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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2019-001477

The State, ... Respondent

v.

Brandon Jerome Clark, ... Appellant.

Reply Brief of Appellant

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This court should reject the plain misinterpretation of the holdings of *Anderson* adopted by the trial court and urged by the State and hold that Clark was improperly denied the right to confront the witness against him when his right of cross-examination was improperly limited.

The State argues that the trial court properly denied Clark the right to confront the forensic interviewer. This argument is based on a misapplication of case law prohibiting pitting and bolstering, neither of which is applicable to the circumstances in this case.

The State first cites a line of cases prohibiting argumentative questioning that takes the form of pitting one witness against another. But in each of the cases cited, the court was concerned with questions formulated to prompt one witness to comment on the veracity or credibility of another.

In *State v. Bryant*, 316 S.C. 216, 447 S.E.2d 852 (1994), the solicitor expressly invited the defendant witness to affirm that the only other witness—a police officer—must be lying. That is textbook "pitting" and completely distinguishable from the line of questioning sought by Appellant at trial. In this case the Appellant sought to undermine the reliability of the *interview*, not to evince testimony of the interviewer to directly rebut or otherwise comment on the credibility or veracity of the child.

Similarly, as in Bryant, the solicitor in *State v. Sapps*, 295 S.C. 484, 369 S.E.2d 145 (1988), expressly sought to force the defendant witness to expressly rebut the credibility of other witnesses by asking if those other witnesses were lying. In *State v. Benning*, 338 S.C. 59, 524 S.E.2d 852 (Ct. App. 1999), again, the Court of Appeals disfavored a line of questioning in which a defendant witness was expressly asked to affirm that other witnesses in the case were lying. And *Burgess v. State*, 329 S.C. 88, 495 S.E.2d 445 (1998),

also cited by the State makes clear that it is when a line of questioning demands a witness comment on the credibility or truthfulness of another adverse witness' testimony that impermissible pitting occurs.

Unlike all of these cases cited by the State, here, the line of questioning sought to call into question the suggestive nature of the interviewing technique, not to force the interviewer to opine as to the child's veracity. If this court were to adopt the State's expansive view of pitting, it would foreclose nearly all questioning intended to bring relevant information about the credibility of witnesses—which includes the circumstances under which their prior statements may have been made—to the attention of the jury.[1] But, as *Burgess* notes, the bias of a state's witness is "the concern of a defense attorney and would either be done during cross-examination of the state's witnesses or during direct examination of the defendant." *Id.* at 91.

Considering the State's proposed application of the pitting line of cases in another context highlights its impropriety: in a case involving the defense that a confession was coerced, it would not be considered improper pitting to ask questions of a police interrogator about the conditions under which a statement was taken or to ask an expert about the suggestiveness of a particular interrogation tactic. Such information would be relevant to the jury's assessment of the circumstances under which a statement was made, which may, in turn, affect the jury's assessment of credibility. This would not be pitting but the essence of the provision of a criminal defense, and it is directly analogous to the situation here. That there is a child witness whose credibility is at issue should have no bearing on the application of these rules.

[1] Moreover, in every single one of the cases on pitting cited by the State, the Court was concerned with a solicitor questioning a defendant testifying in his own defense in such a way as to force him to comment on the truthfulness of an adverse witness.

The State then pivots to an alternate theory—that the testimony sought would have been improper bolstering—and attempts to bootstrap that argument to the Supreme Court's holding in *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015). The *Anderson* court was concerned with the use of forensic interviewers to vouch for the credibility of child victims. In *Anderson*, the interviewer first testified to common behavioral characteristics among child victims of abuse and then testified that she observed these characteristics in the child. 413 S.C at 219, 776 S.E.2d at 79. The Court properly held this to be impermissible vouching or bolstering because it directly tied the witness' purported expertise in identifying victims to the child witness' veracity. The State now asks this Court to make the same logical leap that the trial court did and hold that *Anderson* should be extended to prohibit any cross-examination regarding interviewing techniques and questions used by forensic interviewers. The undersigned could find no supporting case law for the reverse bolstering or inverse vouching prohibition the State seeks to conjure from the case law. This is because there can be no fair trial where the investigative or interviewing techniques employed to elicit testimonial evidence are shrouded from critique or question.

The Court should find that the error in admitting the forensic interview was preserved for review, and the State's substantive arguments for admission are clearly rebutted by the *in camera* cross examination of Amber Cheney and the *in camera* testimony of Dr. Amanda Salas.

As a threshold matter the State argues in its brief that any error in admitting the forensic interview was unpreserved. While it is true that Clark's trial counsel initially offered her willingness to consent to the interview's admission, her consent was clearly conditioned on being able to review the interview with her attorney and to allow the jury to follow along with the interview by admitting a certified transcript of the interview into

evidence. R. 2. Rather than fully addressing these issues before admitting the interview, the trial judge hedged and indicated he would rule at a later time on both of those matters. At that point, trial counsel clearly expressed on the record that she could not stipulate that the video met the statutory requirements of trustworthiness required by South Carolina Code Ann. § 17-23-175. R. 5. While trial counsel may not have used "magic words" or phrased her objection in the precise language of a law review article or legal brief, she made her concerns about the admissibility clear, and the State's efforts to sidestep the problems of the admission of the video should be rejected by this Court.

For an error to be properly preserved, the issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007). All four requirements were met in this case. Trial counsel for Clark expressed an unwillingness to stipulate to the admission of the video after the court refused to rule on whether the transcript would be admitted and whether her proposed expert would be qualified and permitted to testify. This was prior to the admission of the video and sufficiently raised the issue of reliability to put the trial court on notice. To the extent that her objection was not more vociferously raised, that is an issue that rests on the shoulders of the trial court, whose delay in ruling on the admission of the transcript and the scope or admissibility of Salas' testimony unfairly limited Clark's counsel in appreciating the degree to which her defense of Clark would be constrained by the Court's orders. All of these issues could and should have been addressed prior to the admission of the video, but any delay in deciding them was not the fault of Clark's counsel and should not form the basis of a procedural bar.

Substantively, the *in camera* cross-examination of Amber Cheney reflected that her interview of the child was flawed. Her intended technique of prompting the child to correct her if she made a misstatement did not result in a proper correction. Clark's line of cross-examination was interrupted when the State argued, wrongly, that it was foreclosed by the holding in *Anderson*, and the Court agreed. Later, during the *in camera* testimony of Dr. Salas, the trial court was presented with testimony about why corrections are so important in child forensic interviews and why Cheney's attempted demonstration of a correction failed. Dr. Salas further walked through the variety of issues with Cheney's interviewing technique, including establishing an implied reward or incentive for the child to continue making disclosures. Moreover, Salas reviewed some of the more bizarre and improbable, if not impossible, elements of the disclosure. Unfortunately, because the trial court did not allow Clark to properly cross-examine Cheney in front of the jury and prevented Salas from testifying, the jury was prevented from benefiting from her expertise in assessing the reliability of the forensic interview disclosures. While the court could not put the genie back in the bottle once the video was played, the decision to prevent Salas from testifying after her review of the wide variety of issues with the interview serves to underscore the seriousness of the error to allow its admission at all, which was compounded by the improper limitation on Clark's ability to mount a defense.

This Court should find that Dr. Salas' testimony before the jury would not have violated *Anderson*, that her testimony was not sought for the purposes of pitting her against any other witness or in a manner to produce pitting testimony, and that her rejection of the interview technique used was not a proper reason to exclude her as an expert but rather an extension of her expertise.

The State again relies on its misreading of *Anderson* and its nonsensical pitting theory in arguing that the trial judge's exclusion of Salas was proper. For all the reasons

argued *supra*, these arguments should be rejected by this Court. The State attempts to draw a razor thin line and asserts that Salas could have testified if she had testified only as to generalities about interviewing of children and types of techniques. But this flies in the face of the purpose of Rule 702, which allows a person with specialized knowledge to testify in the form of an opinion. The State's proposed rule would essentially eliminate the use of experts in all manner of investigative techniques and substitute that useful testimony with generalized pablum.

The State also argues that Salas' testimony was properly excluded because she acknowledged that she had not used the "ChildFirst" interviewing procedure here. Dr. Salas, a psychiatrist board certified in adult, child and adolescent and forensic psychiatry, testified that she is somewhat familiar with the ChildFirst method and is "familiar with the processes that are collateral to what we do in our training for interviewing child and adolescents." R. 452. She testified that she had previously testified as an expert in another case in which ChildFirst or the RATAC method was used. R. 452-453. She explained that her training and experience allowed her to opine on the methodology and best practices in interviewing children, independent of any specific method used to train forensic examiners. R. 455. The State argues that she could not articulate why ChildFirst would be an improper way to interview a victim. But that is a straw man argument, as she was not offered for the purpose of undermining the specific training Amber Cheney had received but, rather, to provide through her experience and specialized knowledge information not within the ordinary knowledge of jurors to help them assess the whether the specific approach employed by Cheney in that interview was likely to result in a reliable disclosure. Specifically, as she testified *in camera*, Salas' experience and training allowed her to opine on the kinds of questions and techniques—many of which may seem

innocuous on the surface—that have a tendency to substitute the words or thoughts of an adult interviewer for those of a child. But the jury did not have the benefit of her expertise and was not given, as the trier of fact, the opportunity to weigh her opinions against those of the State's expert, Shauna Galloway-Williams. That Salas was prevented from testifying was error. That she was prevented from testifying, while Galloway-Williams was permitted to offer her opinions on the typical behaviors of child victims was manifestly unfair.

This Court should reject the State's conflation of the rules governing the sufficiency of indictments and those governing the sufficiency of proof.

Notwithstanding the State's lengthy exegesis in its response brief on the law of sufficiency of indictments, Clark does not here and did not in the trial court challenge the sufficiency of the indictment. He challenged the sufficiency of the *proof* of the allegations contained in the indictment. The trial court's attempts to frame the directed verdict motion as a challenge to the sufficiency of the indictment do not make it so any more than the state's unsupported protestations.

Clark's directed verdict motion was based on the insufficiency of properly admitted evidence. Without the testimony of Meena, whose statements were admitted by way of a tortured reading of the medical diagnosis exception to hearsay, the State had no testimony upon which to prove the alleged acts occurred within the timeframe specified by the indictment. And without the unreliable narrative contained in the improperly admitted forensic interview, not one witness offered live testimony at trial—including the alleged victim—to alleging acts that would constitute Criminal Sexual Conduct in the First Degree. The only source of that testimony was the suggestive and deeply flawed forensic interview. The directed verdict motion should therefore have been granted.

This Court should reject the State's defense to the *Brady* motion because it relies chiefly on cases involving delayed disclosure of *existing* evidence the materiality of which can be ascertained but cannot here rebut the presumption that the *lost* evidence may have been material to Clark's defense.

In its response, the State provides an accurate summary of the *Brady* line of cases as it relates to the materiality of improperly undisclosed evidence. But here there is no way to assess the materiality of the undisclosed evidence, because as the officer testified and the State concedes, the evidence at issue was lost or destroyed. The State notes, "there is no evidence the lost notes contained information favorable to the Appellant." If the State is to be rewarded for losing or otherwise destroying evidence without explanation, this Court would be establishing a dangerous precedent. Instead, this Court should adopt the reasoning that evidence, the destruction or unavailability of which is indisputable, should be imputed to the State and cannot be sufficiently cured by a spoliation instruction to the jury.

CONCLUSION

This Court should reject the State's arguments that would limit to the point of elimination defendants' rights to confront witnesses and mount defenses in cases of child sexual assault. Clark again respectfully prays for that relief sought in his opening brief.

Respectfully submitted,

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