statutes**

S.C. Code § 17-23-175.....6, 12

## **STATEMENT OF ISSUE ON APPEAL**

Whether the court erred by admitting the forensic interview, where the interviewer impermissibly had the child promise to tell the interviewer the truth, thereby improperly bolstering the credibility of the child, and where the interviewer asked leading questions since the forensic interview was not admissible, pursuant to the statute given these fundamental defects?

## STATEMENT OF THE CASE

Appellant was indicted at the June 27, 2019 term of the Colleton County grand jury for the offense of criminal sexual conduct with a minor in the third degree. R. 259-260. His case was called to trial on September 9, 2019 before the Honorable Thomas W. Cooper, Jr., and a jury. L. Scott Harvin and Robert Bonds represented appellant. Assistant solicitors Katherine Orville and Ceth Utley represented the state. R. 1-2.

On September 11, 2019, the jury found appellant guilty of criminal sexual conduct in the third degree. R. 244, ll. 20-25. Judge Cooper sentenced appellant to five years' imprisonment. R. 257, ll. 18-23.

This appeal follows.

## STANDARD OF REVIEW

“Because the admissibility of forensic interviews and the testimony based thereon at trial has been the subject of several recent appeals, we believe it would be helpful to set forth, by way of example, the kinds of statements that a forensic interviewer should avoid at trial:

- that the child was told to be truthful;
- a direct opinion as to a child's veracity or tendency to tell the truth;
- any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a “compelling finding” of abuse;
- any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or
- an opinion that the child's behavior indicated the child was telling the truth.

A forensic interviewer, however, may properly testify regarding the following:

- the time, date, and circumstances of the interview;
- any personal observations regarding the child's behavior or demeanor; or
- a statement as to events that occurred within the personal knowledge of the interviewer.

These lists are not intended to be exclusive, since the testimony will of necessity vary in each trial, but this may serve as a general guideline for the use of this and other similar testimony by forensic interviewers.” State v. Kromah, 401 S.C. 340, 350, 737 S.E.2d 490, 495-96, (2013).

## ARGUMENT

The court erred by admitting the forensic interview, where the interviewer impermissibly had the child promise to tell the interviewer the truth, thereby improperly bolstering the credibility of the child, and where the interviewer asked leading questions since the forensic interview was not admissible, pursuant to the statute given these fundamental defects.

### **Relevant Facts**

Prior to trial, a hearing was held on the admissibility of the forensic interview. The judge stated, “The forensic interviewer’s testimony, of course, will stand on its own.” Defense counsel Harvin replied, “Right. Well, assuming the forensic interviewer hasn’t tried to suggest or bolster.” R. 36, l. 20 – 37, l. 22.

Defense counsel repeated that he wanted to be sure that the forensic interviewer did not bolster the child’s testimony by suggesting “she believes the child witness, which is improper.” R. 38, ll. 3-11. The solicitor claimed the state was not “[t]rying to bring in anything that would be bolstering.” R. 38, l. 15 – 39, l. 10.

The state then proffered the testimony of forensic interviewer Trina Elfering in camera. Elfering testified she was a licensed social worker. R. 40, ll. 17-24. Prior to that, she had worked at DSS as a “Child Protective Services investigator.” R. 40, l. 25 – 41, l. 7. Presently, she worked at the Dickerson Children’s Advocacy Center in Lexington. R. 41, ll. 10-11.

Elfering said the protocol for her forensic interview was to make the child comfortable “and then moving into possible disclosure or no disclosure” using “open-ended questions at all time[s].” R. 42, ll. 7-15.

Elfering remembered she saw the alleged victim, B.C., on September 13, 2017. She thought B.C.’s father and/or her step-mother brought her to the forensic interview. R. 43, ll. 1-4.

Elfering said the child told her she had been assaulted in the summer of 2017 at her grandmother's house in Walterboro. R. 43, l. 5 – 44, l. 19. Before the tape was introduced during the pretrial hearing, defense counsel told the judge he was concentrating on whether there were leading questions and whether there was “enough indicia of truthfulness in the statement and in the recording.” R. 45, ll. 15-20. The following occurred on cross-examination of Elfering by defense counsel Harvin:

Q: And you don't basically you're not testifying yourself. Is that correct?

A: That's correct.

Q: So what you're not supposed to do is not the best practice to repeat what the child says and ask them if that's true -- true or false. Is that correct?

A: No, we do that all the time.

Q: You say that is that is part of the protocol?

A: Yes.

Q: Are you familiar with some literature called *Child Abuse and Neglect, the Use of Paraphrase by Investigators*, by Angela Evans, Kim Roberts, Heather Price, in 2010?

A: I don't think I've ever seen that.

Q: What literature do you use for this?

A: There -- there's -- there are new studies all the time that we use. Each of the steps of the protocol is related to different literature in the field. And I did not study all the literature before I came here.

Q: Well, I mean, what, just in general, for certification, whatever that may be—

A: Um-hmm.

Q: --what literature do you use?

A: There's an article by Sorensen and Snow about how children disclose. There's research on -- there's new research probably every two years on different ways to ask different questions.

Q: Is that Sorensen -- now, that's going back from the eighties. Is that correct?

A: Way back.

Q: Way, way, way, way, way, way back.

A: Yeah. But it's been re-tested.

Q: *But you agree it's probably not the best practices to paraphrase what the child is saying and repeating it to them?*

A: *We always do that.*

R. 49, l. 17 – 50, l. 25. (emphasis added).

Elfering says by repeating what the child had already told her that she was not suggesting something new to the child. R. 51, ll. 3-13.

Elfering admitted that the child told her that her grandmother had informed the child if they called the police about the alleged lewd act by appellant that she would “have to answer questions, many, many times if she—if they called the police, I believe.” R. 52, ll. 9-13.

The solicitor argued that the forensic interview was admissible pursuant to S.C. Code § 17-23-175. The solicitor said that Elfering asked open-ended questions and only asked the child to clarify what she was saying if it was unclear. The solicitor said that the forensic interviewer was not bolstering “the child’s testimony in any way. And the interviewer doesn’t express [any] opinion at all about—about the child’s truthfulness or whether she believes her, none of that. She’s simply eliciting a narrative from the child.” R. 54, l. 4 – 55, l. 13.

Defense counsel Harvin disagreed about the interviewer not leading the child and he argued the interview should not be admitted. R. 55, l. 17 – 56, l. 17.

The judge ruled that Elfering was leading the child, but reasoned she only paraphrased the child at times. He said her questions did not suggest an answer. The judge said it would be up to the jury to decide if the forensic interviewer’s questioning influenced the child’s responses. That respectfully was an abdication of the judge’s gatekeeping function. The judge ruled the forensic interview was admissible. R. 56, l. 19 – 58, l. 8.<sup>1</sup>

The child’s father, Dominick Carlini, testified in the presence of the jury that his daughter, B.C., was the victim. Dominick said in the summer of 2017, he let B.C. and her brother go to Walterboro to visit their mother and grandmother. It was apparent Dominick had custody of B.C. and her brother. R. 77, l. 9 – 78, l. 11.

Dominick said that he received a phone call from Rob, who was Samantha, his ex-wife’s, husband, “just saying that my kids weren’t safe here [in Walterboro], that I should try to keep them away from here. And yes. Kind of how it happened.” R. 78, ll. 15-22. Dominick added without objection that he was led to believe that his daughter had been molested by Wayne, appellant. R. 78, l. 23 – 79, l. 1.

Dominick said he talked to B.C. “and she broke down and told me what had happened. And then I called the Ridgeland [Richland] County Sheriff’s Department.” R. 79, ll. 2-10. The Richland County Sheriff’s Department “[g]ot me in touch with somebody at Colleton County.” Dominick said Colleton County Law Enforcement “instructed me to take her and have a forensic therapist to talk with her, and they did a medical exam.” R. 79, ll. 14-17. Without objection,

---

<sup>1</sup> The defense also argued that the forensic interviewer statute was unconstitutional and a violation of due process given its cumulative nature of the child’s tape testimony being played for the jury and then the child testifying live before the jury. The judge denied that motion, as well. R. 58, l. 9 – 59, l. 4.

Dominick offered that B.C. had become a lot quieter and withdrawn, and that she was not as eager to meet and talk to people since the incident, whereas she used to be “real friendly with everyone.” R. 79, ll. 20-25.

Dominick acknowledged he thought that when Rob, his ex-wife’s current husband, called him about the alleged abuse that he believed Rob and his ex-wife, Samantha, were fighting. R. 80, ll. 9-16. There would later be testimony that Samantha, B.C.’s mother, informed Rob during this time that she had had an affair with appellant. There was then a physical confrontation between Rob and Samantha, in which Samantha apparently shot at Rob. Dominick said he filed an order of protection in Richland County against his ex-wife, Samantha. R. 81, ll. 19-22.

The state next called the forensic interviewer, Trina Elfering. The forensic interview was introduced and played for the jury over defense objection. R. 84, l. 5 – 87, l. 17. In the forensic interview, Elfering had B.C. promise to tell her the truth in everything she said and to tell Elfering if Elfering had any of the facts wrong. Interview at 9:45.

B.C. related that she lived with her father and her stepmother, Crystal. Once she started middle school, she had a habit of waking up early in the morning. B.C. told the jurors about an incident, in which appellant allegedly got into bed with B.C., her grandmother, and her brother and appellant rubbed her legs. B.C. also alleged that appellant pulled her pants down and touched her “private part.” B.C. maintained that appellant also licked her chest.

B.C. said she did everything she could to wake up her grandmother sleeping next to her to no avail. The next morning, she told her grandmother, but her grandmother did not believe her. Tape at 9:48. B.C. said she wanted her grandmother to call the police, which her grandmother eventually did. B.C. said her grandmother told her the police officer she called told

her that B.C. would be repeating her story often for the next two years if she went forward with a prosecution.

Elfering then asked B.C. several questions. Tape at 9:50. B.C. said she was lying on her back, and appellant was on his belly when the lewd act occurred. She repeated that she tried to wake up her grandmother, but she could not. B.C. said the next morning she told her grandmother, her mother, and brother what had happened. B.C. related that her grandmother did not believe her, and B.C. said her grandmother was lying about the police officer saying that the child would go through two years of problems if she tried to prosecute appellant. Tape at 9:59. B.C. said she saw appellant crying about the allegations at one point, but offered that she did not care. Tape at 10:02.

Elfering on cross-examination that she prepared for the interview by reading the police report. Elfering acknowledged that B.C. claimed during the interview that her grandmother was lying about what the police officer supposedly told her. Elfering said it was not her job to figure out whether the grandmother had indeed lied or whether the deputy actually said what the grandmother related. R. 89, l. 6 – 90, l. 13.

B.C. then testified that she lived with her father and stepmother in Columbia. She was ten years old in 2017 when the lewd act allegedly occurred at her mother and grandmother's house in Walterboro. R. 93, l. 14 – 100, l. 24.

B.C. related on the night in question that she was sleeping with her grandmother and her brother in the same bed. She claimed appellant tried to wake her up, touched her leg, her "private part," her "breast area," and then quickly left the trailer. B.C. said she told her grandmother and mother the next morning about the incident. B.C. said she did not immediately tell her father because her mother and grandmother both said "[I] would have to be on the news,

and I would have to repeat myself, and I would have to like go to court and testify.” B.C. said this scared her. R. 102, l. 6 – 109, l. 2. B.C. had not seen her mother or grandmother since that summer of 2017. R. 109, ll. 22-24.

B.C. admitted she had stayed at appellant’s house in the past. She related that when her mother did not have a place to live or a job, they would go and live with appellant. Appellant would even drive her mother to Columbia to pick her B.C. R. 110, l. 24 – 111, l. 19.

B.C. said that her mother, grandmother, and appellant all drank during these family get-togethers. R. 113, l. 25 – 115, l. 1. B.C.’s little brother, ten-year-old D.C., testified he was “half-asleep” when he saw appellant get into the bed with B.C., him, and their grandmother that night. R. 120, l. 12 – 122, l. 4. D.C. admitted he told his mother and grandmother the following morning that he slept the entire time and did not see anything. R. 124, ll. 5-7.

The prosecution called Dr. Susan Lamb, who was a pediatrician. Dr. Lamb testified B.C. was referred to her because of sexual abuse. Even though the only evidence in this case was that the child disclosed immediately, Dr. Lamb testified that sexual abuse is not something that is typically disclosed immediately, and she told the jury about delayed disclosure. R. 128, l. 17 – 129, l. 17. Dr. Lamb also told the jurors that formal physical exams, such as B.C.’s exam, were usually perfectly normal following sexual abuse.

Samantha Russo, the mother of B.C. and the ex-wife of Rob, admitted that B.C. and her brother loved appellant, their Uncle Wayne. R. 170, l. 25 – 171, l. 4. Samantha acknowledged that she had a terrible fight with Rob when she disclosed that she had had a sexual relationship with appellant. This was at the same time the allegations in this case arose. R. 178, l. 3 – 179, l. 22.

Samantha said that her then husband Rob had tried to kill her, and she grabbed a gun and shot at him. He was charged with criminal domestic violence in the first-degree after that incident. R. 180, l. 5 – 182, l. 22. Samantha said that she was not surprised her mother, B.C.’s grandmother, did not believe B.C. was telling the truth. She alleged: “Mom didn’t believe me either.” Samantha claimed to defense counsel that she was now telling the truth. R. 182, ll. 7-22.

Detective Kelly Padgett of the Colleton County Sheriff’s Department testified that appellant denied the allegation he committed a lewd act on B.C. R. 188, ll. 14-24.

At sentencing, appellant’s children spoke on his behalf. Defense counsel Harvin noted that appellant had no prior record, and he had done many good things for the community. The allegations were “completely out of character,” and he asked the judge for a probationary sentence. R. 252, l. 19 – 257, l. 23.

## **Discussion**

A forensic interviewer may not offer an opinion regarding the credibility of others. State v. Kromah, 400 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). The forensic interviewer may not in any way signal to the jury that the child is telling the truth or that the forensic interviewer believes the child is telling the truth. See State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). See, also, State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

At the very beginning of the forensic interview that is on file with this Court, the forensic interviewer had the child promise to tell her the truth during the interview and even correct the forensic interviewer if she is wrong about anything during the interview. This was highly improper. Such “tell the truth” language at the beginning of forensic interviews is routinely redacted so that the jury is not impermissibly tainted by viewing the child promising to tell the

truth to the forensic interviewer. This improperly bolsters the child's credibility and also signals and insinuates to the jury that the forensic interviewer, who conducts these interviews for a living, believes the child is telling the truth.

Further, in State v. Kromah, the Supreme Court held the forensic interviewer should always avoid telling the jury in any manner that the child was told to be truthful in any statement or opinion that indicates the interviewer believes the child or indicates the child is telling the truth. State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013).

Defense counsel correctly objected that the forensic interview should not have been admitted because B.C.'s statement, the bolstering aside, was elicited by leading questions. See S.C. Code § 17-23-175 (B)(1). Defense counsel argued that the forensic interviewer's tendency to repeat the testimony of the child and ask her if that was indeed her point was in essence leading the child to the conclusions the forensic interviewer sought. That was improper.

Appellant should be granted a new trial.

**CONCLUSION**

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

*s/ Robert M. Dudek*

Robert M. Dudek

Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of November, 2020.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**

**Nov 13 2020**

**SC Court of Appeals**

Appeal from Colleton County

Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT WAYNE EAVES,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Wayne Eaves states:

1. He is Chief 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 Thomas W. Cooper, which was held on September 9 & 10, 2019, 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 Robert Wayne Eaves.

Respectfully Submitted,

*s/ Robert M. Dudek*

Robert M. Dudek

Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of November, 2020.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED

Nov 13 2020

SC Court of Appeals

Appeal from Colleton County

Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT WAYNE EAVES,

APPELLANT

**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;
- (2) Entire pre-trial and trial transcript dated September 9-10, 2019
- (3) Entire trial transcript dated September 11, 2019
- (4) State's Exhibit #1 (Item identified as DVD of B.C. Forensic Interview)

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

November 13, 2020

*s/ Robert M. Dudek*

Robert M. Dudek

Chief Appellate Defender

South Carolina Commission on Indigent  
Defense

Division of Appellate Defense

PO Box 11589

Columbia, SC 29211-1589

(803) 734-1330

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.”

November 13, 2020.

*s/ Robert M. Dudek*  
Robert M. Dudek  
Chief Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

**RECEIVED**  
**Nov 13 2020**  
**SC Court of Appeals**