STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL THOMAS DYER,

APPELLANT

APPELLATE CASE NO. 2021-000680

ANDERS BRIEF OF APPELLANT

ADAM SINCLAIR RUFFIN
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STATEMENT OF ISSUE ON APPEAL

Whether the court erred in admitting Minor 1's video recorded forensic interview, where Minor 1 had been improperly influenced and coached by her grandmother on how to answer the forensic interviewer's questions and therefore the forensic interview did not have particularized guarantees of trustworthiness as required by S.C. Code § 17-23-175?

STATEMENT OF THE CASE

Appellant was indicted by the Lexington County Grand Jury for two counts of criminal sexual conduct with a minor in the first degree, eight counts of first-degree sexual exploitation of a minor, and disseminating harmful material to a minor. R. 489-510. Appellant's trial was held before the Honorable Walton J. McLeod, IV, and a jury from May 24 – 27, 2021. Appellant was represented by Sarah Mauldin and David Mauldin. The state was represented by Suzanne Mayes and Ashley Wellman. R. 1.

The jury found Appellant guilty on each count. R. 470, l. 22 – 473, l. 11. The judge sentenced Appellant to life imprisonment for both counts of criminal sexual conduct with a minor in the first degree, consecutive five-year-imprisonment sentences for each of the sexual exploitation counts, and ten-years imprisonment for disseminating harmful material to a minor. R. 486, l. 20 – 487, l. 19.

This appeal follows.

STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

STATEMENT OF FACTS

Minor 1 and Minor 2 were siblings and both lived with their grandmother because their parents were deceased. R. 137, l. 11 – 138, l. 3. Appellant also lived in the home and Minor 1 described Appellant and her grandmother as "dating on and off." R. 138, ll. 4 – 18. Minor 1 was nine years old at the time of the alleged abuse. R. 136, ll. 5 – 11.

Minor 1 claimed that on more than one occasion, Appellant touched her "private part" with "[h]is private part and his fingers." Minor 1 claimed that Appellant touched her underneath her clothing and both "on" her private part and "inside" her private part. R. 144, l. 7 – 145, l. 15. Minor 1 specifically alleged that Appellant would ask her to sit on the couch with him in their living room and he would offer for her to use his iPad. According to Minor 1, while they were on the couch together Appellant would show her pornographic videos and touch the inside and outside of her private part with his fingers. R. 147, l. 4 – 149, l. 21. Minor 1 also recalled that Appellant took sexually explicit photographs of her. R. 150, l. 3 – 152, l. 18.

Minor 1 said that Appellant also touched her in his bedroom, but this was less frequent than him touching her in the living room. R. 152, l. 22 – 153, l. 2. Minor 1 said that while they would be in the bedroom together, Appellant would touch her "on [her] private part" with "his private part and his penis." R. 155, ll. 9 – 18. Minor 1 again claimed that Appellant would touch both the inside and outside of her private part with his private part. R. 156, ll. 1 – 15. Minor 1 further maintained that Appellant showed her pornographic videos in the bedroom and took more sexually explicit photographs of her in the bedroom.[1] R. 157, l. 10 – 158, l. 22.

When Minor 1 would tell Appellant "no" to his sexual advances, Minor 1 claimed that Appellant would yell at her and punch holes in the walls. R. 173, ll. 2 – 13. Minor 1 did not tell

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1 Several sexually explicit photographs of Minor 1 were obtained from Appellant's cell phone records. R. 320, ll. 14 – 22; R. 348, l. 11 – 353, l. 23.

her grandmother at first because she claimed that Appellant told her that if she did, her grandmother would not like her anymore and would not take care of her. Ultimately, Minor 1 did disclose the alleged abuse to her grandmother. R. 174, l. 21 – 175, l. 13. Minor 1's younger brother, Minor 2, testified that he walked into Appellant's bedroom one time and saw Appellant and Minor 1 having sex. R. 206, l. 5 – 211, l. 10. Minor 2 also claimed to have seen Appellant touching Minor 1's thigh on the couch in the living room. R. 211, l. 15 – 214, l. 3.

Minor 1 acknowledged on cross-examination that she had previously made a false allegation of sexual abuse against her maternal grandfather when she was four years old. R. 193, ll. 10 – 18. Specifically, Minor 1 had alleged that her grandfather digitally penetrated her "private part" in May of 2015. R. 193, l. 21 – 194, l. 2. Minor 1 repeated this allegation at the hospital and at her medical exam at the Dickerson Center. R. 194, l. 3 – 195, l. 9. Minor 1 ultimately told her grandmother that her mother told her to make the allegations against her grandfather. R. 195, l. 10 – 196, l. 2.

Ladonna Young, who was qualified as an expert in child abuse and neglect, testified that she performed a medical exam of Minor 1. R. 240, l. 7 – 241, l. 24. Young testified that Minor 1 had a "normal genital exam" and that there was "no evidence of injury to the labia minora or majora." Young further testified that Minor 1's hymen was "complete and intact all the way around without any laceration or deficit to the hymen tissue." R. 246, ll. 8 – 15. Young admitted that it was possible Minor 1 had never been sexually penetrated. R. 252, ll. 19 – 24.

ARGUMENT

The court erred in admitting Minor 1's video recorded forensic interview because Minor 1 had been improperly influenced and coached by her grandmother on how to answer the forensic interviewer's questions and therefore the forensic interview did not have particularized guarantees of trustworthiness as required by S.C. Code § 17-23-175.

Relevant Facts

The state made a pretrial motion to introduce the video recorded forensic interview of Minor 1. R. 37, ll. 14 – 16. During a pretrial hearing, Aaliyah Simon testified for the state that she was employed at the Dickerson Children's Advocacy Center where she conducted forensic interviews of children. R. 63, ll. 14 – 23. Simon conducted a forensic interview of Minor 1 on July 9, 2020 where Minor 1 made several allegations against Appellant. R. 68, l. 11 – 69, l. 21.

Simon claimed that Minor 1 showed no indications of improper influence or coaching in her interview. R. 69, l. 25 – 70, l. 4. However, Simon admitted on cross-examination that Minor 1 did discuss things in the interview that she had no personal knowledge of and stated that her grandmother had told her that Appellant had abused other people. R. 72, l. 20 – 73, l. 15.

Defense counsel argued that Minor 1's forensic interview should not be admitted because it did not have particularized guarantees of trustworthiness. R. 82, l. 15 – 25. Specifically, counsel pointed to several videos that were recorded prior to Minor 1 having done her forensic interview where Minor 1's grandmother was discussing the allegations with Minor 1 and directing her how to answer. R. 83, l. 18 – 84, l. 13; Court's Exhibit 4 (DVD – Tammy Todd Interview on file with this Court). Counsel argued that the prior questioning of Minor 1 by her grandmother tainted the later forensic interview. R. 86, ll. 10 – 15.

The Court disagreed with counsel and found that the forensic interview was admissible because it met the requirements of S.C. Code § 17-23-175. The video recording of the forensic interview of Minor 1 was ultimately introduced at trial over defense counsel's renewed objection. R. 266, l. 17 – 267, l. 22; State's Exhibit 21 (DVD – Minor 1 Interview on file with this Court).

Discussion

"Generally, a prior consistent statement is not admissible unless the witness is charged with recent fabrication or improper motive or influence." State v. Russell, 383 S.C. 447, 450, 679 S.E.2d 542, 543–44 (Ct. App. 2009) (citing Rule 801(d)(1)(B), SCRE; State v. Saltz, 346 S.C. 114, 123-24, 551 S.E.2d 240, 245 (2001)). However, "[w]hen the victim testifies, [in a criminal sexual conduct case] evidence from other witnesses that she complained of the sexual assault is admissible as corroboration of the incident; however, the evidence must be limited to the time and place of the assault, and may not include particulars or details." State v. Barrett, 299 S.C. 485, 486–87, 386 S.E.2d 242, 243 (1989). Furthermore, "in CSC cases involving minors, the Legislature has made specific allowances for such hearsay statements of child victims under the proper circumstances." State v. Whitner, 399 S.C. 547, 558, 732 S.E.2d 861, 867 (2012).

Specifically, S.C. Code § 17-23-175 permits the introduction of an out-of-court statement made by a child under twelve years old in certain circumstances. This statute requires the trial court to make a finding "that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness" before the prior statement can be admitted into evidence. S.C. Code § 17-23-175 (A)(4). The statute further details important factors for a trial court to consider in making its determination:

(1) whether the statement was elicited by leading questions;
(2) whether the interviewer has been trained in conducting investigative interviews of children;
(3) whether the statement represents a detailed account of the alleged offense;
(4) whether the statement has internal coherence; and
(5) sworn testimony of any participant which may be determined as necessary by the court.

S.C. Code § 17-23-175 (B).

In this case, the trial judge erred in admitting the video recorded forensic interview of Minor 1 because the statement lacked the particularized guarantees of trustworthiness as required by S.C. Code § 17-23-175. While the trial judge weighed the factors listed in S.C. Code § 17-23-175 (B), the trial judge failed to properly and adequately consider the impact of Minor 1's grandmother's prior questioning of Minor 1 on Minor 1's answers during the forensic interview.

As defense counsel argued, the videos of Minor 1 and her grandmother's conversations show the grandmother directing Minor 1 on how to answer her questions regarding the alleged abuse against Appellant. R. 83, l. 18 – 84, l. 1. Counsel further pointed out that the videos were incomplete and did not show the entirety of the conversations between Minor 1 and her grandmother which further called into question the trustworthiness of Minor 1's subsequent forensic interview. R. 84, ll. 2 – 13.

At the very beginning of one of the videos, the grandmother stated to Minor 1: "so tell me now that you remember," which suggests the grandmother had been coaching Minor 1 immediately prior to initiating the recording. See Court's Exhibit 4. The videos further show the grandmother asking Minor 1 leading questions in a highly suggestive manner and seemingly coaching Minor 1 on how to describe the alleged abuse. See Court's Exhibit 4.

While the trial court acknowledged defense counsel's concerns about the conversations between Minor 1 and her grandmother, the court separated those conversations from the forensic

interview itself by stating that "the process of the [forensic] interview itself doesn't seem to show the witness was coached by the forensic interviewer and otherwise seemed to be within the norms that are expected of that type of interview." R. 85, l. 16 – 86, l. 9. However, Minor 1 was coached by her grandmother. This fact was not adequately considered by the trial court and because Minor 1 was coached by her grandmother prior to the forensic interview, the subsequent forensic interview was tainted such that whether the forensic interviewer coached Minor 1 is beside the point.

Appellant's case is readily distinguishable from State v. Perry, 410 S.C. 191, 763 S.E.2d 603 (Ct. App. 2014) where this Court found that a video recording of a forensic interview of a minor was properly admitted into evidence. In Perry, the trial court correctly noted that the minor's statements were not elicited by leading questions by the forensic interviewer and there was no allegation of outside influence on the minor prior to her forensic interviewer. See also State v. Whitner, 399 S.C. 547, 558, 732 S.E.2d 861, 867 (2012) (holding that forensic interview was admissible because forensic interviewer did not improperly influence the minor); State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011) (holding that forensic interview met the requirements of section 17-23-175(A) and was therefore admissible in evidence).

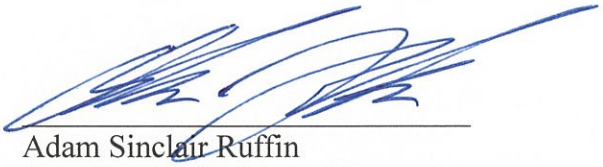
The fact that the forensic interviewer did not coach or influence the minor is not dispositive. If outside influence is present, a trial judge must take that into consideration when determining whether the video recorded interview is trustworthy.

The trial court erred by focusing exclusively on the forensic interview itself and not taking into consideration the previous coaching and improper influence placed on Minor 1 by her grandmother. This improper influence and coaching by the grandmother was documented via video recording and should have been considered by the trial court in determining whether the

forensic interview was trustworthy. The trial court erred in allowing Minor 1's video recorded forensic interview into evidence because it did not have particularized guarantees of trustworthiness. Appellant's convictions should be reversed.

CONCLUSION

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



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of December, 2021.

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Dec 31 2021
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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Thomas Dyer 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 Walton J. McLeod, IV which was held on May 24 - 27, 2021, 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 Michael Thomas Dyer.

Respectfully Submitted,

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of December, 2021.

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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 21 (DVD – Minor 1 Interview);
(4) Court's Exhibit 4 (DVD – Tammy Todd Interview).

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

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ATTORNEY FOR APPELLANT

December 31, 2021

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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."

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December 31, 2021